



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL DIVISION

CRIMINAL (MURDER) CASE NO. 44 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

SHABIR WACHIRA WESONGA.....ACCUSED

JUDGMENT

Introduction

1. The accused person herein SHABIR WACHIRA WESONGA is charged with murder contrary to Section 203 as read with Section 204 of the Penal Code, the particulars being that on the night of 19th and 20th July, 2014 at Mureko Village, Bulafu Sub location in Butere District within kakamega County he murdered JUMA OKUNE SHIUNDU. On 17.9.2014, the accused appeared in court for plea and denied the charge. Following the said plea, the prosecution called 8 witnesses in support of its case against the accused person.

The Prosecution Case

2. PW1 was NELLY APIYO ONGOLA, a wife to the deceased. She testified that on the evening of 19.7.2014, the deceased was at home and spent the better part of the evening talking to his children before he went to bed. At about 1.00am on 20.7.2014, PW1 (Nelly) heard a kick on the door of their house and as door gave way, two people entered the house and asked for the deceased's whereabouts. Among the people whom Nelly saw enter the house was Shabir Nanjira, the accused person herein. The accused person is a nephew to the deceased, and Nelly stated she knew him well.

3. Soon thereafter, the accused pushed the deceased out of the house while one man remained with Nelly and pinned her down for about 10 minutes. After the 10 minutes, the man had remained behind also left as he told Nelly to sleep. After the attackers left Nelly also went out of the house and went to the house of her co-wife Choice Nyakowa Okune, Pw2 (Choice) to inform her of what had happened to their husband.

4. Together Nelly and Choice followed the people who had dragged the deceased out of Nelly's house. They also went to their brother in-law Athuman's house and informed him that the accused person had taken the deceased with him. A short distance from Athuman's house, the deceased's body was with a deep cut wound on the head. He (deceased) also had an injury on the right eye and was bleeding. Thereafter a report was made to Butere Police Station and the deceased's body taken to St. Mary's hospital mortuary to await postmortem. Nelly was one of the people who identified the body of the deceased to Dr. Juma Khayombe PW7 for post mortem examination.

5. Nelly also testified that on 01.07.2014 the deceased and the accused's father known as Wesonga Marambe went to the home of one Alexander Chemseny where they had been hired to demolish a toilet. During that assignment, the accused person's father died when the toilets wall collapsed on him. It was after that accident that Nelly allegedly heard the accused vow that he would revenge, but apparently she did not understand what the revenge was about.

6. During cross examination Nelly testified that though her statement to the police mentioned that two people attacked her and the deceased, she did not give the two people's names. She also stated that though the night was dark, a torch held by one of the 2 attackers, was on and that during the 20 minutes or so when she argued with them, she was able to recognize the accused person, not from the torch light above but also from his voice. In a later statement recorded on 17.8.2014, Nelly gave the name of the accused person as one of the attackers. In answer to another question in cross examination, Nelly stated that she had earlier feared to mention the name of the accused person to the police for fear of her life.

7. Choice corroborated Nelly's testimony about the attack and how after the attackers took the deceased away, the 2 ladies tried to follow them only to later find the deceased's body lying on the foot path with injuries on the head.

8. Choice also testified that after the accused person's father was killed by a collapsing wall, the accused went to her home and vowed to

revenge the death of his father, though she never mentioned that allegation in her statement to police. Both Nelly and Choice confirmed that they had no grudge with the accused person.

9. PW3 was Joseph Andabwa Shiundu. He testified that on 01.07.2014, Hussein Wesonga Marambe had a fatal accident when the wall of a toilet collapsed on him. He also testified that when the accused got home to attend the funeral of his father, he (accused) uttered words to the effect, that the deceased herein knew why the father had died and that if he (deceased) did not bring accused's father back to life, he (accused) would revenge. PW3 (Joseph) also testified that on 03/07/2014 the area assistant chief called for a meeting of the two with a view to reconciling them following the death of father of accused.

