



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL CASE NO. 10 OF 2013

REPUBLIC-----PROSECUTOR

VERSUS

SAMSON OSENYI EMAASE-----1ST ACCUSED

WYCLIFFE BARASA----- 2ND ACCUSED

JUDGMENT

1. Anne Hellen Ajiambo last saw her son Evans Wanyama Masawa (the **Deceased**) alive on the morning of 29th March 2013. On that morning the deceased left his home in the company of Samson Osenyi Emaase (A1) and Wycliffe Barasa (A 2). The case for the prosecution is that the two are responsible for the death of the deceased and they face the charge of Murder contrary to section 203 as read with section 204 of the Penal Code.

2. The prosecution case comprised of seven (7) witnesses. Anne Hellen Ajiambo (PW1) was at her home on the morning of 29th March 2013 when, at about 8.00 a.m., two young men visited the home. The two were the Accused Persons herein. Prior to this day, Accused 1 was known to her. The two went directly to the house of her children. Her son Kevin Obwire (PW2) opened the door to the two young men. Shortly, the Deceased came out of the house and the four held a short conversation. As the two left in the company of the Deceased, PW1 called them and they had a conversation.

3. A1 told PW1 that his (A1's) parents had hired the Deceased but the Deceased had left without their knowledge on 27th March 2013. That after he left they had discovered that Kshs. 1000/- was missing from the homestead. For that reason the father of A1 had sent the Accused persons to seek out the Deceased. After they made this explanation the two left with the Deceased. That would be the last time she saw her son alive.

4. Later on that day, this would be at about 10.00 a.m., A1 returned alone to the home of PW1. He told her that although the Deceased had initially denied stealing the money on being beaten, he made an admission. That the deceased also stated that he had taken the money to his uncle who resides at Nasra. PW1 suggested to A1 that he should go to the uncle's house which was about 5 km from her home. Instead A1 returned to his parent's home.

5. At about 1.30 p.m. PW1 received horrifying information from her step son by the name of Philip. The information was that the deceased had died and his body was lying at Busia District Hospital mortuary. In the company of her sister by the name Phanice, they visited the mortuary. There she was able to identify a naked body that belonged to her son. She saw some visible injuries to his left elbow and right leg.

6. PW2 gave evidence that supported the evidence of PW1. A1 had on the morning of 29th March 2013 at about 8 a.m. gone to the home of PW2 in the company of A2. A1 asked the witness about the whereabouts of the Deceased. PW2 called out the deceased who was in the house. He heard the Accused persons discuss the issue of some money with the Deceased person. The Deceased denied having stolen any money and showed the two persons his wallet which only had a voter card and ID card. After a short conversation with PW1, the Accused persons left their home together with the Deceased. The Deceased left as pillion passenger on the bicycle ridden by A1. Their destination was the home of A1.

7. Fast forward to the events of 12.00 noon of 29th March 2013. Bernard Asudi (PW3) and Henry Tisa (PW4) are both security officers with Bedrock Security Company. Both were on duty at Busia District Hospital. PW3 was called by a colleague by the name Melvin Nakhanu who told him that there was an urgent issue. He asked PW3 to go to the outpatient section of the Hospital. There he found a Doctor whose name was not known to him. The Doctor told him that a patient who had been brought to the hospital was in critical condition and he asked PW3 to arrest the young man who had brought the patient. PW3 called for backup.

8. One of the people who helped PW3 to arrest the young man was PW4. The two locked up the young man in the Sentry Box at the main gate. On interviewing the young man, he told them that the patient had drunk poison. At about 3.30 p.m. the two security officers took the young man to Busia Police Station. It was the evidence of the two that the young man they had arrested and taken to the police station was A1.

9. Pius Kilonzo Ndwiko (PW5) was at the material time the Deputy Officer in Charge of Adungosi Police Station. At about 3.30 p.m., he received a report from PW1 who informed him that her son had been killed. The Police Officer visited the mortuary on that very day and was able to observe the body of the deceased. The body lay naked at the mortuary. In the words of the witness the body was clean and did not have any blood on it. Later, he visited Busia Police Station and found that A1 and some Security Guards had already booked a report of suicide under OB number 42 of 29th March 2013.

10. After carrying out further investigations, the Police Officer on 30th March 2013, visited the home of A1. He did not find the accused there. He was told that the Accused Person, together with his father, had left for Busia Police Station. Indeed PW5 found the Accused persons at the Police Station. He then took him to Adungosi Police Station. After interviewing some witnesses he made a decision to charge the two Accused persons. He had arrested A2 at the home of the father of A1 on 30th October 2013.

11. One of the witnesses interviewed by PW5 was Gabriel Amungaise (PW7). He is a village elder at Asokoti village. His evidence was with some difficulty and because it varied materially with a witness statement (P Exh. 4) allegedly made by him, the DPP successfully applied that the witness be declared a hostile witness. In his oral evidence to Court the witness stated that whilst at a river near his home, three young men visited him on 29th March 2013 at 12.00 noon. Of the three persons he knew A1. The three young men told him that one of them had stolen money. The witness spoke to the alleged suspect who confirmed having stolen the money and taken it to his uncle. He directed that the suspect be taken to the airstrip Administration Police Camp. That he made this decision because the young man possessed a bottle of some chemical. On his observation he did not notice any injuries on the suspect.

