



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL CASE NO.14 OF 2011

REPUBLIC.....PROSECUTOR

VERSUS

PIUS ZAKARIA NYONGESA.....1ST ACCUSED

HOSEA NYONGESA WANYONYI.....2ND ACCUSED

JUDGEMENT

1. The two accused persons Pius Zakaria Nyongesa and Hosea Nyongesa Wanyonyi are faced with the offence of murdering one Joab Murefu Wanyonyi their step brother on the 21st of May 2009 along Kanduyi / Chwele road.

2. The pace of Prosecution of the Case has been slow for two reasons, the first being that the defence Counsel did not always avail himself which then necessitating changing of defence Counsel. Secondly, the Prosecution was not ready with its witnesses severally.

3. By the time of closing of the Prosecution Case only 4 out of an anticipated 12 Prosecution witnesses had testified.

4. In brief the Prosecution Case was that the accused persons together with one other not before Court shot the deceased severally while he drove a matatu fatally injuring the deceased. Further that the deceased and the two accused had a disagreement over Succession of their deceased father estate and therefore there was bad blood between the deceased and the accused persons.

5. Although no evidence of a doctor was adduced both the Prosecution and defence do agree that the deceased was shot at and died on the 21st of May 2009 and his death is not in issue.

6. The first ingredient of murder; death in this Case not an issue and therefore the Prosecution is left to prove its Case it had to establish that the accused persons herein are the ones who killed the deceased and their action was laced with malice aforethought.

7. Out of the 4 witnesses who testified **PW4 Florence Mtengo** stated that she witnessed the shooting first hand. It was her evidence that on the 21st day of June 2009 she left her house at 3.30a.m. as she was on her way to Chwele to buy vegetables as she was a vegetable vendor. That she entered the vehicle being driven by the deceased who switched the engine on but alighted briefly, and in his absence 3 people came looking for the him, she learnt that 2 of the said persons were the driver's brothers.

That shortly thereafter, the vehicle left and as they reached Kanduyi / Chwele road, the vehicle's lights were switched on and the 3 people she had been earlier with came to each side of the vehicle armed with guns and shot at the driver, the witness and other passengers they urged the driver to drive on and he only made it to 5Km where the vehicle veered off into a ditch.

The passengers got out and hid in a bush for about 45 minutes.

8. The other witnesses were brothers and a wife to the deceased. **PW1 Paul Wamoto Wanyonyi** a brother to the deceased testified that the two accused persons had earlier threatened the deceased due to an objection the deceased and the witness had filed in a Succession Case. He received news of death at 6a.m. of the fateful day.

PW2 Charles Wanyonyi a cousin to the deceased testified that he met the two accused persons in a bar in Bungoma on 20th May, 2009 where they took and bought him beer and while drinking the two asked for the deceased whereabouts.

9. When put on their defence the two accused persons stated that PW1 had sent a cyclist to both their homes in Cheptais on the 21st of May, 2009 at 8a.m. who informed them that the deceased had been involved in an accident. They learnt of his death upon arrival at the police Station and Bungoma district hospital respectively. They denied having had any differences with either the deceased or PW1.

10. This case is clearly based on identification of the assailants by one witness who claimed to have witnessed the incident. The Law on identification by one witness is settled; in that a Court may receive evidence of identification by one witness but needs to carefully consider the same as it proceeds to convict based on the same.

In the Case of Abdalla Bin Wendo V R (1953)20 E.A. C.A. the Court stated

“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 positively conclude that the evidence of identification though based on the testimony of a single witness can safely be accepted as free from any possibility of error”

In Roria V Republic (1967) E.A. at 573 the Court of Appeal affirmed the above when it held that

“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 though 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 the circumstances it is safe to act on such identification.”

11. In this Case **PW2** does not say what time she saw the accused persons for the first time and indeed what time the shooting took place. From **PW1** he received the information of death at 6a.m. If one was to take **PW2**'s evidence that they hid for 45 minutes before emerging from the bush then the incident may have occurred by or before 5a.m. when it is usually fairly dark. Assuming that the first visit by the assailants was before 5 a.m. it is not clear how the witness was able to identify persons she saw for the 1st time. She did not say whether there was light and from where and how bright, whether she identify them due to special features or their clothing none of these was brought out in her evidence.

Secondly the witness stated that at the Kanduyi / Chwele junction she saw the assilants since the vehicle's light had just been switch on. This is itself was strange. Why suddenly were the vehicle lights switched on? What made her identify the assailants as the same people she had seen earlier. These are questions that remain unanswered from the Prosecution Case. This evidence of **PW4** by itself is not sufficient for this Court to return a guilt verdict. It is not safe as there are several gaps in the same.

12. The only other evidence was that of **PW1** and 2 and the assumption that due to the alleged differences between the brothers and the fact that the 2 accused had asked for the deceased this points to their guilt.

13. The assumption created by **PW1** and 2 is a bit far-fetched, since the father to the deceased, **PW1** and the accused had died 8 years before and the Succession Case had been filed 4 years prior. One cannot without danger base a conviction on this evidence.

14. The accused persons and their witness denied that the two indulged in alcohol and that they were in the company of **PW2** the night before the incident.

I tend to agree with the accused that they were not with **PW2** as alleged as they indeed received news of the deceased while in their respective homes on the morning of the alleged death.

15. All in all considering the Prosecution Case the same is so insufficient to be relied upon to convict the accused persons. They are acquitted for lack of evidence. They are set free unless otherwise being lawfully held.

DATED and DELIVERED at BUNGOMA this 21st day of December, 2017

ALI-ARONI

JUDGE