10. Asuman Okwayo Shiundu testified as PW4. He recollected that on 01/07/2014, he learnt of the death of the accused's father which occurred as a result of a wall collapsing on him. He visited the scene and confirmed that the deceased had indeed died. The deceased's body was taken away to St. Mary's mission Hospital Mumias to await post mortem.

11. PW4(Asuman) also testified that when the accused person came home on learning of Wesonga's death he(accused) wanted to establish the circumstances under which the father had died, since he did not believe that a collapsed wall had caused the said death. Asuman told the court that the accused blamed the deceased, Juma Okune Shiundu and one James Waka for the death of his father.

12. Asuman also recalled that on 03.07.2014 the area Assistant Chief convened a meeting to seek a reconciliation between the deceased's family and the family of the accused. That meeting according to Asuman was held in Wesonga's home. During the meeting the deceased herein explained the circumstances under which Wesonga (accused's father) had died. Asuman stated that although other family members were satisfied with the explanation given by the deceased, the accused person herein still maintained that his father had been killed.

13. During further evidence in chief, Asuman testified that during the burial of the accused's father, the accused said loudly that he would revenge his father's death. On the 19.7.2014 the deceased allegedly confided in Asuman that a sister to the accused herein had gone to his (deceased's) home and told him (deceased) that it was him who had killed their father. After being advised to go and report the matter to the police the deceased went his way. It was that same night that the deceased was killed. Asuman testified that when he saw the body, it had a cut on the head and an injury to the right eye. As he concluded his testimony, Asuman told the court that he had never had any grudge with the accused.

14. During cross examination, Asuman testified that he did not report the accused person's threats that he would revenge the death of his father. Though Asuman alleged to have mentioned the accused person in the statement to police as one of the suspects, the investigation diary for 20.7.2014 at 2.10am did not mention the suspect.

15. Emmanuel Shiundu Andabwa testified as PW5. (Emmanuel). He is son to the deceased. He testified that on the morning of 1.7.2014, his father the accused's father and other people left the homestead together for the home of one Alexander, for the purpose of demolishing an old toilet in that home, but he later learnt a wall of the toilet collapsed on Hussein Wesonga and killed him. The body was later removed to the mortuary in the presence of the area Assistant Chief.

16. Later on, Emmanuel heard allegations connecting the deceased with the death of Hussein Wesonga. The allegations were reported to the area Assistant chief who in turn convened a baraza (public meeting) at which Hussein Wesonga's family refunded the deceased all the expenses he had incurred in taking Hussein Wesonga to hospital. Emmanuel further testified that during the funeral of the accused's father the accused warned that the deceased herein would also be buried in a week's time by uttering the words "**I am giving mzee Juma one week and I will have buried him.**"

17. Emmanuel testified further that a week after the accused's father was buried, the deceased was abducted from his house and killed. He testified further that on the fateful night, he was woken up around midnight by his mother and told the deceased had been killed. He went to the scene and found the body of the deceased lying some 50 metres outside his (deceased's) house. On observing the deceased's body Emmanuel noticed cuts at the back of the head and another cut on the right side between the ear and the eye. To his recollection, Emmanuel did not see the accused person at the scene. He then went to Butere Police Station where he reported the incident, after which the deceased's body was taken away by the police to St Mary's Mission Hospital Mortuary Mumias. Emmanuel confirmed to the court that he did not have any personal grudge with the accused person, nor did their two families have any grudge between them.

18. During cross examination, Emmanuel testified that the reconciliation meeting called by the area Assistant Chief was convened before the burial of Hussein Wesonga. He also testified that in his statement to the police, he mentioned the accused person by name as the person who had vowed to slaughter the deceased.

19. PW6 was Wilson Namayi Wamalwa. He testified of how on 1.7.2014, he received information from the deceased that Hussein Wesonga had been injured and how not long thereafter, he received another report from the deceased telling him that Hussein Wesonga had died. He also testified that on that same day he saw and also spoke to Ibrahim Wesonga, a son to Hussein Wesonga who had an affidavit in his possession confirming that he family of Hussein Wesonga had no claim against anybody for the death of their patriarch.

