



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO.26 OF 2011**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**GODFREY WAFULA SIMIYU.....ACCUSED**

**JUDGEMENT**

1. The accused Godfrey Wafula Simiyu was charged with the offence of murdering one Eric Mutambo Situma on the 7<sup>th</sup> of April 2007 at Kimalewa village Kuywa location in Bungoma Central district within Bungoma County.

2. The Prosecution Case is that the accused and his brother Evans Simiyu not before Court fought with the deceased and in the process the accused hit the deceased with a bench on his head, when the deceased fell down unconscious and on arrival in hospital was pronounced dead.

3. The Prosecution called a total of 7 witnesses. **PW1 Swinny Wafula**, wife of the deceased was the only eye witness and her evidence was as follows;

*“my husband was at the shop while I was preparing lunch behind. I heard some commotion and went to the front I found people fighting with my husband ...”*

*My husband Eric was fighting with Evans when Godfrey saw my husband had overpowered Evans he took a bench made of wood and hit my husband at the back of his head twice. My husband fell and became unconscious.”*

Further in her evidence the witness said that she knew the accused who was a neighbor for a long time.

4. **PW2 a neighbour, PW3, PW4 and PW6** all learnt of the death when they went to the scene, **PW5** attended the postmortem. **PW7** produced the investigation file and **PW8** produced the postmortem report which indicated that the deceased was found to have a posterior or scalp depression with bruising measuring 4X6cm.

The cause of death was given as severe head injury due to a blunt trauma.

5. The accused when placed on his defence stated that on the 7<sup>th</sup> April, 2007 he was at his home, he had noise about 200m away, he went to the scene and saw his younger brother Evans bleeding from the head and the deceased lying down and he learnt the two had fought.

That his brother was charged and acquitted, and that he had been accused of failing to testify in his brother's Case and that in 2011 he was arrested and later charged. He implicated his brother with the killing and alleged that his brother was **PW1's** lover. He denied having ran away.

6. This being a case of Murder, 3 ingredients are necessary (1) **the fact of death** (2) **there has to be proof that the action or omission of the accused person resulted into the death** (3) **that the said action or omission was actuated with malice aforethought.**

7. There is only the evidence of one eye witness to the incident and that **PW1**, the deceased wife. This evidence is corroborated by **PW8** the Doctor only to the extent of where the deceased received injuries.

8. This is a case of recognition as **PW1** and the accused knew each other well. The Court has taken heed that a Court may rely on the evidence of one witness on identification having warned itself of any likely danger.

In **Criminal Appeal No.46 of 2015** Chuka Mabeya J addressed this factor as he considered two earlier decisions as follows;

Abdalla Bin Wendo V Republic (1953)20 E.A. CA where it was held

*“Subject to certain exceptions, it is trite Law that a fact may be proved by the testimony of a single witness but this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence whether it be circumstantial or / direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence or identification although based on the testimony of a single witness, can safely be accepted as free from any possibility of error.”*

And, Roria V Republic (1967) EA at 573 where the Court of Appeal of Eastern Africa said

*“A conviction resting entirely on identity invariably causes a degree of uneasiness...*

*That danger is of course greater when evidence against an accused is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld, it is the duty of this Court to satisfy itself that in all in the circumstances it is safe to act on such identification.”*

9. The eye witness PW1 stated that the fight was during lunch hour and she was known to her husband’s assailants a fact confirmed by the accused. The accused confirms the deceased was lying unconscious though denies having hit him. I rule out the question of wrong identification as the witness and the accused knew each other well and this incident occurred in broad day light. Secondly all witnesses who arrived at the scene confirm to have not just been given the name of Evans but that of the accused as the one who hit the deceased with a bench.

10. PW8 on receiving the news of the deceased death looked for the assailants, he only find the accused brother Evans who was initially charged but later released though it is not clear what led to his release.

PW7 while being cross examined indicated that the accused herein had not been initially arrested as he was at large until when he was arrested 4 years later.

11. The evidence of PW1 was very categorical in naming the assailants, the conditions were favourable towards positive identification, coupled with the conduct of the accused who disappeared for 4 years and only returned once his brother’s case was concluded put an accusing finger upon the accused.

12. With the above evidence I therefore find that the Prosecution was able to prove the case against the accused beyond all reasonable doubt and I consequently convict him of the offence of Murder contrary to Section 203 as read with 204 of the Penal Code.

**DATED and DELIVERED at BUNGOMA this 21<sup>st</sup> day of December, 2017**

**ALI-ARONI**

**JUDGE**