



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**CRIMINAL DIVISION**

**CRIMINAL (MURDER) CASE NO. 36 OF 2012**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**RAJAB MOI OSANYA (DECEASED).....1<sup>ST</sup> ACCUSED**

**MOSES ABWOTO AMWEYE ALIAS MUSA.....2<sup>ND</sup> ACCUSED**

**CORAM: LADY JUSTICE RUTH N. SITATI**

**JUDGEMENT**

**Introduction**

1. The two accused person herein Moses Abwoto Amweye alias Musa together with Rajab Moi Osanya (deceased) were jointly charged with the offence of ***murder contrary to section 203 as read with section 204 of the Penal Code***, the particulars thereof being that on the 25<sup>th</sup> day of July 2012 at Shibunje Village in Butere District within Kakamega County they murdered Abdalla Wesamba. Each of the accused persons denied the charge when they appeared for plea before my sister, Justice B. Thurairaja Jaden on 9<sup>th</sup> October 2012. The first accused, Rajab Moi Osanya died during the pendency of the hearing of this case.

**The Prosecution Case**

2. The prosecution case is anchored in the testimonies of the 5 prosecution witnesses called by the prosecution. Mohammed Omukanda Shibo testified as PW1, while Bakari Makokha Omukanda was PW2. Zaituna Auma Makokha was PW3 while number 69299 PC Kennedy Lubembe was PW4. The last witness, PW5 was Dr. Juma Khayombe of St. Mary's Mission Hospital, Mumias.

3. From the above named prosecution witnesses, the prosecution case is that on the 25<sup>th</sup> July, 2012 the two accused persons among other boda boda riders took the deceased from Tavern Inn after they had lured him there though his brother PW2, Bakari Makokha Omuganda (Bakari). The deceased was taken to his father's sister's home, one Zaituna Auma Makokha who testified as PW3 (Zaituna). There at Zaituna's home, the deceased was ordered to produce a motorbike which he had allegedly stolen from Jackson Andayi, one of the boda boda riders in the area. When the deceased failed to produce the motor bike as demanded, he was beaten, tied up and cut on the head with an axe and a hoe before he was set ablaze and burnt. His house at Zaituna's homestead was also set ablaze.

4. The matter was reported to Butere Police Station on the same day. Number 69299 PC Kennedy Lubembe, PW5 (PC Lubembe) who was by then stationed at the CID office Butere received the report and later accompanied the Butere Police Station OCS, CI Saitera to the scene of the killing at Shivuche Village. Other police officers also accompanied the OCS to the scene. On arrival at the scene, the officers noted that the body of the deceased had a number of injuries including cut wounds on the head, a deep cut wound on the neck as well as other cuts on the body and hands. The feet had been burnt. The police recovered a jembe and a hoe which had been placed beside the body. These were produced as Pexhibits 1 and 2.

5. After the preliminary investigations, the deceased's body was removed to St. Mary's Mission Hospital Mumias for post mortem examination. The post mortem examination was conducted by Dr. Duncan Oluoch on 26<sup>th</sup> July 2012. However, since Dr. Oluoch could not be availed to testify the post mortem report was produced by Dr. Juma Khayombe who testified as PW5. According to the post mortem report, the deceased suffered multiple cut wounds on the head and both upper and lower limbs. He also had third degree burns on the soles of his feet and on his hands. The report further showed that the deceased suffered a skull fracture and inhalation burns in his airway.

6. According to Dr. Oluoch, the cause of death was head injury with haemorrhagic shock. The duly signed and stamped post mortem report was produced as Pexhibit 3 while the statutory declaration form showing age of the deceased was produced as Pexhibit 6.

### **Defence Case**

7. It is to be noted that the 1<sup>st</sup> accused, Rajab Moi Osanya died while the case was in progress. In his sworn statement the accused person herein, Moses Abwoto Amweye alias Musa denied any link with the murder of the deceased. His story was that on 25<sup>th</sup> July 2012, one of the boda boda members belonging to the group chaired by himself was assaulted and his motorbike stolen. He went to see the member who was admitted at St. Mary's Hospital Mumias. When he went back to the stage, he established that his members had gone to look for the person who had assaulted their member Jackson Andayi. When the boda boda group returned to the stage, they informed him that the stolen motorbike had been recovered and its thief killed. He went to the scene of the killing where he found the body of the deceased. Nearly two months later on 19<sup>th</sup> September 2012, he was arrested.

8. The defence witness, Desterio Mukoya who testified as DW2 stated that on 25<sup>th</sup> July, 2012, he accompanied the accused person to St. Mary's Hospital to check on Jackson Andayi who had been admitted to the hospital following assault. On retruning to the stage, he got to hear that someone had been assaulted and burnt in connection with Jackson Andayis stolen motorbike.

### **Issues for Determination**

9. In addition to establishing the ingredients for the offence of murder as set out under **section 203 of the Penal Code**, this court is under a duty to determine the issue of identification of the people who actually killed the deceased. This is so because of the fact that there were more than twenty people who were baying for the deceased's blood when he was attacked. The issue of identification is a cardinal principle of law and the burden of proof of the same rests entirely on the prosecution.

