



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUSIA
BUSIA HIGH COURT
CRIMINAL CASE NO. 31 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

AKHMED MUKHSIN WAMALWA *alias* YASIN.....ACCUSED

JUDGEMENT

1. On information presented to Court on 15th December 2014, Akhmed Mukhsin Wamalwa *alias* Yasin(**the Accused**) was charged with murder contrary to section 2013 as read with section 204 of the Penal Code. It being alleged that on 13th December 2014 at Sioport Township within Busia County he murdered Collins Okello (the Deceased).

2. Lakeview Footclub is a team in Busia County. Up to the time of his Death, the Deceased was one of the sponsors of the team. On 13th December, 2014 the team was in camp at Sioport at the LPK Building. The evidence of Godfrey Oduol Oudo (PW1), Okello Maxwell Brian (PW2), Peter Kennedy Were (PW3), Zablon Barasa Kadima (PW5), and Patison Nowa Mukhemba (PW6), was that together with Collins they visited the camp on the night of 13th December 2014.

3. It was the evidence of PW2 that together with PW6, PW5 and the Deceased they left the camp at about 12.30am. Although the witness had given conflicting evidence, he asked the Court to believe the account that when the four left the LPK building they were headed for the Opondo's Bar. After a two minutes walk, and outside the Bar, the four met the Accused. The evidence of PW2 was that the Accused emerged from the Bar.

4. The witness told Court that after an exchange of greetings, the Accused called out the Deceased by name and the two stepped aside. After a short discussion, which according to the witness lasted 2 minutes, the Accused pulled a knife from his jacket and stabbed the Deceased. As the three went to the rescue of the Deceased, the Accused person ran away. It was the evidence of PW2 that they raised an alarm and they went to the aid of the Deceased. That alarm attracted PW1 and PW3 who shortly came to the scene.

5. After they conferred, PW1 and PW3 set off to the Police Station, while PW2, PW5 and PW6 helped the Deceased to Sioport Sub-County Hospital which was about 100 Metres from the scene. After receiving some initial treatment, the Deceased was referred to Nangina Mission Hospital for further treatment. The evidence of PW2 is that the Deceased was bleeding heavily and passed on in the treatment room of

Nangina Mission Hospital as Doctors were attending to him.

6. The evidence of PW5 and PW6 substantially supported that of PW2. As to how the Accused attacked the Deceased, PW5 told Court that the Accused removed the knife from under his shirt and that the knife was held by a belt. On whether the intention was to visit the Bar, this witness told Court that, when they left the camp their intention was to escort the Deceased home.

7. As for PW6, he stated that the Accused removed the knife from the left side of his waist and stabbed the Deceased. The Accused thereafter jumped over a fence and ran away.

8. When their colleagues left the Camp, PW1 and PW3 remained behind. But shortly thereafter, PW1 says that he heard someone shout out in Kisamia language, "*Hosein is killing Collins*". This prompted him and PW3 to rush to the scene. It was his evidence that as he ran to the scene, he met the Accused who was from the direction of the screams. He spoke to the Accused for less than 40 seconds.

9. At the scene he found PW2, PW4 and PW6. The witness saw that the Deceased had a stab wound, was bleeding and lying on his back. At the scene were other members of the Public. PW1 and PW3 went to Sioport Police Station while their colleagues carried the Deceased to the Hospital. At the Police Station the two reported the incident to the Police Officers.

10. PW1 told Court that alongside some Police Officers, they left the Police Station for the home of the Accused's Grand Mother at Budenge. This was after they had been informed by one Zangi that the Accused could possibly have gone there. When they reached Bundenge, PW2 and the others found a crowd of people who had surrounded a house in which the Accused had taken refuge. The Police entered the house and removed the Accused. The Police had to disperse the angry crowd by shooting in the air.

11. The evidence of PW3 supported that of PW1 in many respects. However the witness did not say that he saw the Accused as he hurriedly rushed to the scene. It was also the evidence of this witness that the Deceased lay about 10 metres from Opondo's Bar. As to where they found Zangi the witness told Court that Zangi was at Busijo.

12. Inspector Simon Mutungi Mbaku (PW7) was at his house within the station quarters of Sioport on 13th December, 2014, when he was called by the Officer manning the Report Office on that night. At the Report Office he met a group of young men who introduced themselves as members of Lake View Football Club. He was also informed that the Deceased had been assaulted by the Accused. And that the assailant was on the run. Together with some Police Officers, PW7 visited a Mosque at Bumbe-Busijo junction. On searching the Mosque they found a person called Zangi. Upon interrogation of Zangi, Zangi informed them that the Accused had gone to his grandmother's house.

