



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL DIVISION
CRIMINAL(MURDER) CASE NO. 14 OF 2009

REPUBLIC.....PROSECUTOR

VERSUS

PIUS WAEME OKUMU1ST ACCUSED

WYCLIFFE SAKA KASAMANI.....2ND ACCUSED

LABISTA SAKA KUSINYO.....3RD ACCUSED

STEPHEN BOYO KUSINYO.....4TH ACCUSED

J U D G M E N T

Introduction

1. The four accused persons in this case are charged with the 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 24th day of February, 2009 at Musongo village, Eluche Sub-Location, Mumias District within Western Province, jointly with others before court they murdered Melkizedek Omusumba. All the accused persons denied committing the offence. To prove its case against the accused persons, the prosecution marshaled evidence from 7 witnesses

Prosecution case

2. From the testimonies of the 7 prosecution witnesses, the prosecution case is as follows;- on 24/02/2009 at about 7.30 pm, Protus Okwaro Mukwabo, PW1 (Protus) was in his house together with his family among them his son, Melkizedek Omusumba who is the deceased in this case. The door to the house was open. Then suddenly, 7 men entered the house armed with pangas, rungu and a club. All the 7 men according to Protus were known to him, and they were violent. They then dragged the deceased out of the house and went with him. Protus stated that among the people who entered the house were Kefa Saka, Edward Kasamani, Stephen Buyo, Labista Saka and Pius Waeme. The 7 men did not speak to anyone.

3. After the deceased was taken away by the 7 men Protus asked his two sons, Geoffrey Mukwambo Waeme, PW4(Geoffrey) and Pius Mwenje Waeme, PW3 (Pius) to run and report the matter to the police. When Protus eventually made a report to the police, he gave names of 7 suspects, among them Edward Kasamani who is still at large, Pius Waeme(1st accused) but he did not mention, the name of Wycliffe

Saka in the statement. Protus told the court that apart from seeing the deceased being taken away by the 7 men, he did not witness the killing of the deceased.

4. PW2, Abednego Olubwaya (Abednego) who was formerly a village elder received information from Pius and two other brothers that the deceased was being assaulted by a group of men. By the time Abednego got to the scene, the deceased was already dead. Pius also testified that when he got to the scene, the deceased was being assaulted. He did not stop to watch or do anything else, but ran to report the matter to Abednego and later to Mumias Police Station. Pius alleged to have seen Wycliffe Saka, Pius Waeme, Charles Waeme and Samuel Anamsa trying to burn the deceased,. PW4, Geoffrey also alleged to have seen the accused persons assaulting the deceased.

5. The investigating officer was number 45402 CPL Charles Njaramba who testified as PW7 (Cpl Njaramba) he stated that while he was at Mumias Police Station on 24.02.2009 at about midday, he received a report to the effect that that someone was being beaten by a mob. He rushed to the scene accompanied by other police officers. On arrival at the scene, they found the naked body of the deceased lying on the road. On interrogation of those at the scene one Pius Saka Kasamani told him that his (Kasamani's) bicycle had been stolen by the deceased and that the deceased had subsequently been assaulted by members of the public. CPL Njaramba and his colleagues took away the body of the deceased to St. Mary's Hospital Mumias. They also arrested the first accused.

6. During cross examination, CPL Njaramba stated that it was the deceased family who told him that the first accused had stolen his (1st accused's) bicycle, Cpl Njaramba also testified that according to reports he received, the deceased died at the hands of mob justice.

7. Dr. Florence Wanangwe of St. Mary's Hospital Mumias testified as PW5. She is the one who performed the autopsy on the body of the deceased on 25.02.2009 at about 3.30pm at the St. Mary's Hospital Mumias. The body of the deceased was identified by CPL Njaramaba and Pius. The body which was 6" long was still fresh. On examination, the body had 2 cut wounds on the forehead, but did not involve the skull. There was also a cut wound on the upper lip, cut wound of the lower thoracic spine, fracture of the left tibia fibula on the lower one third. The body also had multiple bruises and lacerations.

8. Internally, all the body systems were normal, while the head had mild subdural pleading. The skull was intact through there was bleeding in the parietal area. According to Dr. Wanangwe, the cause of death was bleeding in the head due to head injury caused by blunt object. The post mortem report was produced in evidence as PExhibit 3.

The Defence Case

9. All the 4 accused persons gave sworn evidence. None of them called any witnesses. Each of them pleaded defence of alibi and urged the court to find that the prosecution case against each one of them had no legs to stand on.

