



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL CASE NO. 33 OF 2015

REPUBLIC.....PROSECUTOR

VERSES

FRANCIS GITHINJI WANYOIKE.....1ST ACCUSED

JOSEPH SIMIYU SHIKUKU.....2ND ACCUSED

JUDGMENT

1. The accused persons were jointly charged with the offence of **Murder contrary to Section 203 as read with Section 204 of the Penal Code**. The particulars of the charge were that on the **26th day of December, 2015 at Bidii village within Trans-Nzoia County jointly with others not before court murdered SAMWEL EWATON**.
2. They denied the charge and the prosecution called several witnesses to support its case. At the close of the prosecution's case the accused were put on their defence and they each gave unsworn evidence but did not call any witnesses. It shall be appropriate to summarise the evidence as presented before the analysis and final determination.
3. **PW1 DAVID BARASA SIMIYU** testified that on the night of 25th December, 2015 at around midnight he was carrying a customer using his motorbike (boda boda) on his way to Tuwani. He met the accused persons on the way who stopped him and sought to know where he was going. He explained to them and he was told to come back as they were going to catch a thief. He came back and the second accused told the deceased to board the motor bike and they went up to Section 6 where there were other people
4. At some distance past the Cereal Board the 2nd accused told the deceased to sit down and they told him to remove his shoes and money. They then began to assault him. The first accused had a rungu and the 2nd had a whip. They demanded that he produces a motor bike. He told them that it was at home but they continued assaulting him including breaking his legs. Later they brought dry maize stalks and burned him. People who were there were told to put off their mobile phones and their motorbikes lights.
5. When cross examined by the defence counsel the witness said that he knew the two accused persons as they operated boda boda at *Kisumu Ndogo* and *Express stage* respectively. He said also that he had known the deceased for about one year and his name was *mzee msima*. Beside the two there were also other boda boda riders who numbered about 14 of them.
6. **PW2 DR FAUSTINE SHITOTE** from Kitale County Referral hospital produced the post mortem report on behalf of **DR OBALA** who had carried out. He found that the body was burned beyond recognition and the cause of death was cardiopulmonary arrest secondary to 100% burns.
7. **PW3 P.C JAMES THIAURI** took over the investigation from **Corporal Katana** who had also taken over from **P.C Kirui**. They charged the two accused persons based on the evidence which showed that they were among the people who murdered the deceased in a mob justice. He had been accused of robbing other motor riders. They burned his body and the police went and collected the remains.
8. When placed on their defence, the 1st accused in his unsworn evidence denied the charge. He said that he lives in Tuwani and he runs a bar and he is also a driver. That on the 27th December, 2015 at around 11am they left for Falkland area with his friend Isaac to have some drinks. At 3.00 pm they went to Bondeni market also to drink and later went home.
9. On the way they met two boys who wanted to be taken home and using Isaac motorcycle he took them but on the way he was stopped by boda boda riders. As he inquired why he was being stopped someone snatched his mobile phone and as they questioned him police vehicle arrived and he reported to them that his phone had been snatched.

10. He was then put in the police vehicle and taken to the police station. He stayed there till 28th when they interrogated him and asked where he was on the 25th and he explained to them where he was. He explained to them where he was and what he did during that Christmas period including arranging issues of schooling.

11. The second accused also gave unsworn evidence denying the charge. He said that on the 29/12/15 he was transporting milk to Mois' Bridge when he was stopped by Police Officers and told that he was required to give some information. He went to the police station and he stayed for two days when he was told that he was a suspect over an incident he did not understand.

ANALYSIS AND DETERMINATION

12. The parties have filed written submissions which as expected are at variance from each other. Counsel for the state has submitted that there is sufficient evidence to convict the accused of the offence of murder. The defence counsel on the other hand submitted that the evidence of the star witnesses PW1 was circumstantial in nature and could not be relied on. He went on to state that the accused persons did not have the requisite mens rea. He said that the said witness was actually an accomplice in the whole crime.

13. What is essential to be established in proving the offence is the cause of death, that the death was caused by the unlawful acts and omission of the accused and that the same was committed with malice aforethought.

14. The only eye witness to the incident was pw1 who said that he was at the scene and he saw the accused injure the deceased and later had him burned. He testified that he saw the 2nd accused order the deceased to board the motorbike. He said that the 1st accused had a whip and the 2nd accused had a rungu.

15. The accused persons then assaulted the deceased despite his protest and had his legs broken before setting him on fire by use of dry maize stalks.

16. From the evidence of PW1, this court is convinced that although there were many other motorbike riders, it was the accused who led the action. It cannot be said that there was a case of mistaken identity since the witness knew both of them. He said during cross examination that he knew the accused for over two years as the first accused operated along *Kisumu Ndogo* stage and the 2nd accused *express* stage.

17. Although the intensity of the light that night was not explained, this court is satisfied that the witness was able and had sufficient time with the accused persons during the whole process. There was nothing during trial that doubted the presence of the witness at the scene or to suggest that there was mistaken identity.

18. The defence by the accused was not of much probative value in the sense that they did not offer any chance for cross examination. They did not offer any explanation where they were on that night. The said defences were an afterthought.

19. The cause of the deceased's death was consistent with the evidence tendered by the first witness, namely the breaking of his limbs and burning of his body. The Pathologist found that the same was burned beyond recognition a fact which the police confirmed when they went to collect the remains. The post-mortem showed that he had broken bones which as stated above was consistent with the evidence by PW1.

20. There was obviously malice by the accused persons, namely, that the deceased had been suspected of stealing and robbing motorcyclist. The same was well planned and executed at midnight. The other accomplices were not traced by the police. Suffice to state that the evidence by PW1, though a single witness was sufficient to prove that they committed the offence.

21. There was submission by the defence counsel that pw1 was an accomplice and that he should have been arrested too. This is not true in the sense that there was not much challenge in his evidence to suggest that he was an accomplice.

22. The conclusion of this court therefore is that the case against the accused has been proved beyond any shadow of doubt. The accused and others meticulously planned the horrendous scheme including luring the deceased at that ungodly hour and beside assaulting and breaking his limbs when ahead to burn his body. He must have died a terrible painful death.

23. The accused once he told them that the motorcycle was at home should have simply gone ahead and taken him to the relevant authorities. It even appears from the evidence of pw1 that the accused commanded a lot of authority and fear as exemplified by forcing the rest of the riders to switch off their mobile phones and lights from their motorcycles.

24. The accused are hereby convicted jointly and severally of murdering the deceased herein under the provision of Section 203 of the Penal Code.

Dated, signed and delivered in open court at Kitale this 18th day of December, 2019.

H. K. CHEMITEI

JUDGE

18/12/19

In the presence of:-

Mr. Omoori for State

Accused – present

Court Assistant – Silvia

Judgement read in open court.