



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
CRIMINAL CASE NO.18 OF 2012

REPUBLIC.....PROSECUTION

VERSUS

ANTONY JUMA WAFULA.....1ST ACCUSED

NICK WASWA WANJALA.....2ND ACCUSED

DAVID NYONGESA MUNIALO.....3RD ACCUSED

ALEX WAFULA MUKHEBI.....4TH ACCUSED

SYLVIA DEBORAH ASANGA.....5TH ACCUSED

JUDGEMENT

1. The five accused persons, Anthony Juma Wafula, Nick Waswa Wanjala, David Nyongesa Munialo, Alex Wafula Mukhebi and Sylvia Deborah Asanga are faced with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.

Particulars thereof are that the 5 murdered Protas Silali Osyangu on the 21st of April 2012 at Tuuti village, Kibabii location of Bungoma County.

2. In brief the Prosecution case is that on the 21st day of April 2012 the 5 together with the deceased were drinking at the home of the 1st accused when an argument arose between the deceased and the 1st accused over a drink and the accused persons all attacked the deceased with kicks and blows wounding the deceased who two weeks later succumbed to the injuries.

3. The evidence of the Prosecution witnesses was as follows;

PW1 Isaiah Mukhongo Kiyabi a foster father to the deceased, who stated that on 22nd April, 2012 he received information from PW3 that his son was very sick. He visited the deceased, took him to hospital where he cared for him. The deceased was unable to talk at the time. He reported the matter at the Bungoma Police as soon as the deceased could speak and when he learnt that the deceased had been assaulted. Further that the night before his death the deceased was able to communicate, the witness alerted the Officer who was assigned the matter, and the Officer. **PW4** visited the deceased in hospital and took his statement. PW1 was present when the deceased gave names of his assailants to PW4. The deceased succumbed and died the same night he gave his statement.

4. **PW2 Dr. Cleophas Wekesa Kubasu** conducted post mortem examination on the body of the deceased on 9th May 2012 and found the following;

Externally;

- **Bruises on abdominal area**
- **Surgical wound**
- **Bruises on the chest**

From the hospital notes he learnt that the operation had been done due to perforation from a stab wound.

Internally;

- **Blood on the chest**
- **Blood with abdomen cavity and perforation.**

Opinion formed

Cause of death was infection and perforation.

In cross examination the witness stated that the cause of death was from infection and wound sustained.

5. **PW3 Japhira Osyanju** explained how he visited the deceased on the morning of 22nd April 2012 and found him seriously ill and the accused informed him that he had been beaten by Nick Waswa (2nd accused) while drinking. He went and informed the deceased parents of the injuries.

6. **PW4 PC Fred Maanya** of Bungoma Police Station received a report from PW1 on 2/5/2012 of an assault meted out to the deceased at Tuuti village on 21/4/2012 while the deceased was having a drink at 1st accused home. That the 3rd accused had attacked when others joined and beat the deceased who sustained injuries. He visited the deceased who was unable to communicate much as he was in great pain. The following day he visited and the deceased was able to name his assailants who are the accused. The deceased had injuries on the stomach, hands and legs and he had several bruises. As part of his evidence the witness produced the statement by the deceased.

7. The accused persons were found to have a case to answer and the 1st, 2nd and 4th gave sworn statements, the 3rd opted for an unsworn statement. All the accused persons knew the deceased. They all denied the charge of murder. They also all denied that they assaulted the deceased on the material night.

8. I read the statement recorded by the deceased. The deceased stated that on the 21st of April 2012 at about 6.30p.m. he visited Pilipili (1st accused) and found the 4 accused and others when an argument arose over a drink. The 3rd attacked him and others joined in. He stated

“I bought chang’aa of Kshs.30/- and mzee Libolio snatched. When I stood up to go for my chang’aa, mzee Libolio started to attack me and the other ones joined him and started to beat me using kicks and blows.

... I sustained multiple injuries ...”

9. Against the evidence and facts above I reiterate the Law that the Prosecution must prove its case against the accused persons beyond all reasonable doubt and any doubt in its case must be resolved in favour of the accused.

10. This being a murder trial three ingredients must of necessity be provided I). The fact of death II). That an act or omission by the accused that led to the death of the deceased and III). Proof that the act

or omission was actuated with malice aforethought.

11. There is no dispute that the accused died on or about the 5th of May 2012 having been admitted at Bungoma hospital since the 22nd of April 2012.

12. There were no eye witnesses to the assault allegedly leading to the death of the deceased and the only direct evidence is that of the deceased in his statement to PW4.

13. The evidence of the deceased is that he was attacked by kicks and blows. He does not mention any weapon having been used against him. There is no evidence either that the beating was so severe as to have not enabled him to reach his home. Indeed he was found home the next morning.

14. Apart from the statement of the deceased the other inference is drawn from the evidence of PW3 that the deceased had informed him that he had been beaten by Accused 2 while they had an argument. The two pieces of evidence are contradictory. One gives the name of one person and the other names 5.

15. **PW4** gave injuries seen at post mortem as follows;

External Examination

- **Bruises on abdominal area**
- **Surgical wound**
- **Bruises on the chest**
- **Operation (surgical wound) had been done as he had perforation from a stab wound.**

External Examination

- **Blood in the chest.**
- **Blood within abdominal cavity and perforation**
- **Infection**

16. The deceased did not say he was stabbed. So where did the stab wound come from? It also appears that the perforation led to the surgery which may have caused the infection.

17. The nexus between kicks and blows and a stab wound was not established by the Prosecution and the evidence before the Court does not link the accused persons to the stab wound that resulted into the perforation leading to the surgery and the infection that caused the death.

18. The evidence is certainly unclear on the above, coupled with notable contradictions, I find the evidence placed before me unsafe to return a conviction.

19. The contradictions and gaps in the Prosecution case have to be resolved in favour of the accused persons. They are accordingly acquitted of the offence of murder contrary to Section 203 as read with 204 of the Penal Code.

20. They are set free unless otherwise lawfully held.

DATED and DELIVERED at BUNGOMA this 16th day of November, 2017

ALI ARONI

JUDGE