### **Submissions**

10. M/S Nandwa & Company Advocates filed brief written submissions in which this court was urged to make a finding that the offence of murder had not been proved, and to accept the alibi defence offered by the accused person. Counsel also submitted that the delay in arresting the accused person herein casts some doubt on the prosecution's case, especially when there is no indication from the evidence on record that he went into hiding after the deceased had been killed. Further, that there is no evidence that the accused person herein planned and executed the killing of the deceased. In effect, counsel submitted that the prosecution had completely failed in its duty to prove the charge of murder beyond any reasonable doubt. Reliance was placed on *Kiarie versus Republic [1984] KLR 739* in which the Court of Appeal held, inter alia that **"6. An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable....."**

11. The state did not respond to the written submissions by the defence.

### **Analysis and Determination**

12. As indicated earlier in this judgment, the prosecution is under a duty to prove the following:-

- a. The fact of the death of the deceased**
- b. The cause of that death**
- c. Whether the deceased met his death as a result of an unlawful act or omission on the part of the accused person.**
- d. Whether, in committing the unlawful act or omission, the accused person did so with malice aforethought.**

13. Regarding the first and second issues there is no doubt that the deceased in this case died. PW5 produced the post mortem report which confirmed beyond any shadow of doubt that the deceased died. Further, PW5 testified that according to the findings of Dr. Oluoch who performed the post mortem examination, the cause of the deceased's death was head injury with haemorrhagic shock.

14. On the third issue, there is clear evidence that the accused was among the group of people who assaulted the deceased before setting him on fire with the clear intention that the deceased should not live. In his evidence, Bakari told the court that on 25<sup>th</sup> July 2012, while he was at Ekeru Market where he works as an artisan, the accused person approached him and sought to know where the deceased was. The accused person convinced Bakari to ask the deceased to make his way to Tavern Bar. As requested the deceased presented himself at the Tavern Bar from where the accused person herein and another forced the deceased onto a motorbike and rode away with him. On seeing what the duo had done, Bakari contacted relatives to alert them. One of those alerted was Mohamed Omukanda Shibo PW1, an older brother of the deceased.

15. On that same day, Zaituna who was at home testified that between 9.00 and 10.00am many people descended on her home. They were armed with pangas, rungas and metal bars. She was asked to confirm if she was the owner of the homestead and when she said so, the people took her to the front of the house and asked her to tell them where the deceased was though the deceased was with them. They also asked her to show them the deceased's house and wanted to know whether there was a motor bike in there. They broke the door to the deceased's house. According to Zaituna the people she clearly identified were one Wesonga, (still at large) and the first accused Rajab Moi Osanya (Now deceased) and the accused person herein. Wesonga and Rajab are the ones who inflicted the cut wounds on the deceased.

Further Zaituna stated that the accused herein who was with the mob, climbed onto the deceased's house and brought down grass thatch which was used to light the fire to burn the deceased. Some of the grass thatch was used to set the house ablaze.

16. In my considered view therefore the evidence of identification places the accused person herein at the scene. Further, and more compelling is the fact that the accused was the last person to be seen with the deceased before the deceased died. Bakari saw him forcing the deceased onto a motorbike and riding away with him. The accused person was also part of the crowd that was present when the deceased was set ablaze at Zaituna's home. He is the one who brought down the grass from the roof to set both the deceased and the house on fire.

17. Further, ***under section 21 of the Penal Code, "where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein, and any one there, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to the offence."*** In the present case, the accused person, as chairman of his bodaboda group, together with others whisked the deceased away on a motor bike from TAVERN BAR, and took him all the way to Zaituna's home.

18. It is clear from the evidence on record that the purpose of taking the deceased to his home, was to administer mob justice to the deceased unless and until he produced Jackson Andayi's stolen motorbike. The evidence shows that the mob of boda bodas had formed a common intention of how to deal with the deceased concerning the matter of the stolen motorbike. The accused person who was in charge of the mob of bodaboda riders should have known that the commission of the offence of assault upon the deceased would be a probable consequence of the deceased's death.

19. Lastly on the issue of malice aforethought, the evidence on record shows that the accused person, in the company of others went looking for the deceased in connection with the alleged theft of Jackson Andayi's motorbike. From Bakari's and Zaituna's testimonies once the deceased was found, he was driven to his death by burning after he was seriously assaulted. There is no doubt that the intention of the accused person herein was either to kill the deceased or to cause him grievous harm. In my considered view, the alibi defence fronted by the accused person has not in any way displaced the evidence of identification of the accused person herein as the prime mover of the deceased's murder. I therefore reject that defence as the said defence has not introduced any doubt in my mind regarding the guilt of the accused person herein.

### **Conclusion**

20. From all the foregoing, I am satisfied that the accused person herein together with others not before the court, committed the offence and I accordingly find him guilty of the murder of ABDALLA WESAMBA on 25<sup>th</sup> July 2012 and accordingly convict him of the same under ***section 322(1) of the Criminal Procedure Code.***

It is so ordered.

Judgment written and signed at Kapenguria

**RUTH N. SITATI**

**JUDGE**

Judgment delivered, dated and countersigned in open court at Kakamega on this 26<sup>th</sup> day of October, 2018.

**J. NJAGI**

**JUDGE**

### **In the Presence of:**

Mr. Ngetich for State

Mr. Munyendo holding brief for Mukhwana for Accused

George - Court Assistant