



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA
CRIMINAL CASE NO. 2 OF 2014

REPUBLIC..... PROSECUTOR

VERSUS

ELIAS WAFULA OKWARO..... ACCUSED

JUDGMENT

1. Elias Wafula Okwaro (The Accused) faces the charge of Murder Contrary to Section 203 as read with Section 204 of the Penal Code. It is alleged that on the 19th of January 2014 within Busia County jointly with another not before Court, Murdered E A B (the “Deceased”).
2. A total of 9 witnesses testified on behalf of the State. Geoffrey Nyongesa (PW1) is a nephew to the Accused. On the 19th of January 2014 at about 3.00 p.m. he was at the home of the Accused when the Deceased came and asked to be lent a phone by the wife of one Ben. A person by the name Collins asked her to return later as Ben’s wife was unwell. But A refused to leave and so Collins held her by her hand and dragged her. She resisted. Angry, Collins went to his house and emerged with a hoe (Jembe) which he used to hit the Deceased on her head. Collins then chased Isaac the witness. Isaac and the witness went to a neighbour’s house to seek help. On returning home the witness did not find either Collins or the Deceased at home. Later he heard yells from the home of A and members of the public saying that Collins had killed A.
3. Isaac Ouma Wafula (PW2) is the son of the Accused Persons. On the material day, he was at his home together with Collins Wafula and PW1. The Deceased found him at home and greeted him. After an exchanging greetings Collins left with the Accused to the outside of the house. In a conversation that PW2 heard, the Deceased wanted Night (her in law) to help her with a mobile phone. But Collins told her that Night was unwell and therefore could not leave her house. The Deceased insisted on going to the house of Night but Collins who was drunk went into his house and came out with a hoe which he used to hit the Deceased. Collins then confronted PW1 and PW2 and chased them. The two ran to the neighbour’s house and on returning they did not find either Collins or the Deceased. He later saw the Body of the Deceased lying next to her son’s house. The witness did not know how the Body got there.
4. E B (PW3) was at the time of testifying a Standard 3 student at [particulars withheld] Primary School. On 19th January 2014 at about 3.00 p.m., the witness was at his home after attending church with the Deceased. On his way to picking some vegetables, he says, that he saw Collins and the Accused person carrying his mother (the Deceased). The Accused was holding her hands while Collins her legs. That when the two saw him, they dropped the body and left the scene. The witness saw that the Deceased was bleeding from the top of her head and he ran to where she lay. He found her already dead. The witness then went to inform the Village Elder of what had happened. The witness told Court that there was a trail of blood that ended up at the house of the Accused. That members of the public were angry and burnt down the houses of the Accused and his son.

5. Vincent Okwero (PW4) knows the Accused well as a neighbour. On 19th January 2014 at about 4.00 p.m., the witness had taken out his cattle to graze when he heard someone groaning. The person groaning was the Deceased. She was lying in the compound of Otoro Barasa and she was badly injured. The Deceased was bleeding heavily from the head. At the scene the witness never saw any of the children of the Deceased. The witness then went to the house of the Deceased to report what he had seen. There he found PW3. The witness told pw3 that he had found the Deceased lying in the compound and badly injured. PW3 then ran to the direction of where the body was. The witness then left to inform the Deceased's neighbours. On returning to the scene he found that the Deceased had died. There was a trail of blood that ended at the house of Collins and another house under construction. Near the house of Collins was a pool of blood that had been covered with dry grass.
6. Irene Nekesa Wafula (PW5) is a step sister of Collins. On 19th January 2014 at about 3.00 p.m. she heard screams from the compound of Otoro. She later learnt that the Deceased had died and member of the public were alleging that Collins had killed her. The witness saw the Deceased's body which had blood on her head.
7. Stephen Ouma (PW6) was at their home in Nasira on 19th January 2014 when he heard PW3 screaming "**Collins has killed mama**". The witness then went to the home of Otoro and found that indeed the Deceased had died. E was present at the scene. The witness saw blood on some nearby grass and on following the trail of blood, alongside a neighbour called Clement, it led them to a pool of blood near a house under construction. The witness then returned home and thereafter headed to the home of the Chief whom he informed what had happened. Together, they returned to the scene where the body of the Deceased lay. The witness then left to the home of the Accused where they found that some policemen had already arrested the Accused Persons.
8. The Police Officer who investigated the alleged murder of the Deceased was Walter Ongonga (PW7). On the 19th January 2014, he was instructed by Inspector Nganga Muchemi (the Officer in Charge Busia Police Station) to visit Nasira village. In the company of Inspector Juma, Sgt. Makokha, PC Claire and PC Peter Kivuva (PW9) the witness visited the scene of crime. There he found a crowd of people outside the house of the Deceased. The people were angry and led the Police Officer to where the body lay. The body was outside the house of one of the Deceased's sons by the name Otoro. The body of the Deceased had a big deep cut on front part of her head. There was also some blood on the ground. Near the scene the Officer saw some houses that had been burnt down. These were six houses in total. One house belonged to Collins. Outside that house was a heap of grass that had been used to cover a pool of blood. Besides where the pool of the blood was, the witness noticed that the grass had been disturbed, signs of a struggle.
9. PC Peter Kivuva (PW9) accompanied PW7 and Inspector Ongonga to the scene on 19th January 2014 at about 6.30 p.m. At the scene he found members of the public had gathered at the home of the Deceased. The body of the Deceased was lying a few meters from the home. The body had a wound on the head. The Officer later moved to the compound of the Accused Person where he saw blood stains covered with grass. The blood was fresh. The Police arrested the Accused Person who had been locked in the house of a neighbour. The Accused Person appeared to be in pain and claimed to have been assaulted. Collins had escaped and has not been traced to date.
10. A Postmortem was conducted on body of the Deceased on 21st January 2014 by Dr. Hadija Kombo (PW8). The body was already embalmed and had a deep wound around the parietal area. All the other body systems apart from the head were essentially normal. On the internal appearance of the head the Doctor observed a left sided massive parietal hematoma and comminuted fracture of the left parietal and part of frontal bone. The Doctor formed an opinion that the cause of death was due to brain herniation secondary to open head injury. The witness explained that brain herniation was a protrusion outside the skull. In cross-examination, the witness stated that the injury was consistent to the use of a blunt object as opposed to a sharp object.
11. The Accused person in his Defence made an unsworn statement. He denied the offence. His evidence was that on 19th January 2014 he was at home when the Village Elder and two Administration Police Officers visited him. That the three told him that they had information that his son Collins Odhiambo Wafula had killed someone. The witness showed the house of Collins to the three but on going there did not find him. The three then asked the Accused Person to

