



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL CASE NO. 10 OF 2015

REPUBLIC PROSECUTOR

VERSUS

FANUEL AMOLLO ACCUSED

JUDGMENT

1. **FANUEL AMOLLO** is charged with an offence of murder contrary to section 203 as read with section 204 of the Penal Code.
2. The particulars of the offence are that on the 16th day of October, 2013 at **NANDEREMA** Sub-location, in **BUSIA** County, murdered **GREGORY NICHOLAS APOPO**.
3. Praxidis Apopo had passed on and was to be buried on 16th October 2013. Her siblings and close relatives went to the home where she was married to mourn and participate in the burial. On their arrival at the home, they were attacked by their in-laws on allegations that their deceased sister was a prostitute. A number of them sustained injuries from the attack. The deceased herein later succumbed to the injuries he sustained. This is a case where the family was torn apart by bereavement and lost one more member from their reaction. The accused was blamed for the death of the deceased, the subject of this case.
4. The accused in his defence contended that he arrived at his Nanderema home at about 1 pm. Since he was informed that the funeral had been postponed to the following day, he decided to rest for he had travelled from Nairobi. He joined the other mourners at about 4 pm, after the fracas. He denied to have participated in the same.
5. The issues for determination are as follows:
 - a) Whether the accused was present during the commotion and the fight that led to the death of the deceased, **GREGORY NICHOLAS APOPO**;
 - b) Whether the prosecution has proved common intent in the part of the family that attacked the family of the deceased; and
 - c) Whether the accused participated in beating the deceased.
6. When an accused person pleads an alibi, the onus is on the prosecution to prove it untrue, even if it is raised for the first time during defence. In the case of **VICTOR MWENDWA MULINGE vs. R, [2014] eKLR** the

Court of Appeal rendered itself on the issue of alibi as follows:

*It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution; see **KARANJA V R, [1983] KLR 501** ... this Court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought.*

In the instant case, I will analyze the alibi of the accused together with the evidence on record.

7. Before we analyze the alibi defence in conjunction with the evidence on record, it is important to appreciate the prosecution version of what took place just before the fight.
8. According to the evidence of **Hillary Bwire Wafula (PW1)**, who is a relative of the late Praxidis, is that one Adikinyi ordered the sisters

of the late Praxidis to stop mourning and asked them to take the prostitute away (referring to the deceased Praxidis) and bury her elsewhere. It was at this juncture that a person hit the coffin and a fight broke out. They (the relatives of Praxidis) were overrun. He said the incident took place at about 3 pm. He saw the accused hit **GREGORY NICHOLAS APOPO** on the head with a piece of firewood. He however conceded that the issue of Adikinyi calling the deceased Praxidis a prostitute and the allegation that he saw the accused hit the deceased **GREGORY NICHOLAS APOPO** were missing from his statement to the police. This is what he recorded in his statement:

Shortly one man while armed with a stick hit the casket strongly. Shortly a group of people from Ambunga's family then surrounded us and started beating us with sticks. One by the name Obilo hit me on the left arm with a stick where I sustained injuries, others (sic) two joined in beating me that is Ali and Adikinyi. I could not manage to identify the others.

I managed to escape towards Nanderema AP camp. Later I realized that Gregory Apopo, Deogratius Apopo, Jentrix Apopo and Cyrine Apopo received injuries as a result of the scuffle.

9. The version of **Cyrine Benjadid Apopo (PW2)** is different. He testified that after their arrival at their in-law's home, as soon as they had sat down, Adikinyi addressed him saying that they should not mourn their sister there, for she was a prostitute. He stood up and addressed her reminding her that they were all bereaved. While he was still addressing Adikinyi, the accused pushed him with a lot of force and he staggered backwards. It was at that point when he heard a bang and a person saying:

“Take this Prostitute away”.

The rest of the members of their in-laws' family descended on them. He did not testify to have seen the accused beat the deceased. He also conceded that his statement did not mention “prostitute” nor did it indicate that he saw the accused hit the deceased. This is what he recorded in his statement:

Suddenly I saw my brother Deogratia Apopo being beaten by a group of people. I managed to identify Nathan Mbunga, Ojiambo, Adikinyi and others.

10. A third version was introduced in the evidence of **George Wafula Elima (PW3)**. He said that when he arrived at the home of Praxidis, he found the family in a meeting whose agenda was preparation for the attack on the relatives of the deceased. I will revisit the alleged conspiracy theory later. Immediately the siblings of the deceased Praxidis arrived, their in-laws emerged from the house where they were meeting and descended on them with pieces of firewood. He saw the accused hit the deceased on the head with a piece of firewood. When he fell down, the accused hit him severally. In his statement he stated:

Suddenly a disagreement ensued between them and their in-laws. A group of people while with sticks started attacking the above listed people. As a result the above people were injured, Gregory, Cyrine, Deogratius, Hillary, Silas and Jentrix. The assailants included Ndalo, Nathan Mbunga, Ali, and Adikinyi among others. Fanuel assaulted Gregory.

The statement by this witness is at variance with his evidence in court. The statement that was recorded when the incident was still fresh is very sketchy on the role of the accused compared with the details in his evidence. One is left wondering whether the evidence in court was not tailor made so as to fix the accused. It also presupposes a discussion between the two families took place contrary to his contention in court that the relatives of Praxidis were attacked immediately they arrived in the home where the deceased body lay.

11. The statements by these three prosecution witnesses were at variance with each other and the evidence of **PW1** and **PW2** introduced very material facts during their evidence in court and which were lacking in their statements they recorded with the police. The court of appeal in the case of **NDUNGU KIMANYI vs. REPUBLIC [1979] KLR 283**, (MADAN, MILLER and POTTER JJA) held:

The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.

These three witnesses cannot be described in any other terms other than that they are unreliable witnesses.

12. The accused in his defence contended that he arrived at the scene after the incident. He said that he met with **PW2** at the gate while the latter was running in the opposite direction. His contention was supported by that of **Vincent Okiyai Odanga (DW2)** who said he was the pastor who was liaising with the family of Praxidis in preparation for her burial. He said at the time of the fracas he never saw the accused at the home.

13. After weighing the entire evidence on record, I find that the prosecution was unable to dislodge the alibi defence of the accused.

14. The prosecution through the evidence of **George Wafula Elima (PW3)** introduced a conspiracy theory which if true, can be a basis of finding that even if the accused did not actually hit the deceased, common intent can be inferred from the conspiracy, if it is proved that he was present. In the case of **DICKSON MWANGI MUNENE & ANOTHER vs. R [2014] eKLR** the Court of Appeal deduced common intention as follows:

... where there are two or more parties that intend to pursue or to further an unlawful object or a lawful object by unlawful means and so act or express themselves as to reveal such intention.

It implies a pre-arranged plan. Although common intention can develop in the course of the commission of an offence ...

This theory was not proved for the witness who brought it forth did not convince the court why he was allowed to participate in such a conspiracy meant for the family members where he was not one of them. In any case this witness has already discredited himself as unreliable witness.

15. From the foregoing analysis of the entire evidence on record, I find that the prosecution has not proved to the required standards that the accused Participated in beating the deceased herein. I accordingly acquit him of the offence he is charged with and set him free unless if otherwise lawfully held.

DELIVERED and SIGNED at BUSIA this 28th day of May, 2018

KIARIE WAWERU KIARIE

JUDGE