13. On visiting the home of the Grand Mother, PW7 found the Accused already under civilian arrest. Members of the Public had already subjected the Accused to Mob justice. The Police rescued the Accused person and took him first to Sioport Police Station. But as the Accused person was badly injured they later took him to Port Victoria Hospital. Later, at about 4.00am, PW7 visited the scene. At the scene there were marks that suggested a struggle. This Officer recorded some Statements from some witnesses and made a decision to charge the Accused.

14. Doctor Patson Kubuta (PW4) is a Medical Officer who at the time of testifying was attached to Kocholia Sub-County Hospital. He produced the postmortem form in respect to one Collins Edga Okello. The Doctor performed the postmortem on 15th December 2014. The details of his findings on examination shall be set out in the analysis of his evidence at a later stage of this decision. It will suffice for now to note that the Doctor formed the opinion that the cause of Death was severe bilateral lung collapse with air Emphysema. The Doctor explained this as lodging of air in the tissue. The Doctor also noted that the injury was severe as it was in his words "a through to through penetration".

15. Upon the close of the Prosecution case, the Court formed the view that the evidence lead was sufficient to require the Accused to make and answer to the charges he was facing. On 19th May, 2016,

the Accused person gave a sworn statement.

16. The Accused told Court that on 12th December, 2014 he visited Opondo's Pub at Sioport. He got to the Bar at 5.00pm. There was a disco at the Bar that began at 8.00pm. He was allowed into the Bar after a search was conducted on him at the entrance. As the night wore on, the revelers danced. He was one of those dancing. By accident he stepped on PW2. In turn PW2 pushed him and the witness fell on a table. The table had alcohol on it which poured on impact. This angered the owners of the alcohol. A quarrel started and a fight broke out. The fight was between those who sat at PW2's table and those whose alcohol had poured.

17. The music was stopped, disco lights were broken and people were screaming. The Accused left the Bar in a hurry and went home to their home at Bundenge where he reached at about 1.30am. It was his evidence that sometime between 3.00am and 4.00am, some Police Officer knocked on his door and on opening to them the Officers carried out a search. Nothing was recovered. Then PW1 and PW2 pointed him out as "the person". As the Police Officers escorted him to their car, some young men suddenly attacked him and the Officers and the Officer took to their heels. At this point he was attacked and assaulted. He later heard gunshot and his attackers fled. The Accused says he passed out and found himself at Port Victoria Hospital. He was later charged with the present offence. He denies stabbing, assaulting or killing the Deceased.

18. At the end of the Trial, the State was confident that it had discharged its burden of proof. The State Counsel asked this Court to find that the eye witnesses account of PW2, PW3 and PW6 were believable. These three gave evidence that they saw the Accused stab the Deceased. It was submitted that the scene of the incident was well lit and each of the witnesses described the lighting on that night.

19. The Court was asked to find that the eye witness account was corroborated by the evidence of PW1 who is said to have met the Accused person shortly after the Accused had assaulted the Deceased. PW1 knew the Accused person well and positively identified him.

20. It was submitted that there would be further corroboration from the evidence of PW4 who conducted a postmortem on the body of the Deceased. That the findings of the Doctor supported the eye witnesses that the Accused stabbed the Deceased on the chest.

21. As to malice aforethought, it was argued that the injuries caused by the Accused were so severe. They were a through and through penetration. This taken together with the fact that the blow was aimed at the Chest, proved that the Accused either intended to kill, wound or cause grievous harm to the Deceased.

22. The Defence did not think that the Prosecution had proved its case beyond reasonable doubt. Counsel for the Defence submitted that even the very Death of the Deceased was not proved. Counsel has directed the Court to the Postmortem Report by PW4. In the Report, it was indicated that the body was presented by P.C. Joseph Kisau and identified by one Pius Baraza Wilberforce and another Alloys Majanga. These three never testified and it was argued that it is unclear how the body was identified to the Doctor. There is no evidence that PW4 verified the identities of Pius and Alloys and their relationship to the Deceased. Further that from the evidence of PW7 (the Investigating Officer) these two were not even interviewed.

23. The Defence was of the view that there was conflicting evidence as to the scene of the incident. Was it outside Opondo's Bar or outside Joint Bar? That the evidence of PW2, PW3 and PW6 suggested that it was outside Opondo's Bar while that of PW1 was that it was outside Joint Bar.