20. PW6 (Wilson) also testified that on 2.7.2014, the accused person herein went to his (Wilson's) home with a request that Wilson summons the deceased to come and explain how Hussein Wesonga had died, but the deceased did not appear on that day. Again on 3.7.2014, the accused person made a similar request, but the deceased appeared on 4.7.2014 and attended the meeting called by the area Assistant Chief at the home of Hussein Wesonga and explained how the death of Hussein Wesonga had occurred. Wilson stated that he did not attend Hussein Wesonga's burial.

21. Dr. Juma Khayombe of St Mary's Mission Hospital Mumias was PW7. He testified on behalf of Dr. F. Mose who conducted the post mortem examination on the body of the deceased. From the post mortem report **PExhibit 1** produced in court, the deceased's body had lacerations on the head and one deep cut on the back both measuring 15cm long. There was another laceration on the right temporal region measuring 3cm X 4cm. Inside the head, the examination revealed a comminuted skull fracture and loss of brain matter on the occipital

region, with massive bleeding in the brain. Apart from the head injuries, all other systems were normal.

22. In the doctor's opinion, the cause of death was severe head injury secondary to blunt force trauma.

23. The investigating Officer number 78364 Corporal Francis Anyara Ekapten testified as PW8. He received a report of the deceased's murder at about 2.00am on the night of 19th/20th July, 2014. Together with his deputy Sgt Onyango, and other officers, Corporal Ekapten went to the scene where they found the deceased's body lying in a pool of blood about 200 metres from his house. On examination of the body Corporal Ekapten noticed a deep cut at the back of the head, tending towards the right side. He also noted that the deceased's right eye was injured

24. A search for the murder suspect on that night was futile. After the burial of the deceased Corporal Ekapten received information from the chairman of the area community policing that the accused person herein, Shabir Wesonga was a prime suspect in the deceased's murder, following utterances allegedly made during his father's funeral that the deceased is the one who had killed his (accused's) father. On 17.8.2014, the accused person was arrested from his home. Corporal Ekapten testified further that upon his arrest and interrogation, the accused person denied committing the offence and alleged that on the material day, he was in Belgut where he was employed as a teacher in a private school. No murder weapon was recovered.

25. During cross examination, PW8 testified that according to the investigation diary OB No. 2/2007/2014 recorded at 00.10am the reportees of the incident did not indicate they knew the suspected murderer of the deceased.

26. Corporal Ekapten also testified that he visited the school where the accused alleged he was teaching and shown the duty roster but he was unable to confirm whether or not the accused person was on duty on the material day. Corporal Ekapten got copies of the duty roster dated 18.7.2014 Dexhibit 1. There was also the teachers' attendance register which showed that the accused person was on duty on 21/7/2014 – Dexhibit 2. Corporal Ekapten also produced the school's timetable for the period 10.5.2014 to 16.5.2014 but there was nothing in the same to show whether the accused was actually in school teaching on those days. He however confirmed that from the statements of the school's boss and two other teachers, the accused was said to have been in school on 19th/20th July, 2014. The investigating Diary was produced as Dexhibit 6. Corporal Ekapten explained that the delay in arresting the accused was caused by delay in recording witness statements. He denied a suggestion by defence counsel that the accused person was arrested on the basis of mere suspicion.

27. During re-examination, Corporal Ekapten told the court that the teachers attendance register –Dexhibit 1 only shows the time the accused person reported for duty on 18.7.2014, but does not show when he signed off. He also confirmed that 19 and 20.7.2014 were Saturday and Sunday respectively. Corporal Ekapten also testified that according to the attendance register – Dexhibit 3 for Monday 21.7.2014, the accused person reported for duty at 5.07am but does not show the time the accused person left the school. PW8 also confirmed that according to his investigations, the school did not keep a teachers' attendance register on weekends. He also confirmed that Dexhibit 3 did not contain entries for 19th and 20th July, 2014. From Dexhibit 4, the headteachers' statement, she got to school at 12.00noon on 19.7.2014 and the debate that took place ended at 4.00pm. PW8's evidence marked, the close of the prosecution case.

