



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUNGOMA.

CRIMINAL CASE NO. 7 OF 2016.

REPUBLIC.....PROSECUTOR

VERSUS

DICKSON LWENYA NYONGESA.....ACCUSED

JUDGMENT.

Dickson Lwenya Nyongesa the accused is charged with the offence of Murder Contrary to Section 203 as read with Section 204 of the Penal Code. **Particulars of offence are that;** between the night of 2nd and 3rd day of December, 2015 at Namawanga Village, Bungoma North District within Bungoma County murdered ROBERT WANDERA MANYASI.

The case for the prosecution is that on 2.3.2015 Pw1 BMW a child aged 15 years old left with his mother and brother the deceased to attend a funeral at the home of one Marua Franco. He was also with a neighbor called J. They sat in a tent. At 10 p.m. a group of boys who included the accused came to where they were seated. Accused then hit the deceased on the head with a club. The deceased fell down. He went and called the mother who took deceased to his grandfather's house. The grandfather came and the witness pointed out the accused. The grandfather questioned them and they said they were maintaining security in the compound. The accused and one Hillary ran away. The deceased was taken to police and later to Hospital where he later died.

Pw2 JWM testified that on 2.3.2015, at 8 p.m. he, the deceased and deceased's brother Pw1 went to the funeral. They sat in a tent. While there a group of about 4 boys came. They started quarrelling. He then saw the deceased fall down. Deceased told his brother to call the mother who came and they went to the village elder. The deceased was later taken to Hospital where he died.

Pw3 HNC the mother of the deceased went to attend a neighbours funeral at home of Franco with the deceased, and Pw1 B. She went to the house and the deceased and other boys went to the tent. At 11p.m. Pw1 B called her and informed her that accused had hit the deceased. She went there and on observing the deceased she saw he had injuries. B and J (Pw2) told her it is accused who had hit him. The next day he was taken to Webuye Hospital where he was referred to Moi Teaching and Referral Hospital where he died.

Pw4 MM a village elder was woken up by H (Pw3) and she reported that deceased had been assaulted at the funeral. He went there and found the 5 boys who ran away. He advised that deceased be taken to Police and to hospital.

Pw5 SMW the father of the deceased was at his home when he received information that the deceased had been hit and he saw he had injuries. The next day he took him to Naitiri Health Centre who referred him to Webuye Sub-County Hospital who in turn referred him to Moi Teaching & Referral Hospital where he died before being treated. Pw11 John Chweya Simiyu a boda boda rider was present at the funeral when there was commotion and he later learnt the deceased had been beaten and later died while undergoing treatment. He knew both the accused and deceased who were friends. He testified that he did not see accused at the funeral. Pw6 Dr. Achiyenga Shikuunzi produced a Post Mortem on the body of the deceased done by Dr. Kisata. Upon examination he found deceased had a swollen jaw and blood oozing from the nose, fracture on frontal skull, bleeding in the head and right eye. He sustained injuries on the brain and bleeding into the brain. He formed opinion that cause of death was due to injury to brain due to trauma caused by a blunt object.

Pw8 Chief Inspector Paul Kimani conducted an identification parade on the accused on 6.2.2016 where BM picked him at the parade. Pw9 PC Silas Cheronno the Investigating officer visited the scene and made sketch plan of scene. He also took photograph of the body of the deceased. He recorded witness statement and later arrested accused.

At the conclusion of the case for the prosecution the accused was placed on his defence. The accused gave sworn statement in his defence. He testified that on the material day on 2.12.2015 he went to his home at 9 p.m. he was at his home and did not go to the funeral. He testified that all the prosecution witnesses were family members and does not know why they framed the present charge on him.

The accused is charged with offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The ingredients of the offence which the prosecution has to prove are;

1) The fact and cause of death of the deceased;

2) existence of malice aforethought or mens rea and

3) the unlawful act or omission on the part of the accused the actus reus that caused the death.

4) That it is the accused who inflicted the injury.

Fact and cause of death.

Pw6 Dr. Achiyenga Shikuunzi testified that Dr. Kisaka performed a Post Mortem on body of the deceased. His findings were that he had a swollen jaw and a fracture of the frontal skull leading to injuries to the brain. He formed opinion that cause of death was due to injury to brain as a result of trauma, caused by a blunt object. He produced the Post Mortem form. The witness evidence therefore established the fact of death and the cause of death.

The other issue the prosecution has to prove is that it is accused who inflicted the injuries that caused the death of the accused. The accused in his defence testified that he was not at the scene of the offence and would therefore not have committed the offence. His defence is an alibi defence and the main issue for determination revolves around the identification of the accused as the perpetrator of the offence. Identification of the accused as the person who committed an offence is important in criminal trial.

Pw1 BMW aged 15 years and brother of deceased testified that he knew the accused as a person from his village. He stated that he had known him since he was born and they went to the same school at [particulars withheld] Primary. On the material day he testified that he saw a group of boys and accused was among them. He then saw accused hit the deceased with a rungu, and deceased fell down. Deceased asked B to go and call the mother who came. Pw2 JWM was at the funeral when he saw the group of boys come and started quarrelling. He then saw deceased fall down. He asked deceased who had assaulted him. In cross examination by M/s Nanzushi for accused this witness stated;

We recorded the statement at home of the deceased. I did not record that I was a neighbor. In the tent we were not very may. They were about 40 people. There was light everywhere. I knew 4 of the boys in the group. They were not drunk. I only saw accused with a rungu. I did not see when deceased was being hit. He said he did not know who hit him. He told the mother the same.

