



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**CRIMINAL CASE NO.31 OF 2011**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**DANIEL MASIKA KHAEMBA.....ACCUSED**

**JUDGEMENT**

1. The accused Daniel Masika Khaemba is charged with the offence of murder of his brother George Wafula Khaemba which occurred between the night of 8<sup>th</sup> and 9<sup>th</sup> of December, 2011 at Kitayi sub-location in Kimilili, Bungoma County.

2. The Prosecution's case was that between the night of the 8<sup>th</sup> and 9<sup>th</sup> of December, 2011 the accused who had a strained relationship with his deceased brother, over land, entered the deceased house with 2 other people, beat the deceased severely and hanged him by the neck on the door frame in the eye sight of his 4 year old daughter.

All witnesses except the 4 year old PW11 found the deceased hanging having died.

3. The persons who first went to the scene of crime as neighbours were the accused, PW2, PW3, PW4 and PW5 who testified that they found the body hanging with the door closed save for PW1 who testified that he had found the door and window open.

4. **PW7** the wife of the deceased alleged to have travelled at the time and had left the deceased with two young children PWII and one other. The children were aged 3 and 1 ½ respectively. It was her evidence that on the fateful day she had travelled to Kitale and returned on receiving news of her husband's death. She further narrated how her 3 year old girl gave her an account of how the accused and 2 others beat her father and thereafter hanged him. A similar account was given by PW1.

5. **PW6's** evidence was that the accused woke him up at 6a.m. seeking for a claw hammer which he did not have. The accused informed him that he had called the deceased to no avail, the witness accompanied the accused back to the deceased house where the door was locked, he however retreated and on the way back he met PW1 who observed the place and raised an alarm attracting villagers who ran to the scene and broke the door.

6. **PWII** a child of about 6-7 years testified and narrated how the accused entered their home in the company of two others, beat up her father, slapped her when she wanted to scream asked to sleep which she obliged and later in the morning she found her father bleeding and having been hanged. She testified further that at the time of the incident there was a tin lamp which enabled her identify her uncle, the accused. The witness went on to say that the assailants on leaving looked the door from inside and outside and went out through the window. That in the morning she pushed open the door and went to the neighbours.

7. **PW9 Dr. Edward Vilembwa** produced the post mortem on behalf of a colleague. The post mortem report gave the cause of death as acute asphyxia due to strangulation.

8. The Court found the accused had a case to answer. The accused gave a sworn statement he denied killing his deceased brother. His evidence was that Joel a neighbour informed him that he was looking for the deceased but the deceased did not respond. The accused went to his brother's called out PW7 who also did not respond, he however heard a child crying (PWII), he peeped at the door and saw a person hanging, he screamed attracting people including the area Chief who ordered the door open. Inside the house they found a child covered with a blanket.

9. For the charge of murder to succeed three ingredients must be proved (I). ***The fact of death.*** (II). ***It must be established that the act or omission leading to the cause of death is linked to the accused.*** (III). ***That the act or omission must have been actuated with malice aforethought.***

10. There is overwhelming evidence including that of PW9 that the deceased died. The cause of death was strangulation.

11. There was no eye witnesses other than PWII. PW1 & PW7 gave evidence that on the day the body of the deceased was found hanging PWII had told them how the accused and 2 others attacked her father in the night after which they put a rope on his head.

12. I must say that I do not find the evidence of the two witnesses credible. PW1 was at the scene with several others, but he is the only one who purport that PW11 named the accused as one of those who attacked his father and who alleged the door to the deceased house was open whereas the accused and all other witnesses testified that the door was closed.

Secondly none of those who arrived at the deceased house mentioned the narration by PWII save the two. I also do agree with the defence that it did not add up how PW7 would have left two infants children with her husband and stayed away for the night.

13. As regards the testimony of **PW8 PC Mundia**, in his testimony he negated the theory of suicide or hanging as it his view the deceased body touch the ground. Strangulation was proved by the post mortem although it is not clear apart from PWII's evidence how the deceased hanged. Was he placed there and hanged or did he commit suicide?

In cross examination the witnesses admitted that his statement had indicated there was a suicidal note yet the same was not produced in Court or the issue elaborated on.

Could the deceased have taken away his life? What was the note all about? No evidence was advanced towards this end.

14. **PWII** was aged 3 according to her mother PW7 at the time of the incident. She did not give a sworn statement as the Court had formed the opinion that she did not know what the bible is and hence she could not swear or take oath.

However the Court found the witness intelligent enough to be able to testify and she did give an elaborate account of how she was woken up by a sound coming from her Uncle the accused in the company of two other people beating her father who had hidden under the bed, and how a tin lamp enabled her to identify the uncle as one of the attackers.

15. I must also agree with the defence Counsel that in her evidence the minor was not consistent in her thoughts and especially when cross examined. In any event at age 3 the minor must have been traumatized by the events, having woke up to a commotion, seeing her father being attacked and getting a slap that sent her to sleep. The question is whether she could recall the incident as vividly as she did after a period of 3 years.

In the case of **Haro Gufel Jiho V R(2014) e KLR** the Court of Appeal had this to say

***“if the Court proceeds to take unsworn evidence, the accused should not be convicted in the absence of corroborating testimony. There is an exception for sexual offences.”***

The above case is in line with the requirements of Section 124 of the evidence of the need for corroboration needless to say that the evidence of a single witness in identification and or recognition has to be considered carefully. In the case of **Wamunga versus Republic (1989) KLR 424** the Court of Appeal stated

***“...It is trite Law where the only evidence against a defendant is evidence of identification or recognition, a trial Court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction”.***

16. There is no doubt the PWII was traumatized, the only available light as she woke up was the tin lamp, further it is not clear how long the ordeal took and how intense this light was. The evidence linking the accused to the murder is this identification by the minor. In my view this evidence remains uncorroborated and in the circumstance being the evidence of a minor who was only 3 at the time, it was an unsworn testimony and for the said reasons it has failed to meet the necessary standards that would permit a conviction.

17. The above coupled with contradictions in the child's evidence and the evidence of other Prosecution witnesses and the gaps in the said evidence including evidence admittedly left out by PW8, the evidence is totally unsafe to return a verdict of conviction. The anomalies can only be resolved in favour of the accused. He is therefore acquitted, set free unless he is otherwise lawfully held.

DATED and DELIVERED at BUNGOMA this 23<sup>rd</sup> day of November, 2017

**ALI ARONI**

**JUDGE**