The Defence Case

28. The accused person testified under oath. He did not call any witnesses. He gave defence of alibi by stating that on 19th/20th July, 2014, he was at his place of work in Belgut, Kericho West. He stated that he was arrested on 16.8.2014 when he had gone home for a family function. He did not however produce any documents to show how and when he had travelled from Belgut in Kericho West sub- County to his home during the weekend of 19th/20th July, 2014.

29. The accused person told the court that his home is about 200 metres from the deceased's home and that there are two other houses in between. He alleged that the case against him was a fabrication but he did not say why and by whom.

30. During cross examination, the accused stated that the deceased was his friend and that between 2010 and 2011, he used to coach his daughter in her schoolwork, though he could not remember the girl's name. He also stated that while in Belgut, he would visit his home during weekends, especially end of month weekends. The accused admitted that on 3.7.2014, he asked the area Assistant chief to convene a reconciliation meeting between his father's family and the family of the deceased and that all his family members as well as Joseph and Asuman were present, but Emmanuel did not attend the meeting. He denied a suggestion by prosecution counsel that the said reconciliation meeting was held as a result of the deceased's report to the assistant chief that his (deceased's) life was in danger. He also stated that because Hussein Wesonga died in the deceased's hands, the deceased was afraid to face the neighbours. He also alleged that on the day his father died, the deceased herein disappeared from home and that from 1/7/2014 when his father died, he had never stepped in the deceased's home. He denied going to the deceased's home on 19.7.2014, since he said he was in Belgut though he was not the teacher on duty.

31. The accused also stated in answer to other questions that during weekends, teachers at the school do not log in and out of school and further that after the meeting of 3.7.2014 his family and the deceased's family agreed to work together. He referred to Asuman's testimony as a pack of lies, ascribing the lies to the difference in educational levels between his family and that of the deceased's and Asuman's families. The accused also alleged that Joseph's evidence was a pack of lies that was motivated by jealousy. Infact according to the accused, all the witnesses lied to court when they told the court that he (accused) had vowed to revenge the death of his father.

32. The accused also stated that Asuman attended the funeral of Hussein Wesonga and that Joseph also did so, but he said he did not see Nelly and Emmanuel. He denied the allegations that he blamed the deceased for his father's death. The accused also testified that Nelly lied when she alleged seeing him at the deceased's house on 15.7.2014 when he allegedly uttered the words, "**wewe Juma nipe baba yangu**" Hakuna penye utaenda. Hii ni Kenya ndogo." He also denied being at the deceased's house on the night of 19th/20th July and going away with the deceased. The accused alleged that Nelly had been coached to say lies against him. Finally, the accused stated he did not attend the deceased's burial but was quick to add that the failure could not be attributed to fear of being arrested in connection with the deceased's death.

Submissions

33. The accused person, through his advocates, M/S Marisio Luchivya filed written submissions in which he contended that the prosecution had failed to prove that he committed the offence, because both Nelly and Choice did not name the deceased's attackers when they went to report the incident to the police. Counsel reiterated that on the night of the alleged murder, the accused person was in Belgut in Kericho County. Counsel also submitted that the evidence given by the prosecution was generally inconsistent and ambiguous. Counsel urged this court to acquit the accused person. On its part, the prosecution relied on the evidence on record.

Issues for Determination

34. From the provisions of Section 203 and 206 of the Penal Code, the prosecution in this case needs to prove the following ingredients

- (a) Whether the deceased died
- (b) The cause of the deceased's death
- (c) Whether it was the accused person who unlawfully killed the deceased and
- (d) Whether in killing the deceased, the killer had malice aforethought

35. After carefully considering the evidence on record, I now move to determine whether the prosecution proved each of the above ingredients in this case. In other words, I must be satisfied that the prosecution has discharged the burden of proof of beyond reasonable doubt. It is trite that this burden never shifts from the prosecution to the accused person

Proof of death of deceased and cause thereof

36. The evidence on record clearly shows that he deceased herein JUMA OKUNE SHIUNDU died on the night of 19th/20th July, 2014 after being dragged out of his house by a group of people. His body was found lying some 50-100 metres from his house. All the witnesses and even the accused person confirmed that the deceased died. Dr. Juma Khayombe also testified and produced a report of the post mortem examination that was conducted on the body of the deceased on 23.7.2014. I am thus satisfied that the prosecution proved the fact of the deceased's death beyond reasonable doubt.

