



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL CASE NO.1 OF 2013

REPUBLICPROSECUTOR

VERSUS

ESAU MAKHANU WANGILA1ST ACCUSED

AMOS WAFULA WANGILA.....2ND ACCUSED

JUDGEMENT

1. The Accused persons Esau Makhonu Wangila and Amos Wafula Wangila are faced with the offence of murder of one Aggrey Wafula Wanjala. The particulars of the offence are that on the 29th of December, 2012 at Makhongo village in Sirende location within Bungoma they murdered the said Aggrey Wafula Wanjala.

2. The Prosecution case is that on the night of the 28th of December 2012 at around 10p.m. the two Accused attacked the deceased and inflicted fatal injuries on him, they detained him thereafter and did not allow him his relatives to take him to hospital alleging that the deceased was a thief and in the process the deceased succumbed to the injuries on the morning of the 29th of December, 2012.

3. A total of 6 witnesses were called by the Prosecution. The Court found the accused persons had a case to answer and they were placed on their defence. They each gave an unsworn statement and did not call any witnesses. They both denied the charge.

4. From the onset the Court is minded that in a Criminal trial the onus of proving the guilt of the accused squarely lies on the Prosecution and the standard of proof must be beyond all reasonable doubt See the case of **R Vs David Ruo Nyambura & 4 Others (2001) e KLR.**

5. Secondly in order to sustain a charge of murder three ingredients must be proved; firstly the fact of death must be established, secondly, it must be established that the cause of death was as a result of an unlawful action or omission on the part of the accused and thirdly proof that the unlawful action or omission was actuated with malice aforethought.

1. The Prosecution evidence may be summarized as follows;

PW1 Mary Majuma wife of the deceased testified that on the 28th December, 2012 she was woken up by noise outside her house at 10p.m. She opened the door and outside were a group of about 10 people. She saw her husband lying down. She went to touch him but was hit by one person and asked 'ulikuwa na yeye'. She then left to call her parents in-law about 5Kms away, on returning her husband had been moved 5 meters away from his original position, and was still breathing. They were unable to get a

vehicle to take him to hospital, he succumbed to the injuries. The police arrived the next morning at 8.30a.m. That it was dark when she got out and had recognized her husband due to his clothing. She did not witness the assault. She recognized the two accused persons as part of the crowd. The 1st accused is the one who hit her hand. She recognized the two because of their voices. There was also moonlight. They were neighbours. She saw the 2nd accused with a rungu.

Her husband had a deep cut wound on the right side of the cheek, the right leg ankle, and two cuts on the wrists.

7. PW2 Martin Wafula Munyonge the father to the deceased recalled that on the night of 28th December 2012 at about 10p.m PW1 went to them crying that her husband had been beaten and thrown in a trench at Makhongo village. He accompanied her back in the company of his wife and on arrival at the scene he found the deceased lying besides a trench with his lower tarsal still in the trench and with aid of a torch he saw a deep cut injury on the neck.

He pulled the deceased from the trench and walked him to verandah, though the two accused had asked him not to touch the deceased. The two accused and one Davis Mutali Mutula were at the scene with other people. The accused persons had pangas. The third Davis a village elder had a fimbo. It was dark and he had recognized the three as they spoke to him. The three persons blocked him from taking the deceased to hospital.

Notable though is that at some point the witness said he saw them cut the deceased but retracted the same stating that the cut and says they cut the deceased as he went to get a vehicle. That he tried to carry the deceased on a bicycle but was pushed by several people including the 2 accused persons and it is then that he tried to get an ambulance in vain.

He denied that his son was a thief.

8. PW3 Kennedy Juma Wanjala testified that on the night of 28th/29th December 2012 he learnt from his father that his brother had been cut and dumped in a trench. He took his bicycle and rode with his father to the scene. They found the deceased alive and wanted to take him to hospital but were stopped by the 1st and 2nd accused. He saw the deceased bleed from cuts on the head, legs and hands. His father PW2 pulled his brother to a verandah 10 meters away. His father wanted him to load his brother on the bicycle when the two accused persons refused and at 4a.m. his brother died. He also maintained that his brother was not a criminal.

9. PW4 Bernard Wafula Wanjala recalled that on 29th December, 2012 at about 12a.m. while asleep he was woken up by his mother. The deceased was his in-law. He learnt that the deceased was cut as he was suspected of being a robber which according to him was untrue. He rushed to the scene on his bicycle 2Kms away. He attempted to take the deceased to hospital but was stopped by the village Elder. The village Elder sent word that no vehicle should be released. He stopped a motorbike whose owner offered to ferry the deceased. The deceased was a jua kali Artisan and lived an honest life. He saw the 2 accused persons at the scene.

In cross examination he stated that he saw one of the accused persons with a panga at the scene.

10. PW5 Dennis Mutali Muyila a village elder of Makhongo area in Khwisero I recalled that while asleep on the 28th of December, 2012 6 people went to his house who included the accused persons and informed him of a dead body at Marokholi. He called the Assistant Chief and Chief and went to the scene. The dead person was Timothy Wafula.

He did not witness the killing.

11. PW6 Dr. Edward Vilembwa, produced a post mortem report on behalf of a colleague which was not opposed. He gave injuries sustained by the deceased as follows;

- Multiple deep cut wound on the right Parietal region
- Fracture of the skull and brain matter oozing
- Injury to right and left upper next
- Injury to right upper arm
- Deep cut wound on left leg lower 1/3rd middle region. Cause of death was given as haemorrhagic shock from multiple deep cut wounds.