Pw4 MM the Village elder on being informed of the incident went to the scene. He found the 5 boys and the boys ran away but he was informed by Pw1 B that it is accused who had hit the deceased. Pw8 Chief Inspector Paul Kimani conducted an identification parade where the accused was picked by Pw1 B who was the only identifying witness at the parade. Pw11 John Chweya Simiyu testified that he was at the funeral but did not see the accused. He confirmed that there was commotion at the funeral and that the next day he learnt that deceased had died.

Pw5 SMW the father of the deceased received information of the attack on deceased. He went there and confirmed he had injuries. He asked deceased who had hit him and deceased said he did not know the person. He took him to hospital where he was referred to Moi Teaching & Referral Hospital where he died on arrival.

The accused defence is that he was not at the scene of the incident at the funeral at home of Franco, and that on the material day he was at home alone.

From all the prosecution evidence, it is Pw1 B who stated that he saw the accused hit the deceased. The identification of the accused as the person who committed the offence is by a single witness as all the other witnesses did not see accused do so. It is trite law that a fact can be proved by evidence of a single witness. In *Maitanyi Vs. Republic* [1986] KLR 198 the court of Appeal Nyarangi; Platt and Gachuhi JJA aptly stated the position thus;

Although the lower courts did not refer the well known authorities *Abdulla Bin Wendo & Another vs Reg* (1953) 20 EACA 166 followed in *Roria vs Rep* (1967) EA 583, it may be that the trial court at least did have them in mind. It is important to reflect upon the words so often repeated and yet bear repetition:-

“Subject to well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error.”

In short, in a case where the evidence turns out to be of a single identification witness the proper guide for the court was provided in *Maitanyi* (Supra) as

1. Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult.
2. When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light available conditions and whether the witness was able to make a true impression and description.

3. The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision, it must do so when the evidence is being considered and before the decision is made.

4. Failure to undertake an inquiry of careful testing is an error of law and such evidence cannot safely support a conviction.

Applying these principles to this case, was the accused positively identified? The evidence of the Pw1 in this aspect was;

At about 10 p.m. a group of boys came to where we were seated. The accused was among them. He then hit the deceased with a rungu (club) on the head and deceased fell down. Deceased told me to go and call my mother. I went and called her. She came and I told her it is accused who had hit the deceased. My mother took deceased to my grandfather M who was a neighbor. He woke up and we came and found the boys. They were about 5 of them. Accused was among them. They said they were providing security. My grandfather J started asking him why they had hit the deceased. One Hillary came and he and accused ran away. My brother went to the doctor. I went to the funeral.

The next day I went home and found deceased in the house. My mother took him to police and to the hospital. I stayed at home. At 10 p.m. I was informed my brother had died. The next day I recorded my statement. This is the photograph of deceased – PMFI 1.

Cross-Examined by Nanzushi: From my home to the funeral was about ½ Km. There was no lighting. In the group that came there were Hillary, Justin, John and accused. It is only accused who was armed. My mother was in another house. I have not seen the weapon used. They appeared drunk I saw accused hit the deceased. I would see as there was light from a lamp outside the house. There was no lamp. The grandfather is a Village elder – Mukasa.

Re-Examined: There was slight light. I saw accused with a rungu and I saw him beat him. There was an Electric bulb on. At time he hit my brother was not there. I went and called her and she came after 2 minutes. I don't know if the club used was recovered. I have known accused since I was born.

The evidence of the Pw1 and Pw2 is that the accused was known to them. This therefore was a case of recognition of a known person than an identification of a stranger. In the court of appeal in Wamungi Vs Republic [1989] KLR 424 at Pg the court 430 stated: **Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification. The way to approach evidence of visual identification was succinctly stated by Lord Widgery C.J, in the well known case R v Turnbull [1976] 3 All E.R. 549 at page 552 where he said:**

“Recognition may be more reliable than identification of a stranger; But, even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

This need for caution was also reiterated by the Court of Appeal for Eastern Africa in the case of Abdallah Bin Wendo v R 20 EACA 166 at page 168 thus:

“Subject to certain well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt, from which a Judge or jury can reasonable conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error.”

The court in assessing the correctness of identification or recognition of the accused must consider factors which would aid the witness identifying or recognize the accused. Such factors include, the source and intensity of light, the position of the witness in respect to the light, the duration of the incident or time taken and whether there was commotion or static environment. These are factors to be taken into account in assessing the existence of favourable conditions for positive identification or recognition.

In this case there is evidence that the boys were in a tent. While Pw1 says there was light, he again is not sure of the source and intensity. There were about 40 people in the tent and when the 4 boys came there was commotion. Pw1 B says in these circumstances he saw the accused hit the deceased. Pw2 J who was also present testified that he did not see who hit the deceased. Indeed, even the deceased when asked who had hit him told his father that he did not know. These to me points to the existence of unfavourable condition for positive identification/recognition which is free from error. In the result, I find that the evidence of Pw1 B that it is accused who hit the deceased to be unsafe to form a basis of a conviction for an offence of murder which the accused is charged with. I therefore find that prosecution has not established its case beyond reasonable doubt. I find accused not Guilty of the offence of Murder contrary to section 203 as read with section 204 of the Penal Code and acquit him accordingly under Section 215 of the Criminal Procedure Code. Accused to be released unless otherwise lawfully detained.

Dated at Bungoma this 30th day of October, 2019

S.N. RIECHI

JUDGE.