37. I am also satisfied that the cause of the death of the deceased was proved to the required standard. Nelly, Choice, Joseph, Asuman, Emmanuel and Corporal Ekaptan all testified that when they saw the body of the deceased, it had a deep cut wound at the back of head and another cut on the right side of the head between the ear and the eye. The right eye also had an injury. From the post mortem report produced as Pexhibit 1 by Dr. Khayombe, the cause of death was given as severe head injury secondary to blunt force trauma.

Proof of malice aforethought

38. Section 206 of the Penal Code requires the prosecution to prove any one of the circumstances outlined there-under to prove the offence of murder. Under the Section, Malice aforethought shall be deemed to be established by evidence proving any one of the following:-

- (a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not.
- (b) knowledge that the act or omission causing death will probably cause the death or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused,
- (c) an intent to commit a felony
- (d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony

39. In this case, the evidence on record shows that prior to his death, the deceased received threats concerning his life. The threats were in connection with the death of his brother Hussein Wesonga who died on 1.7.2014 when the wall of a toilet he and others were demolishing fell on him. On the night of 19th/20th July, 2014, the deceased was asleep in the house of his wife Nelly when at about 1.00am, the door to the house was knocked open and two people stormed the house asking for him. The people moved near the bed where the deceased was sleeping and dragged outside the house. Not long after that, the body of the deceased was found lying on the ground some 50-100 metres away from his house, with a gaping cut wound at the back of the head as well as an injury to his right eye.

40. Clearly the people who removed the deceased from the house at that ungodly hour of 1.00am did not have good intentions for him. Their intention was either to kill him or to cause grievous harm to him and indeed it became a reality when the deceased's body was found lying in a pool of his own blood some little while after he had been forcefully removed from his house in the night.

41. Further, the deceased's attackers must have known that by inflicting a wound of the magnitude and in the place on the head where the wound was inflicted which was in any event unlawful, would either cause the death of or grievous bodily harm to the deceased.

42. In light of the above, I am satisfied that the prosecution proved beyond any reasonable doubt that there was malice aforethought on the part of the person or persons who attacked the deceased on the night of 19th/20th July, 2014.

Whether it is the accused person who killed the deceased

43. The accused person has denied that he is the one who killed the deceased. He denied doing so upon his arrest and during his evidence, he adduced evidence that he was in fact in Belgut on the night of the alleged offence.

44. It is important for this court to satisfy itself that the identification of the accused person was beyond reproach because the circumstances under which the deceased was taken away from his house were difficult. It was 1.00am. There was no light in the house, except the light from the torch which the attackers had. The only other evidence is that the people, or at least one of them spoke as they enquired after the deceased. There is also evidence that the torch (spotlight) was shone around as the deceased was being dragged out of the house. There is also evidence that all the parties in this case are admittedly family. The deceased and Hussein Wesonga, father of accused are brothers. In effect the accused is a nephew to the deceased and his house was just 200 metres from the house of the deceased.

45. So the question that now arises for determination is whether the accused was one of the two assailants who dragged the deceased out of his house and subsequently killed him or not. The evidence on this issue is that of Nelly, a single identifying witness. Nelly's narrative is that at about 1.00am on the night of 19th/20th July, 2014, she and the deceased were asleep in the house when the door was kicked open and two people entered, and enquired where the deceased was. She said, **"They were two people but I recognized one. That person is Shabir Nanjira. I knew him before, he is a relative. He is a nephew. Son to my husband's brother"** She said she was able to identify the accused in the dock as the person she recognized on that fateful night. She went further to state: - **"The accused pushed my husband out and the other man remained with me. The man who was left behind had a spot light (torch). I saw the accused when light was shown on him by his colleague. The other man pinned me down for about 10 minutes. He later left [after] ordering me to sleep. I went to my co-wife's house and woke her up. I informed her that two people had frog matched my husband out. -----we went to Athuman's house and informed him that his son had gone with his brother....."**

