

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL CASE NO. 17 OF 2010

REPUBLIC..... PROSECUTOR

VERSUS

1. DICKSON WAFULA NDALILA

2. EDWIN WERUNGA WAFULA.....ACCUSED PERSONS

RULING

1. The 2 accused persons **DICKSON WAFULA NDALILA** and **EDWIN WERUNGA WAFULA** are faced with the offence of murder contrary to Section 203 as read with 204 of the Penal Code.

The particulars of the offence are that on the 25th of February, 2010 at Sawa village, Ndalul location in Bungoma North District they jointly murdered **ZACHARIAH NYONGESA**.

2. As the two denied the charge the prosecution called a total of 4 witnesses in an attempt to prove its case and their evidence may be summarized as follows;

PW1 Charles Wasike Chengwali of Ndalul scheme in Tongareni. He recalled that on the 26th of February, 2010 being a Mukasa of his area he received one Linet a Mukasa of Sango area who came with information that one of her subjects had been killed in his area. They went to the deceased home and later to the scene of crime where they found a crowd had gathered and the police had arrived. He did not know how the deceased died.

PW2 Cpl. Abraham Mudai force No. 94028317 stationed in Bungoma East and previously of Mahese A.P Post. He recalled that on 1.3.2010 at about 10.15 a.m. a crowd escorted the 1st accused to the post on information that he was being sought for by Kiminini police station. He called Kiminini to confirm and on receiving the confirmation he arrested the 1st accused. Officers from Kiminini later came for the first accused. He could not recall the name of the person or persons who brought the 1st accused neither did he know how the 2nd accused was arrested.

Pw3 Dr. Edmond Vilembwa who produced a post mortem report on behalf of his colleague Dr. Evans Ng'ang'a. The post mortem report indicated that the deceased had swelling round the eyes, blood was oozing from the nose and ears; he had a skull fracture and a right frontal brain contusion. The doctor formed an opinion that cause of death was cardio respiratory arrest due to severe injuries.

PW4 Investigating officer George Bundotich forces No. 61062

He took over the matter from Cpl. Gideon Ochieng since deceased.

The file indicates that Cpl. Ochieng received a report from the deceased's wife on the 26th of February, 2010 at 8.30 a.m. and proceeded to the scene of crime. The report was that the deceased body was found on a road in Sawa area. In the file it is indicated that the body had injuries on the head and neck. Corporal Ochieng took the body to Kitale District mortuary and attended the post mortem on 6th March, 2010. That during investigation corporal Ochieng received further information that the deceased and the first accused had quarreled over a radio and a cow. He also got information that the 1st accused

had hit the deceased on the head with a rungu.

3. With the above evidence the prosecution closed its case. From the above there is neither direct nor circumstantial evidence linking the 2 accused persons to the death of the deceased. There is no doubt that the deceased was fatally injured leading to his death. **PW4** alludes to information he gathered implicating the 1st accused. That is mere hearsay evidence as the informer did not testify.

4. It is a cardinal principle in criminal cases that the onus of proving a criminal case squarely lies on the prosecution. See **Woolmington vs. D.P.P [1935] AC 462** where it was held that, subject to the defence of insanity and to certain statutory exceptions, no burden of proof rests upon an accused person to establish his defence.

5. There being no evidence linking the accused persons to the death of the deceased this court finds that the prosecution has failed to prove a prima facie case against them both and proceeds to acquit them. They are therefore set free unless otherwise lawfully held.

DATED and DELIVERED at BUNGOMA this 20TH OF DECEMBER 2016

ALI-ARONI

JUDGE.