- accompany them back to the scene. At the scene he saw many people and the body of the Deceased. He did not see Collins. The mob was angry and beat him up until he passed out. When he came round, he found himself at the Busia District Hospital with an injury to the right eye. He was later taken to Busia Police station and later charged with the offence he faces.
12. At the end of taking of evidence, I was urged by the State to find the Accused Person guilty of the minor offence of being an accessory after the Fact of Murder under Section 396(1) of the Penal Code. That Section provides;

Any person who receives or assists another who is, to his knowledge, guilty of an offence, in order to enable him to escape punishment, is said to become an accessory after the fact to the offence.

On the other hand, Counsel for the Accused strongly submitted that the State had failed to prove any offence against him.

13. The only evidence that tends to incriminate the Accused was tendered by (E B) PW3. The relevant part of his evidence was as follows:-

“... I placed a sufuria of water in preparation of making a meal. I then went out to pick vegetables, outside our house. While doing so, I saw Elias (points Accused) and Collins carrying my mother. Elias was holding her hands while Collins her legs. The distance between myself and them was about 2 meters. When they saw me, they dropped the body and left.”

The evidence by this witness is that he saw Collins and the Accused person carrying the body of the Deceased. When he went to where the body lay, he noticed that it was already lifeless.

14. That evidence however does not sit well with what Vincent Okwero (PW4) told Court. PW4's evidence was that he was the first person to see the Deceased lying within the compound of one Otoro. At that time she was alive but bleeding profusely. The witness also told Court that he is the one who informed the relatives of the Deceased about this. One of those relatives was PW3. And that upon getting that information PW3 went to where the body lay.
15. If what PW4 was telling the Court was true then the version of PW3 would not be tenable. Which version is this Court to believe? As I turn to this question I observe that both witnesses consistently maintained their versions of events. Let me consider other evidence that may help this Court resolve the impasse.
16. On 19th January 2014 at about 4.00 p.m., Steven Ouma (PW6) heard screams of a child. Reacting to that distress, he went to the home of his brother Moses Otoro. There he found that the person screaming was PW3. The witness heard PW3 say “Collins has killed Mama” PW3 never mentioned Elias (The Accused) This evidence creates some doubt on the version of PW3. If indeed he had seen both Collins and the Accused carry the body of the Deceased why would he only name Collins and not the Accused as the person responsible for the Death of his mother. As always a doubt goes to the benefit of the Accused Persons.
17. The view I take is that the Prosecution has not sufficiently proved that the Accused was guilty of Murdering E A B or being an accessory after the fact of her Murder. I return a verdict of not Guilty and hereby acquit Elias Wafula Okwaro. He shall be set at liberty forthwith unless detained for some other lawful reason.

Dated, signed and delivered at Busia this 27TH day of January 2016

F. TUIYOTT

J U D G E

In the presence of :-

Oile.- C/Assistant

..... - **for the State**

.....- **for the Accused**