



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
CRIMINAL CASE NO.4 OF 2008

REPUBLIC.....PROSECUTOR

VERSUS

PIUS JUMA NDIEMA.....1ST ACCUSED

PATRICK CHEPTORAE KAPTUNWO.....2ND ACCUSED

PETER KIYENI MAMUYA.....3RD ACCUSED

JUDGEMENT

1. The three Accused persons Pius Juma Ndiema, Patrick Cheptorae and Peter Kiyeni Mamuya are alleged to have killed Silas Chesebe on the 6th of January 2008 at Kashok village, Kashok sub-location, Namorio location in Mt. Elgon. For the allegations they are faced with the offence of murder.
2. The matter proceeded to full trial and the Prosecution case in brief is that on the 6th of January 2008 as the deceased went to look for onion to purchase in the company of PW3 and PW1 and PW2 the first accused who had earlier sold the deceased onion acting together with the 2nd and 3rd accused who were members of an outlawed group attacked the deceased killing him. 7 witnesses gave evidence.
3. 5 of the witnesses who were with the deceased before or during the attack testified that they did not see the 2nd accused neither did they know him. On his part the 2nd accused who gave a sworn statement denied killing the deceased. It was his testimony that he was arrested on 24th of June, 2008 during an operation in Chewangoi. He met his co-accused in Court who were not known to him before. The other 2 witnesses were a police Officer who did not investigate the matter and the doctor who performed post mortem on the deceased.
4. **PW1**, in his testimony stated that he did not know the 2nd and 3rd accused but recalled having seen the 1st accused at the shamba when they harvested onions where he saw him threaten the deceased.
5. **PW2** stated the same as PW1 regarding the threat although with the same breath he said that the 1st accused had offered to get them more onion to buy. He also saw the 1st accused call the deceased aside and talk with him.
6. **PW3 Violet Chepkemoi Chere** a business woman dealing in onions recalled that on 6/1/2008 she joined the deceased at his request to go buy onion from a shamba in Kashok forest. They bought onion from the 1st accused. There was insecurity and the 1st accused offered to alert them in case of any

problem. As they finished and took their onion to the house of one Bernard the 1st accused returned and told them he had more onion they declined to buy more from him, he gave them sugar cane to chew and they left leaving him behind. As they walked near Kochor together with the deceased, Bernard and Emily a man emerged from the forest armed with a gun and a panga and ordered them to lie down. One of the people in her company Benard who was ahead was heard to say “*Chemosit usiniue*” and the man ran away. The assailant with the gun shot at the deceased 3 times. The three ran away towards Kaprison and at Kapsokwony / Senderea junction they met with police whom they reported the matter to. Together with the police they return to the scene with the police but they did not find the deceased. It was also her evidence that she did not identify the attackers except that Bernard mentioned the name ‘Chemosit’ and she cannot for sure tell whether it the person he knows.

7. PW5 Bernard Wafula Simiyu confirmed that on 6/1/2008 he was in the company of PW1, PW2 and PW3 together with the deceased in the 1st accused shamba harvesting onion. That the 1st accused directed them to another shamba and on the way they were accosted by two men with guns who attacked them. It was also his evidence that the 1st accused was with them, when he uttered some words before the attack. That they escaped, with the deceased went a different route. On the way they met the police and informed them on returning back they did not find the deceased but were met by a pool of blood. Further that when the attackers set on them the 1st accused had said ‘*Chemosit unataka kuniua bure*’.

8. On his part the first Accused who gave a sworn statement, stating that on the 6th of January 2008 he sold onion to PW3 who was in the company of others. They harvested and left with one Bernard Mungiti to harvest more near the forest. They asked him for sugar cane to chew and left. The person he knew was Violet, he had not prior met the deceased and had no reason to kill the him.

9. The third accused also gave a sworn statement. He denied that he was the Chemosit being referred to. He also denied killing the deceased and stated that he was arrested on 8th June 2008, by the Military police. He did not know PW5, he first saw him in Court neither PW3 does not sell onions either.

10. The onus of proving a Criminal Case lies upon the Prosecution who have to prove the case beyond all reasonable doubt. Should there be any doubt the same ought to be resolved in favour of the accused person. The burden never shifts to the accused.

11. No doubt from the evidence of PW1 – PW4 the deceased herein Silas Chesebe was attacked, shot at and died on 6th January 2008.

12. There are 3 ingredients that must be established to sustain a charge of murder. The Prosecution must prove that a murder occurred which has clearly been demonstrated. Secondly there has to be proved that the actions of or omission by the accused persons caused the murder and thirdly that the action or omission was actuated with malice aforethought.

13. Having established that the deceased died, is there any evidence linking the three accused person to the death of the deceased? All the 5 witnesses who testified identified the 1st and 3rd accused persons and were in unison in stating that they did not see the 2nd accused indeed PW3 and PW5 who were in the company of the deceased just before his death both said they never saw him. The Prosecution in their submission concede to this fact.

14. As regards the first accused all agree that they saw him immediately they went to harvest. PW3 and PW5 corroborate the 1st accused evidence that he is the one who sold them onions initially and that they were attacked as they went to another farm near the forest.

PW3 and PW5 were the ones with the deceased as he went for the 2nd harvest. The two did not corroborate the evidence of PW1 and PW2 who allege that the 1st accused had threatened the deceased. I do not believe their evidence as I do not see how the deceased could have bought onions, from a person who threatened him or how the 1st accused could have sold threatened and also give sugar cane to one

who he had a grudge with. Having said that there is contradiction between the evidence of PW3 and PW5 as to what happened after they were given sugar cane. Did the 1st accused go with them or was he left behind?

PW3 says they left him behind and had walked for 4-5 minutes before the attack.

PW5 says the 1st accused was with them and he is the one who said “*Chemosit unataka kuniua bure*”.

So why is he an accused if he was also a target of the 3rd accused?

15. The tragedy occurred on 6th January, 2008. The 3rd accused in his evidence says he was arrested on 8th June, 2008 and he is not Chemosit as he was referred to by PW3 and PW5 neither are any of his parents known by the name.

PW3 says she did not recognize him save she heard the name Chemosit being uttered and would not be sure which Chemosit was being referred to. PW5 does not say whether he recognized the 3rd accused physically and how, as they took off upon attack.

16. I must say that the Prosecution Case has serious contradictions and gaps. It is not clear from the evidence of PW3 and PW5 whether indeed the 1st accused was an accomplice of the attackers or whether he was indeed attacked together with the two witnesses and the deceased and what would have been his motive.

As for the 3rd accused there is no adequate evidence as regards his identification, the issue of his names remained unresolved.

17. It was also noteworthy that the second and third accused who were arrested on 24th April 2008 and 8th June, 2008 were not charged until 20th July, 2009 with no explanation having been incarcerated for several months.

18. I have therefore formed the opinion that due to the shortcomings mentioned the Prosecution failed to prove its case beyond all reasonable doubt and the doubt will have to be resolved in favour of the 1st and 3rd accused as for the 2nd accused no *iota* of evidence was adduced against him.

19. For the above reasons all the accused persons are acquitted. They are set free unless otherwise lawfully held.

DATED and DELIVERED at BUNGOMA this 23rd day of October, 2017

ALI-ARONI

JUDGE