



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL CASE NO 21 OF 2012

REPUBLIC..... PROSECUTOR

VERSUS

1. DORCAS MISANYA WAMBOKO

2. MOSES SIRENGO WEKESA..... ACCUSED PERSONS

JUDGMENT

1. The two accused persons **DORCAS MISANYA WAMBOKO** and **MOSES SIRENGO WEKESA** are faced with the offence of murder contrary to Section 203 as read with 204 of the Penal Code. The particulars of the offence were that on the night of 8th of June, 2012 at Miyanguli village, East Sang'alo location within Bungoma County the two murdered **COSMAS WANJALA**.

2. As the two pleaded not guilty to the charge the matter went for full trial with the prosecution calling a total of 7 witnesses on its part. The two accused persons gave sworn statements and called no witnesses.

3. In brief the prosecution's case is that the 1st accused had a love affair with one Dennis (who was since killed by a mob as a result of Cosmas's death) which after the accused 1st husband Cosmas got to know and that Dennis and the 1st accused paid the 2nd accused to kill the deceased.

The evidence of the prosecution is as follows;

4. **PW1 Wycliffe Makokha Nyongesa** – he recalled that on the night of 7th June, 2012 while asleep his sister inlaw accused 1 woke him up saying that two police officers had entered their house but she could not explain why the police had gone to their house. She left to return shortly saying that the two were not police officers but thugs armed with a panga and an axe and had demanded for the sugar cane proceeds. The witness feared for his life and ran to hide. The 1st accused followed saying her husband was being hit. The witness doubted the story, armed himself and proceeded near accused 1 house which was a meter away from his. While there he did not see anyone. He then went to his neighbor Fred and on the way he met accused 1 who informed him that she had called Fred and the witness rushed to another neighbor Dennis but he saw Fred and Nyongesa together at which point they proceeded to the deceased house. They found 1st accused in the house, asked her to switch on the lantern only to find his brother with cut wounds on the head, face and arm and lying naked. He called out the deceased name, the deceased responded but could not talk. They dressed him in a pair of trousers and arranged how he would be taken to hospital but in the process the accused died. The village elder called the police who arrived, interrogated Dennis over his relationship with 1st accused and Dennis disappeared. Later he learnt that

Dennis had been killed. Accused 1 and the deceased had marital problems. He did not see the 2nd accused that night.

5. **PW2 Fred Wekesa Murutu** on 7th June, 2012 at about 12 a.m while asleep in his house the 1st accused woke him up and informed him that thugs had invaded her house. He woke up David Mukhwana, on the way he met PW1 and Dennis. They teamed up and went to accused 1's house they found her standing outside with a tin lamp in her hand but it was not burning. They lit the lamp and saw Cosmas naked with cuts on the head, arms and shoulders and bleeding profusely. They ran to call the village elder. Cosmas succumbed to death. Police arrived and took the body to the mortuary. The 1st accused and the deceased had a very rocky relationship fraught with quarrels and allegations.

In cross examination he said that accused 2 had been seen with Dennis on 7th and he was suspected together with Dennis of having murdered Cosmas.

6. **PW3 Joseph Juma Kulama** village elder of Miyangulu village. He recalled that on the 8th of June, 2012 at about 1.00 a.m he was woken up by Fred and David Nyongesa who informed him that their neighbor Cosmas had been attacked by thugs and was seriously injured. The deceased lived 400m from his home. He spoke to the 1st accused who said two people had knocked at their door claiming to be police officers but turned out to be thugs. He called the deceased daughter Lynette

7. **PW5** who told him that after the deceased had supper and had retired to sleep at about 12.00 a.m. she heard a knock at her parents' house, she saw her mother open the door and talk to two people who got into the house while her mother remained outside carrying the baby. Shortly she heard some commotion and her father crying. She crept and asked her mother what was happening and the mother said it was the police searching the house and she should go back and sleep. Accused 1 then got into the house and slept. Lynette returned shortly told her she had heard her father cry and they should call **PW1** and their grandmother but accused 1 declined. Lynette went to Wycliffe. Neither Cosmas nor the wife had screamed during the attack. He called the area chief and the police.

In cross examination he stated that he had solved marital problems between the 1st accused and the deceased. He further stated that as Dennis was confronted by a mob he confessed that Moses Sirengo cut the deceased. Further he stated that accused 1 had a disagreement with the deceased due to a love affair between one Dennis and the 1st accused 7.