12. PW7 was PC Richard Tumei of Nalondo police station. He recalled receiving a call on 29/12/2012 at 12.44 a.m. from the village elder Dennis Mutali PW5 who told him of the murder.

The witness informed his superior and was directed to go to the scene which he did in the company of Corporal Ndeyo and police driver Ali. On arrival they found the body lying on a shop verandah. They learnt that the deceased lived behind the shop. They viewed and found the body had serious injuries on the face, head, hands. The 1st accused was pointed to them by the crowd, they interrogated him and learnt that, as the 1st accused was asleep in the company of his brother they heard some walking in their house, they chased the person and beat him unaware that the person was their neighbour. The witness found a blood stained hoe handle in the 1st accused house and the accused told them that he had used the same to beat the deceased. They took the deceased body to Webuye. It was his further evidence that on the same day at about 2 p.m. the 2nd accused took himself to the station and he was arrested.

In cross examination the witness confirmed that the report he received was that the deceased had been beaten by a crowd. He was to learn that the accused persons were part of the crowd. He also confirmed that on arrival they did not find any one with a weapon. The first accused had named the second accused.

13. The accused persons were found to have a case to answer.

DWI Essau Makhanu Wangila gave an unsworn statement stating that while asleep on the night of 28th he heard a voice shouting thief outside, he went out and found a crowd. He moved nearer and saw a person lying, since he was new in the area he did not recognize the person. He accompanied those who went to the area Mukasa to relay the information.

They returned with the Mukasa who alerted the Chief and Assistant Chief. Later 3 people held him wanting to know how the deceased died. When the police arrived they picked the body and him.

He denied having killed the deceased as he knew him and had no grudge with him.

14. DW2 Amos Wafula Wanjala. In an unsworn statement denied the charge and stated that on the 29th while at his home when he heard that a thief had been killed. He walked to the scene in the morning and found a police vehicle parked, the Mukasa, Chief and several people others were at the scene. The body was removed and several people accompanied it including the 1st accused, whom he taught at Makhonge primary school. And since the 1st accused kept the school key and books at 4p.m., he went to Webuye police Station to look for him when he was apprehended and they were charged together.

15. In its submission the state urged that the evidence before Court placed the two accused persons at the scene of crime. That they were among the people who went to the village Elder indicating they had killed an unknown person.

That PW6 learnt in the course of investigations learnt that the two killed the deceased the 1st accused was arrested whereas the 2nd accused surrendered himself. That all ingredients of murder were proved.

16. On the other hand the defence argued that there was no eye witness save that PW1 confirmed that on arrival she found the 2 accused persons in a crowd of people. No tests were done on the blood stained hoe allegedly recovered from the 1st accused and as such, the evidence tendered cannot sustain a charge

of murder.

17. All witnesses did confirm that a death of one Aggrey Wafula Wanjala occurred as he sustained fatal injuries from an attack.

18. PW1 – PW4 testify that an arrival at the scene they found the deceased seriously injured and attempts made to save his life by taking him to hospital as he was still alive were thwarted by the 1st, 2nd accused and PW5.

19. It is the evidence of PW7 that on carrying out investigations on arrival at the scene, the crowd pointed at the 1st accused whom he went with to his house where the witness recovered a blood stained hoe handle. Further that the 1st accused told him that they heard a person walking in their house, whom they chased and beat using the handle which he took as an exhibit, and that the second accused surrendered himself to the Police Station.

20. There is no doubt from the evidence of the witness and particularly PW6 that the deceased died of serious injuries. He had deep cut wounds which appear to have been inflicted by a sharp weapon none the less PW1 who immediately got to the scene stated in evidence that the 2 accused persons were part of the crowd and when she touched her husband the 1st accused hit her and stopped her. She recognized the accused persons by their voices as they were neighbours.

PW2, 3 & 4 also saw the two at the scene.

21. PW5 the village Elder recalled that 6 people went to his house to report a murder and the 2 accused persons were amongst them. However, it is not correct as put by the Prosecution that they informed PW5 that they had killed.

22. 1st accused admits having woken up but denies participating in the killing yet he was found with a blood stained rungu which he told PW7 he had used to beat the deceased. He was also pointed out by the citizen and he named his co-accused as having been present. The 2nd accused's alibi was not raised earlier neither is it believable as he was named and he surrendered himself. Secondly the evidence by PW1, PW2, PW3 and PW4 implicates them further as they prevented the said witnesses from taking the deceased to hospital. They did not only wound the deceased but caused him to succumb to the injuries as he failed to get immediate medical attention. Even if one was to believe for one minute that they were not involved the question that lingers is why they wanted the deceased to die. The injuries were vicious and coupled with the action of the two in denying others the opportunity to take the deceased to hospital is a clear indication of their action which was actuated with malice aforethought.

23. Having considered the entire evidence, I am of the opinion that the Prosecution placed sufficient evidence to the required standard, that the deceased was fatally wounded by the accused persons and others not before Court and the deceased met his death as a result and I therefore convict the accused persons accordingly.

24. The only penalty for a conviction of murder as prescribed by Law is one; the death penalty. Consequently I sentence the two accused persons to suffer death as provided by the Law.

DATED and DELIVERED at BUNGOMA this 19th day of October, 2017

ALI ARONI

JUDGE