The submissions

10. At the close of both the prosecution and the defence cases, M/S Ranto counsel for the 4 accused persons submitted that the prosecution had failed in its duty to prove the charge of murder against the accused persons to the required standard. Counsel urged this court to make a finding to that effect and to acquit each of the accused persons.

Issues for Determination

11. The main issues for determination are

- a. whether the prosecution has proved the charge of murder as set out in Section 203 and 206 of the Penal Code and

b. whether the accused persons, or any of them was properly identified as the perpetrator(s) of the murder, and if the case for the prosecution rests on circumstantial evidence, whether the chain of the circumstances were proved as forming part of an unbroken chain pointing to no one else but the accused persons as she perpetrators of the crime against the deceased.

Analysis and Determination

12. I have now carefully considered and evaluated all the evidence on record, both for the prosecution and the defence. I have also carefully considered the law and relevant decided cases. There is no doubt at this stage that the burden of proof in this case, like in all other Criminal cases lies on the production, the standard of proof being one beyond reasonable doubt. I shall now proceed to consider the issues.

13. The first issue is whether the deceased person died and whether the prosecution has shown through the evidence on record, the cause of the deceased's death. As far as the death of the deceased is concerned, there is no doubt that the deceased died. Dr. Wanangwe testified that on 25.02.2009, she was called upon to perform an autopsy on the body of the deceased after the body was duly identified by CPI Njaramba and relative of the deceased. After the autopsy she filled the post mortem form and gave the cause of death as intracerebral haemorrhage secondary to head injury secondary to blunt trauma. The post mortem report, confirming both death and cause of death was produced in court as PExhibit 3.

14. The next issue for determination is whether the prosecution has proved that the deceased died as a result of an unlawful act or omission on the part of all the accused persons or one of them. The events which allegedly led to the death of the deceased took place at night, around 7.30 pm on 22.2.2009. This means that the identification of the accused persons is central in determining whether or not the accused persons are culpable.

15. From the evidence on record, Protus and his family were attacked at about 7.00pm on 24.02.2009 though Protus says the door to the house was open, he does not say whether there was any light either in the house or outside the house, but what he says is that the 7 attackers entered the house suddenly, said nothing to anyone and took away the deceased. Protus gave the names of the accused persons as having been among the attackers. Infact Protus says that the group of 7 was so violent that he had to run back into the house for his safety. Pius also says that when he went to report the incident, he gave the names of all the 7 persons to the police.

16. In his evidence, Pius said that there was moonlight, and that when he went to the scene, he saw people assaulting the deceased, but decided to go and report the matter first and on coming back he found the deceased had died. The first accused was around, but during cross examination Pius stated that when he went back to the scene with the police, the attackers had run away. Geoffrey who testified that he went to the scene testified thus;- "it was dark, but I know the people, there was no torch. I followed them, and saw them hitting him asking him for a bicycle.

17. It is interesting to note that while the evidence shows that the incident occurred on a dark night, there are allegations that all the 4 accused persons and their accomplices were recognized by the witnesses. it is my considered view that such an assertion is not supported by evidence, for the simple reasons that people still make mistakes even when they claim that the attacker was well known to them. In addition, the incident took a very brief moment and Protus is particular who does not say whether he was standing up or sitting down when the attackers entered the house does not also say how close he was to them. And when Protus says that he recognized the people after they left the house, it is not clear to this honourable court whether the attackers stood and faced him so that he could see them as he claims he did and how he managed to do so when it was dark. It is most likely that all the 4 accused persons were among the people who hurriedly took away the deceased from his (deceased's) father's house, but the conditions for proper and positive identification of the accused persons were difficult. For the above reasons, I am not satisfied that the accused persons were properly and positively identified. For this proposition see the cases of **Nzero – vs – Republic [1991] 2 KAR 212 and Wamunga – vs – Republic [1989].....**

18. Finally is the question whether or not the prosecution proved that the accused persons acted with

malice aforethought. in my considered view, the prosecution id not discharge this duty, having failed in the first place in adducing evidence of proper and error free identification of the appellant.

Conclusion

19. In the premises and for the reasons above stated, I have reached the conclusion that the 4 accused persons are not guilty of the murder of Melkizedek Omusumba. They are each acquitted of the offence under the provisions of Section 322(1) of the Criminal Procedure Code. This also means that unless there is any other reasons for holding the accused persons in custody, they are to be released therefrom forthwith.

It is so ordered.

Judgment delivered, read and signed in open court at Kakamega this 18th day of October 2017

RUTH N. SITATI

JUDGE

In the presence of;-

Mr. shifwoka for M/S Rauto.....for the 4 accused persons

Mr. Juma (present).....for the state

Polycap.....Court Assistant