8. **PW4 Clare Wanjala** wife to Dennis who is since deceased stated that her husband left after supper with 2nd accused who was a close friend. He returned at 12.00 a.m and slept 10 minutes later she heard people screaming saying Cosmas had been cut. Her husband did not tell her where he had been. She went to Cosmas house to see for herself. On returning she did not find her husband. Later she learnt that he had been killed by a mob. She did not know why he was killed.

9. **PW5 L N** a child of 14 years daughter of deceased Cosmas and accused 1. She recalled that on the night of 7.6.12 when her father died, he had returned home at 8 p.m. He asked for food which her mother prepared. They ate with him and retired to sleep in the kitchen with her brother which was 30 metres away. Her parents slept in the main house. Two hours later she heard one knock at the door of the main house. It was a gentle knock. She woke up quietly opened the kitchen door to see who was there. She saw her (mother) accused 1 talk to two people who had a torch and she recognized them as accused 2 and Dennis Wanjala. Accused 2 had a small axe and Dennis a panga. Accused 2 wore a rain coat and gum boots and was holding a torch, Dismas wore a jacket and slippers. The mother was carrying a baby and she noticed this witness standing at the kitchen door, went and told her to get in and she locked the door from outside and told the witness that the two men were police officers. The two men had entered the house. She stood by the door listening and she heard a commotion inside the house.

After ½ hour the mother went and opened the kitchen door. The witness asked accused 1 if they could go and see what the commotion was and accused 1 declined. The two men had by then left. Then accused 1 suggested they go and inform their grandmother. They went and accused 1 told the grandmother that

police had entered their house and carried things and suggested that their grandmother accompanies them as she was scared. They left with the grandmother and hid in the sugar plantation and after 40 minutes they woke up neighbors who accompanied them to the house. On arrival they found the deceased lying in bed injured. Later she gave the police information of how she saw 2nd accused and Dennis at the door.

In cross examination she stated that in her statement to the police she gave them names of Denis and Moses. She also confirmed that as they entered the house after the incident there was no light burning.

10. **PW6 PC Fredrick Ouma Olik** –recalled reporting on duty on the 7th of June, 2012 at 6 p.m. at mid night he received a call that someone had been killed within Sangalo village. In the company of Corporal Yusuf and Martin Sele they proceeded to the scene. On arrival they found the deceased Cosmas lying outside his house with deep cut wounds on the head, shoulder and fore arms. They found accused 1 and **PW5** and members of the public. The Mukasa was also there. They gathered information and learnt of a love affair between accused 1 and one Dennis. They took the body to the mortuary and arrested accused 1. He also established that Dennis had been at the scene but escaped when he was implicated. They checked for Denis at his home but did not find him. Later on 8th June 2012 at 10.00 a.m. Dennis was beaten to death by members of the public. Later he received a call that a person was being beaten at Sangalo village. They rushed with I.P Mungilwa, P.C. Muturi and P.C. Sege and managed to rescue the person who is accused 2 who was alleged paid to kill the deceased. He later attended the post mortem.

11. **PW7** – Dr. Philip Koskey of Bungoma referral Hospital. He produced a post mortem report prepared by his colleague Dr. Enock Makori on 12.6.12. He had worked with Dr. Makori before he left.

The report was of one Cosmas Wanjala.

External appearance – deep cut on the right arm, deep cut on shoulder joint,, deep laceration to the scalp measuring 1.9 cm.

2nd laceration on the scalp 2.7 cm. 3rd laceration measured 3.13 cm and there was a severe brain laceration

Cause of death was severe bleeding due to deep cuts in the temporal region of the head.

12. At the close of the prosecution case the court found that the accused had a case to answer and they were placed on their defence both gave sworn statements as follows

13. **DW1 Dorcas Musanya Wambulwa** – she recalled the night of 5.6.2012 when she was at home with her husband Cosmas Masika Wanjala and their 4 children when at midnight they were attacked. The assailants took her to her the bedroom wanted to rape her and her husband went to help. She then escaped and went to call her in-laws who did not come to assist. She ran back and found her husband had severely been cut. He had injuries to his head, face, shoulders and head. In-laws and neighbours went and assisted to take the deceased to hospital but he died. The mukasa was called. He in turn called the police who took the deceased and the 1st accused. She was to write a statement but was confined and later charged. She did not know her co-accused. She did not know why she was charged.

In cross examination she stated that they were attacked by 4 people whom she did not know. She did not open for them neither did the husband. They saw the attackers in the bedroom. She heard her daughter's evidence. With her daughter they ran to call neighbors. She denied taking Lynette away so that Lynette does not witness what was happening. She did not have an affair with Dennis. She denied the mukasa had attempted to solve dispute between her and her husband. She denied knowing Dennis.