24. As to the alleged eye witnesses, the Defence took the position that they were unreliable witnesses. For example, it was submitted, PW2 conceded lying to Court as to whether or not, on leaving LPK Building, they had an intention of going to Opondo's Bar.

25. The Defence pointed out other aspects of the Prosecution case which in its view, demonstrated that the case was unbelievable. There was evidence that there was Disco music at Opondo's Bar which could be heard at the house of PW7. That house was further away from the Disco than to where PW1 and PW3

were said to have been when they heard screams from the scene (which was just outside Opondo's Bar). The Defence thought it fallacious that the screams could be louder than the Disco music. In addition, that there was a contradiction in the words allegedly uttered. How could it be that Collins could say "**Yasin anaua Collins**" unless he was speaking in 3rd person?.

26. The Prosecution was criticized for not availing any independent witnesses. That apart from PW4 and PW7, all the other witnesses had close relations with the Deceased. It was argued that those were not the only potential witness, yet PW7 chose to interview only partisan witnesses. This Court was told that it was unsafe to convict the Accused solely on the evidence of partisan witnesses.

27. Lastly, the Defence submitted that the Accused person gave a strong defence which was unscathed even on the face of intense cross-examination. It was the Defence theory that the Deceased was caught up in a fight inside the Bar. That the presence of multiple bruises on the Deceased's shoulders, lower Limbs and Upper Limbs corroborated the Accused's testimony.

28. Emerging from the evidence and the arguments for both the State and the Defence, the following issues present themselves for the Courts determination;

- a. Was the Death of the Deceased proved?
- b. If the answer to (a) above is in the affirmative, what was the cause of his death?
- c. If the answer to (b) above is in the affirmative, did the Accused cause the Deceased's Death?
- d. If the answer to (c) above is in the affirmative, was there malice aforethought?

29. PW4 is the Doctor who performed a Postmortem on a body alleged to be that of the Deceased. The Doctor produced his Report on the findings. In the Report the Doctor stated that the body was sent to him under escort of a Police Officer, Joseph Kisau. And that two persons namely Baraza Pius Wilberforce and Alloys J. Mujanga identified the body to him. The troubling aspect of the Prosecution case was that neither the Police Officer who escorted the body nor the identifying witnesses testified.

30. That omission was no doubt a serious one. These are important and crucial witnesses for purposes of establishing that the body on which the Postmortem was performed was the Deceased person who is the subject of the Murder Proceedings. The seriousness of the omission is even more acute when the Prosecution does not proffer any explanation as to why the crucial witnesses were not called. The critical question, however, is whether this grave omission makes the Prosecution case an instant failure.

31. The evidence of PW2, PW5 to PW6 was that the Deceased died while undergoing treatment at Nangina Mission Hospital. There is no doubt that the trio knew the Deceased well. They were his friends and were with him on the fateful night. The evidence of PW2 and PW6 was that after the Death, the body was moved to Busia County referral Hospital. The Doctors' evidence is that the Postmortem in whose respect the Report related was performed at Busia County Referral Hospital. There is some convergence on the aspect. The evidence is that the Deceased died on 13th December, 2014. The Postmortem was conducted on 15th December, 2014. In respect to the assessment of time of Death, the Doctor stated;

"...estimated time of Death is about 2 days"

Collins Edga Okello (the Deceased) herein is a male. The Doctor performed a Postmortem on a Deceased person who was male. In the postmortem the Doctor observed that the apparent age of the Deceased was 23 years. PW2, a friend of the Deceased, testified that the Deceased died at the age of 24 years.

32. These four aspects of the Prosecution evidence strongly suggested that the body which was examined by Dr. Kubuta and in respect to which PExhibit 1 was prepared and filled was that of Collins Edga Okello (the Deceased). I hold and find that PExhibit 1 was in respect to the Deceased's body. It is not fatal to the Prosecution case that the witnesses who identified the body to the Doctor were not called as

witnesses. That said, such an important aspect of the Prosecution case must never be left to circumstantial evidence. Unless there is good reason, explained by the Prosecution to the satisfaction of the Court, identifying witnesses must always testify. Luckily for the Prosecution here there was strong circumstantial evidence that could sustain the Report.

33. In that Report, the Doctor made the following observation on the external appearance of the body;

‘Extensive swelling of the whole body with air. Crepitus demonstrated all over the body up to the Lower Limbs. A deep penetrating injury on the Sterna area of the Chest on the Left penetrating injury thru’ the second intercostals space. Extensive Lung collapse noted bilaterally. Both Upper lobes were punctured with the penetrating injury Multiple bruises, noted on the shoulders, Lower Limbs and Upper Limbs. Evidence of bleeding via the mouth’.

