



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL CASE NO. 14 OF 2012

REPUBLIC.....PROSECUTOR

VERSUS

AUSTIN NYONGESA MUSEE.....ACCUSED

JUDGMENT

AUSTIN NYONGESA MUSEE is charged with an offence of murder contrary to section 203 as read with section 204 of the Penal Code.

The particulars of the offence are that on the 16th day of August, 2012 at **OMENA BEACH**, in BUSIA County, jointly with another murdered **VENSWA TAABU AKELLO**.

In the morning of 17th August 2012 the body of the deceased was found lying motionless at the side of the road that lead to Mukhondo. The accused was linked to the death due to an incident that had transpired the previous night outside a hotel at Port Victoria.

The accused in his defence contended that at about 8 p.m he was with his football team and were discussing a forthcoming match. One Wesonga went to their meeting and caused some disturbance. They forcefully ejected him. When he was pushed out he fell down. The following morning when he heard of a body of a person that was found by the road, he panicked and fled to Nairobi for he thought it was Wesonga.

The issues for determination are as follows:

1. Whether the deceased was involved in the commotion that was at Port Victoria at the night of 16th August 2012; and
2. Whether or not the accused was involved in the death of the deceased.

At about 9 p.m on the 16th August 2012, one Wesonga went the hotel of **ROSELINDA NANGILA OGUTU** (PW3) and requested for a seat for the place was full. Before he could be shown where to seat, he went outside. It was after he had gone out that **ROSELINDA** heard someone asking in Kinyala why he was being beaten. When she went to check, she found a person who was on the ground. Austin and Baba were beating him. Other than the accused, Faudi, and Dennis were also at the scene. The accused had a spotlight and a club. She was not able to identify the person who was being beaten. She however assumed that it was Wesonga who was being beaten. The following day she established that Wesonga was alive; she saw him at the police station.

ROBERT MAGOYA ERAMBI (PW4) on the material night was at the hotel of **ROSELINDA** (PW3). When he heard somebody complain that he was being beaten, he went and stood at the door of the hotel. From the door he witnessed the accused and Baba beating the deceased. His evidence was that the door was ajar and the light from the pressure lamp inside the hotel assisted him to see the trio. He said his small body did not block the light.

The evidence of **ROBERT MAGOYA ERAMBI** (PW4) and that of **ROSELINDA** (PW3) is the only evidence that tends to explain what transpired on the material night. It however contradicts each other in material aspects as follows:

1. **ROSELINDA** testified that she found the accused, Baba, Faudi, Mukombozi and Dennis. The accused and Baba were beating the man lying on the ground. **ROBERT** testified that he never saw Faudi, Mukombozi and Dennis. These were people known to him. If indeed the light was favourable as **ROBERT** wanted the court to believe then the reason why the two saw differently was not explained.
2. **ROSELINDA** said that **ROBERT MAGOYA** went to separate the fighting trio but **ROBERT** said he never did so for he did not want to get involved.
3. According to the evidence of **ROSELINDA**, she was unable to identify the victim and at all times she assumed it was Wesonga. Though **ROBERT** contended that he identified the deceased herein as the victim, I am not convinced that he was able to do so. He was standing at the door. His body must have blocked the light from inside. Since the Judge who took his evidence did not indicate his height, the ordinary and natural effect of a person standing at the door at night is to block the light that emanates from inside. The press of the many people at the scene as testified to by **ROSELINDA** would have obstructed the light from inside to be of any assistance.

There was no attempt by the prosecution to logically reconcile these contradictory evidence. It cannot be relied upon to base a conviction on especially when the accused has raised a plausible defence.

The accused contended that he and his teammates were having a meeting and one Wesonga went where they were and disrupted the same. They forcefully ejected him. Apparently Wesonga sustained injuries for the matter was reported to police and they were charged. Wesonga however withdrew his complaint in court. The accused called witnesses who supported his claim. When he (accused) learnt that somebody was found dead the next morning, he assumed it was Wesonga and he fled to Nairobi. Though the prosecution contended that his conduct after learning of the death is not compatible with innocence, in my view the explanation given by the accused is reasonable.

According to the evidence of **ROSELINDA NANGILA OGUTU** (PW3) the body of the deceased herein was found at a distance equivalent to that one from the court to the Weighbridge. I have consulted Google maps and the distance from the court to the Weighbridge is given as 4.1 kilometers. The prosecution did not attempt to explain why the body was found several kilometers from where they claim the deceased was beaten. In my view, these gives credence to the defence contention that the deceased must have been a victim of another person or persons other than the accused.

This is a case where raw evidence was presented to the court with no attempt by the investigating officer to distill and separate facts from fiction. I take note that the investigating officer did not testify. Does this imply that he had no faith in his case? I may not be able to tell.

From the analysis of the entire evidence on record, I find that no reasonable tribunal would convict on the evidence availed by the prosecution. I accordingly acquit the accused and set him at liberty unless if otherwise lawfully held.

DELIVERED and SIGNED at BUSIA this 18th day of October, 2017

KIARIE WAWERU KIARIE

JUDGE