



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**CRIMINAL CASE NO.19 OF 2011**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**KEVIN WANYONYI.....ACCUSED**

**JUDGEMENT**

1. The accused Kevin Wanyonyi is faced with the charge of murder contrary to Section 203 as read with Section 204 of the Penal Code.
2. The particulars of the offence being that on the 4<sup>th</sup> day of April 2011 at Kamukuywa, within Bungoma County he murdered Robinson Masinde.
3. The Prosecution's case is that the accused and 3 others not before Court accosted the deceased on the 4<sup>th</sup> of April 2011 where a quarrel ensued, they assaulted the deceased causing him serious injuries where after a couple of days the deceased succumbed to the same and died.
4. There were no eye witnesses and the Prosecution has relied on "a dying declaration" and circumstantial evidence in a bid to prove its case.
5. **PW1 Isaac Masinde Saasita** and **PW2 Elizabeth Nakhuminja Masinde** are father and mother to the deceased. PW2 in her evidence stated that on the 3<sup>rd</sup> of April 2011 at 9p.m. the deceased went to her house with a cut on the right side of his head and informed her that he was attacked by 4 people who made him kneel and cut him and they thereafter escaped. That he was able to recognize them and he gave the names as Kevin Wanyonyi, Webi Wanyonyi, George a mechanic and PW5 Namukhisa Anyesi.

That she called her to assist neighbours but they were not able to take her son to hospital until the following morning, when PW1 returned home from a funeral.

PW1 on the other hand said that when he got home he spoke to his son who gave names of the assailants as Kevin Wanyonyi, Munialo Wanyonyi, George a luu mechanic and Namukhisa Anyesi.

He further said that he took his son to Kamukuywa clinic and later the same day to Webuye and on 7<sup>th</sup> April, 2011 he was referred to Moi Referral hospital for scanning which he did, after which he took the deceased to Lugulu where surgery was performed however the deceased died on 11/4/2011 at 5a.m.

**6. PW3 PC David Mundia** was the investigating Officer. He initially received a report of the assault and later learnt of the death. In the course of his investigation he learnt that on the 4<sup>th</sup> of April 2011 at 9p.m. as the deceased was returning from Kamukuywa centre he was attacked by Kevin Wanyonyi, George a luu, Munialo Wanyonyi and Mildred Namukhisa Anyesi who ordered him to kneel down, questioned him and cut him twice on the head. The deceased dragged himself upto the mother's home and narrated to her the incident. The mother called the father who was away and who arrived the next day. He however also said that in her statement PW5 had indicated they were all drinking together when the accused and George had an altercation over a cap when the deceased intervened, and when the accused threatened the deceased. That before the deceased died, he had charged the accused with the offence of assault. After the death the accused was charged with the current case.

It was also his testimony that PW5 was initially interrogated by the Chief and she had told him that the deceased had been attacked by the accused and George in her presence.

The other culprits went under to date.

**7. PW4 Dr. Wambani Muturo** produced the post mortem report on behalf of an absent colleague **Dr. Alex Munyendo**. The post mortem report revealed the following injuries;

**External** – cut wound on the head 5cm long (had been stitched)

- Scar 10cm long and a bruise on the right parietal part of the skull 7cm in diameter.
- The bruises were swollen.
- Had Defence bruises on the left hand 5cm X 3cm with bleeding upto the fascia.
- Healed superficial bruises on right thigh approximately 3cm diameter.

**Internal** – 2 scalp opening (surgical) right temporal with clots

- Flattened brain with mid line shift of brain

**Opinion:** Cause of death, severe head injury caused by a blunt trauma on the left side of the head.

**8. PW5 Mildred Nafula Namukhisa** stated that on 3<sup>rd</sup> April 2011 she was at a club known as *Miti ni Dawa* having a drink with the deceased up to 8.30p.m. On their way out they met George who was her boyfriend. Shortly the accused appeared and snatched George's cap. The deceased intervened and though the accused returned the cap he warned the deceased. The three then headed to the witnesses house where they took soda and the deceased left the witness and George behind. She learned of the accused death the following morning. Later the accused mother offered her 20/- to disappear.

**9.** Having gone through the Prosecution witnesses the Court found the accused to have a case to answer and he was placed on his defence.

**10.** The accused gave an unsworn statement where he denied killing the deceased whom he knew. It was his evidence that on the fateful night he was at home at the alleged time of the offence. And when the A.P. police arrested, they took him to the Chief they had found him washing clothes.

**11.** This being a criminal case the onus of proving the same either through direct or circumstantial evidence is on the Prosecution.

**12.** Being a murder charge, three ingredients must be proved. 1<sup>st</sup> the fact death of the victim ought to be established. 2<sup>nd</sup> there has to be evidence adduced linking the accused to the act or omission leading to the victim's death. 3<sup>rd</sup> there has to be proof that the act or omission causing death was laced with malice aforethought.

**13.** There is ample evidence from PW1, PW2 and PW4 that the accused succumbed to death as a result of injuries sustained from assault.

**14.** PW1, PW2 and PW3 testified that the deceased named 4 people being the ones who accosted and beat him. The deceased did not say that he had been in their company but that they accosted him on the way home.

**15.** PW5 who was mentioned by the deceased gave a twist to the information. She gave the impression that her boyfriend George and herself were on the same side with the deceased as the accused initially grabbed her boyfriend's cap and the deceased had intervened. This information in my view contradicts the deceased information and indeed PW4's finding that PW5 on being interrogated by the Chief had mentioned George and the accused as being the assailant. She did not mention Munialo yet the deceased did. In my view PW5 is trying to save the skin of George and Munialo but only implicating the accused. If George and Munialo are innocent why did they escape immediately? Their action gives them away.

The deceased said he was cut with an axe. The doctor found a cut on the head and forearm. The information by the deceased as narrated appears to have been clear and believable.

PW5's evidence cannot be trusted. She must have been in the company of those who attacked the accused and her evidence is of no evidential value.

**16.** The deceased and those who attacked him came from the same village, they knew each other and although it was dark the deceased was able to identify the three men and the lady (PW5). PW5 though in a skewed manner admitted being with the deceased, accused and George that evening.

**17.** I see no reason why the deceased would have given the same names of his assailants to his parents a few days before his death if the information was not true. I find further that the information he gave was a dying declaration. Partially PW5 confirms, PW3 also confirmed part of the information which crystallises the dying declaration.

I therefore find that the Prosecution has proved the link between the injuries sustained by the deceased and the accused and his other accomplices who are at large.

**18.** The injuries were very severe such that ill will and malice aforethought must have accompanied the assault.

**19.** All in all the 3 ingredients have been proved and I accordingly find the accused guilty of the offence of murder as charged.

**DATED and DELIVERED at BUNGOMA this 25<sup>th</sup> day of January, 2018.**

**ALI-ARONI**

**JUDGE**