46. In cross examination, Nelly stated that though she did not mention the name of the accused to the police, she stated that she argued with the attackers when they were pushing her husband. They even slapped her on the cheek. She also testified that the torch light was on all this while, and that the attackers were in the house for about 20 minutes. It was also Nelly's testimony that she informed her co wife that Shabir had come to the house with a person she did not recognize.

47. In her evidence, Nelly's co-wife Choice stated in part, "My co-wife did not mention names of the people who took away my husband." But added that the accused had vowed to revenge for the death of his father.

48. In my considered view, though Nelly did not mention the name of the accused to Choice, I am satisfied that the 20 minutes verbal exchange she had with the accused as the deceased was being dragged out of the house was sufficient for her to recognize the accused person as one of the two attackers. I have searched the record for any reason why Nelly would concoct a story against the accused person and I find none. The accused person suggested in his defence that the rest of the family were jealous of Hussein Wesonga's family because that family had gone to school, but in light of the other available evidence, and the fact that the accused confirmed he had no grudge with the witnesses, I am satisfied that Nelly told the truth. The reality of the moment, coupled with threats that had been issued prior to that date could make anyone forget even obvious details like giving names of suspects. I have no doubt however, that Nelly recognized the accused person on the night of the attack. In any event identification by recognition is always easier than identification of a stranger.

49. There is also circumstantial evidence in this case. Soon after Hussein Wesonga died, the accused came home from Belgut and loudly announced that he was not satisfied with the explanation given by the deceased as to how Hussein had died. Nelly, Choice, Joseph, Asuman, Emmanuel and Wilson, the assistant chief, were all privy to the threats issued by the accused person that whoever had killed his father would also die. It was because of these threats that on 4.7.2014 or there abouts, the assistant chief Wilson, called for a meeting between the deceased's family and the accused's family to try and reconcile them ahead of the burial of Hussein.

50. According to Wilson the accused first approached him on 2.7.2014 and asked him to convene a meeting at which the deceased could explain how Hussein had died. The deceased did not attend the meeting, so again on 3.7.2014, the accused approached Wilson with a similar request and sought to know whether the deceased had told him (Wilson) how Hussein had died. Eventually, the deceased attended the meeting on 4.7.2014 and explained how Hussein had met his death.

51. Wilson stated that in spite of these explanations, the accused appeared not satisfied and made utterances to the effect that the deceased had to produce Hussein alive, and that he made such utterances during the burial of his father.

52. I have carefully considered the accused's defence against this circumstantial evidence, as well as Nelly's testimony, and concluded that the defence does not displace the prosecution evidence that the accused person indeed issued threats against the deceased and eventually carried out those threats then he attacked the deceased on the night of 19th/20th July, 2014. I have also looked at the defence exhibits and in particular the teachers attendance register and note that there was absolutely nothing to stop the accused person from making the 6-7 hour journey from Belgut in Kericho County to Bulafu in Butere Sub-County for purposes of carrying out his mission of killing the deceased whom he perceived as his father's killer.

Conclusion

53. From all the evidence on record and after a careful analysis of the same as above given, I am satisfied that the prosecution has proved all the ingredients of the offence of murder as provided under section 203 and 206 of the Penal Code. I accordingly find SHABIR WACHIRA WESONGA guilty of the murder of JUMA OKUNE SHIUNDU and convict him of the same under Section 322(2) of the criminal Procedure Code.

It is so ordered.

Judgement written and signed at Kapenguria

RUTH N. SITATI

JUDGE

Judgment delivered, dated and countersigned in open court at Kakamega on this 20th December, 2019

WILLIAM M. MUSYOKA

JUDGE

In the Presence of:

Mr. Mutua for state

Mr. Osango for accused

Erick – court assistant