34. On opening up the body, the Doctor found that the Trachea was punctured at the level of T8 and both Upper Lungs Lobes punctured and collapsed. These were the only significant findings on the internal appearance. The Doctor then returned the following opinion on the cause of Death;

‘Severe bilaterally lung collapse with emphysema’

On enquiry, the Doctor explained that emphysema is the extensive lodging of air into the tissues.

35. Who caused these injuries on the Deceased? The evidence of PW2, PW5 and PW6 is that it was the Accused who did so.

The three witnesses gave substantially similar accounts as to how this happened. The evidence was that on that fateful night the three were together with the Deceased. The agreed version was that the four intended to visit Opondo’s Bar but did not make an entry because of the assault of the Deceased.

36. That somewhere outside that Bar, they came across the Accused who called out the Deceased. The Deceased obliged and the two spoke at a short distance from them. Shortly, PW2 puts it at 2 minutes, the Deceased pulled out a knife and stabbed the Deceased. The Accused then fled.

37. There were some differences as to where the Accused pulled out the knife from. PW2 said that the Accused pulled out the knife from his jacket. PW5 testified that the Accused removed the knife from the left inner side of his trouser. PW6’s account supported that of PW5. These differences do not seem to be significant as whether from the jacket and from the inner side of the trouser, the knife is said to have been removed from a concealed part of the Accused’s left side.

38. The three witnesses gave a vivid description of the source of light on what would otherwise have been a dark night. There were 3 fluorescent tubes on the wall of Opondo’s Pub. One of which was above the door of the Pub. There was also a strong flood light. The three witnesses were emphatic that the light was sufficient for them to see the Accused attack the Deceased.

39. The three knew the Deceased prior to the day he is said to have attacked the Accused. PW2 knew him as Yasin. The two were childhood playmates. PW5 had known him for at least 12 years. The Accused had been a neighbor of PW6 for about 3 weeks prior to the alleged incident. If the three were to be believed, theirs would be evidence of recognition.

40. The evidence of PW1 and PW3 is that shortly after the Deceased, PW2, PW5 and PW6 left the LPK Building the two heard distress call of familiar voices. The calls were to the effect that Collins had been attacked. PW1 and PW3 immediately reacted and ran towards the direction of the screams. The evidence of PW3 is that PW7 got the scene first. The evidence of PW1 is that as he made his way to the scene, he met the Accused who was from the direction of the screams. The two are known to each other and spoke.

41. At the scene PW1 and PW3 found Collins injured lying on the ground. He was bleeding heavily and had a stab wound to his chest.

42. The Prosecution evidence I have outlined in the preceding paragraphs is undoubtedly strong evidence. Yet there are two aspects of the case that the evidence does not explain.

43. The Medical evidence is that in addition to the stab wound, the Deceased had multiple bruises on the shoulder, lower Limbs and Upper Limbs. There was also evidence of bleeding via the mouth. About the bleeding from the mouth the Doctor explains that it could be caused by trauma, infectious condition of the mouth and abdominal bleeding. About the bruises, the Doctor explained that these could be as a result of a fight.

44. The presence of the bruises is of some significance as the three eye witnesses were emphatic that after a short conversation, the Accused stabbed the Deceased and ran away. There was no fight between the two and the Accused never inflicted other injuries on the Deceased save for the stab. The significance of that Medical evidence is greater still when taken together with the evidence of PW7 on the scene visit.

45. The scene visit was at about 4.00am on the same night. That would be about four (4) hours after the alleged attack. The Police Officer stated as follows about the scene;

“At the scene there were marks that suggested there was a struggle and presence of people”.

46. The Medical evidence of the bruises and the disturbed scene, taken together, seem to suggest that the Prosecution witnesses may not have told the entire story. This creates a doubt in the mind of the Court.

The Court wonders whether the Defence theory is in fact not credible. Is it not possible, as propositioned by the Defence, that the fatal injuries were caused by someone else when the Deceased was involved in a fight on that night? The Medical evidence and the disturbed scene seemed incongruent with the prosecution account of the Deceased's Death. A doubt has been created from which the Accused ought to be benefited.

47. The upshot is that I do not find the Accused guilty of the offence of Murder. I do hereby acquit him and set him free forthwith unless detained for some other lawful reasons.

DATED, READ, DELIVERED, AND SIGNED AT BUSIA THIS 16TH DAY OF AUGUST, 2016.

F. TUIYOTT

JUDGE

PRESENT:

Ommodi for Accused

Owiti for State

Khuloi - Court Clerk