14. **DW2 Moses Sirengo Wekesa** – state he was arrested on 8.5.12 in Mianguli in Sangalo at 9.00 a.m. He thought his arrest was because he had left crops in the farm in Sangalo. He worked as a turn boy. He did not know about the murder. He knew the deceased and Dennis as childhood friends. He did

not see how **PW5** could have identified him from a torch he had. He knew **PW4** but was at his home on the night of 8.6.12. He denied having been with Denis on the material night. On his arrest he found Dennis dead body lying in the police vehicle. He does not know whether Dennis had been killed by a mob. Lynette's evidence was a fabrication.

15. No doubt it is the duty of the prosecution to establish its case beyond all reasonable doubt to be able to sustain a criminal charge.

In the notable English case of Woolmington Vs. DPP [1935] AC 462 the court spoke of the "Golden Thread" in the Web of common law which has been adopted and form part of our law see also Festus Mukali Marua Vs. Republic [2013] e KLR.

16. In a murder trial the prosecution must prove the ingredients of murder and link the same to the accused. Section 203 of the Penal Code defines murder as follows;

"Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.

Section 206 defines malice aforethought as follows:-

"Malice aforethought shall be deemed to be established by evidence proving any or at more of the following."

a. An intention to cause murder of or to do grievous harm to any person, whether that person is the person actually killed or not.

b. Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

c. An intend to commit a felony.

d. An intention by the act or omission to facilitate the fight or escape from custody of any person who has committed or attempted to commit a felony.

17. No doubt the murder of the deceased occurred where he was severely cut leading to his death. However no direct evidence was adduced of people who were seen cutting him or inflicting the injuries.

18. The prosecution has led circumstantial evidence of **PW1, PW2, PW4, & PW5** that tend to point an accusing finger towards the accused persons.

PW5 the child to 1st accused stated that she saw her mother accused 1 open the door for accused 2. People, Dennis and 2nd accused heard a commotion. On asking, her mother locked her in the kitchen. Later both went to call neighbours. She states there was light from a torch that enabled her see the accused 2 and Dennis. Accused 1 did not challenge the evidence of **PW5** that she saw her talk to the 2 men and there was a commotion in the house, and that accused 1 declined to let her see what had happened. This evidence remains unchallenged.

PW1 on his part stated that accused 1 told him initially that police had been to search their house moments later she changed and told him that thugs had attacked.

PW1 & 2 arrived at the scene and found accused 1 standing. There was no light in the house yet her husband had been beaten and was at his death bed. It is those who arrived that asked to have the tin lamp put on. This is a strange behavior of a person who had been attacked and whose spouse had been severely injured a fact that was well within her knowledge.

PW4 stated in her evidence that on the night of 7.6.12 her husband left the house after taking supper with accused 2. He returned after midnight and moments later she heard screams of how the deceased Cosmas had been killed. On returning home she did not find her husband and the following day her husband was killed by a mob.

PW6 – states that Dennis was killed by a mob on suspicion that he and accused 2, who was rescued from a mob had killed Cosmas.

19. In Sawe Vs. Republic [2003] KLR @ 364 the Court of Appeal had this to say in circumstantial evidence;

“1. In order to justify circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilt.

2. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.

3. The burden of proving facts which justify the drawing of the inference from the facts to the exclusion of any other reasonable by hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.”

4. _____

5. _____

6. _____

7. Suspicion, however strong cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”

20. In my mind the evidence of **PW5** places the 1st accused and the 2nd accused at the scene of murder as accomplished together with one Dennis. **PW4** confirms that Dennis and co accused left together and Dennis returned moments before screams announcing the death of the deceased Cosmas were heard.

Accused 1 was inconsistent in the manner she reported the alleged attack and her behavior thereafter gives her away. Apart from minor inconsistencies that do not go to the root of the evidence I find the prosecution witness to have been consistent and truthful.

21. I do not believe the evidence of the accused person. As noted above the 1st accused kept wavering while seeking for assistances from the in-laws. She did not challenge the testimony of **PW5** her child which was detailed on the occurrence of the events the fateful night.

Accused two gave an alibi which he did not back up with evidence. **PW4** and 5 saw him on the fateful night.

22. All in all I find that the prosecution proved its case. The circumstantial evidence leaves no doubt in my mind that there is no other inference capable of being arrived at other than the 2 accused persons with Dennis (now deceased) conspired and Denis and the 2nd accused did inflict severe injuries on the deceased which led to his death.

23. Having formed an opinion as above the two accused persons are found guilty of the offence of murder and are accordingly convicted.

Dated at Bungoma this 18th day of August 2016.

ALI-ARONI

JUDGE.