12. That oral testimony differed in some material aspects with a statement allegedly made by the witness on 30th March 2013. In that statement the witness stated that the suspect had some injuries and he seems to have been beaten. And that he advised them that it was a police case because the other two young men appeared to be serious. He nevertheless, in his statement, stated **“the two Geoffrey’s boys were carrying certain chemical for spraying cattle and suspected that the suspect took”**

13. Doctor Rabarenina conducted a post mortem on the body of the deceased on 3rd April 2013. As the Doctor was not available to testify, the post mortem report was produced by Doctor Patson Kubuta (PW6) who is familiar with the handwriting of his colleague. The report shall be discussed in greater detail later in this Decision. For now it is sufficient to note that the Doctor was unable to establish the cause of the

Deceased's death.

14. In cross examination, PW6 stated that there was no history of the possibility of the deceased having drunk poison. And that if the Deceased had taken poison it would have had a corrosive effect on his digestive system. He however stated that no findings were made in regard to the digestive truck. Although in his view, the examination carried out was not exhaustive enough to rule out the possibility of poisoning, he thought that there was no finding in the report that was consistent with poisoning. He added that poison would manifest itself in terms of corrosion but there was no corrosion found in the body of the deceased.

15. At close of the prosecution case, I formed the view that the evidence adduced had established a sufficient case to require an answer by both Accused Persons. I did thereby place them on their defence. The two Accused Persons gave fairly detailed evidence in their sworn statements.

16. Before his arrest, A1 was a student at St. Mary's Burumba Secondary School. He was a form two student. He knows A2 who used to reside with them at their home in Angoromo. A1 also knows the deceased who had been employed by his parents as a herdsboy but it would seem that the employment lasted a short three to four days. On the morning of 29th March 2013, A1 woke up to find that the Deceased had left. One of the co-workers of the Deceased by the name Boi told him that the Deceased had left at night.

17. The mother to A1 instructed both A1 and A2 to find out if the Deceased had gone to their home. In obedience to those instruction A1 and A2 travelled that very morning to the Home of the Deceased. They used two bicycles. At the home of the Deceased they were able to find the Deceased with whom they had a conversation. The Deceased was unable to explain why he had left suddenly. It is said that the Deceased asked the two if they could go back together to their home. As the three were leaving, they were beckoned by the Deceased mother (PW1) who inquired why they were taking away the Deceased. The two explained the reasons to the mother and that in addition A2 told her that the Deceased had left with Boi's money in the sum of Kshs. 1200/-.

18. That A2 carried the Deceased on his bicycle but as the road was muddy and slippery the bicycle, they were using skidded and the two fell. When they reached home, the Mother of A1 spoke to the Deceased and later the Deceased sent A1 to his mother with a request that her Mother should ask his uncle to return the money which he had given him. A1 took the request to the Mother of the Deceased but she would hear nothing of it.

19. That the Deceased then suggested that he commits himself before the Village Elder on repayment of the money. But before they would leave to the Home of the Village Elder, the Deceased went into the house he was staying allegedly to fetch his clothes. But on following him, A1 found the Deceased holding a bottle of Triatix. Triatix is a poisonous pesticide. He then snatched the bottle from him at this point A1 did not know whether or not the deceased had drunk the contents of the bottle.

20. So together with A2, Boi and the Deceased A1 set off to the house of the Village Elder (PW7). The four spoke to the village elder whom they found at his sugar plantation. The Village Elder directed them to report the matter to police Airstrip Administration Police AP Camp. The A1 and A2 together with the Deceased left for the camp, A2 carrying the Deceased on his bicycle.

21. Somewhere on the way, A1 found Deceased on the ground while A2 was holding his bicycle. A1 then decided to leave the two by the road and headed for the AP Camp. It is his evidence that he made a report of the matter at the Camp. That in his report he mentioned about the Deceased and the pesticide he was then directed to take the Deceased to hospital. A1 returned to where the deceased and A2 were.

22. When he found the two, the Deceased was breathing heavily, sweating profusely and his mouth was foaming. There was a smell of Triatix in air. The two administered first aid on the Deceased, one, by giving him some raw eggs which they got from a Good Samaritan. A1 then explained that his many attempts to get transport to the hospital failed because many Boda Boda operators were reluctant to offer

transport due to the serious condition of the Deceased. After a considerable passage of time, it would now be 12 noon, a Good Samaritan gave A1 some Kshs. 50/- to pay a Boda Boda which he used to transport the deceased to hospital. And it must have been a difficult day, as somewhere on the way, the motor cycle ran out of fuel and so the operator and A1 were forced to push it to a petrol station. Anyhow, they eventually made it to Busia District Hospital. By this time the Deceased was unconscious. The Deceased was taken into the Casualty ward of the Hospital. He was in a critical condition. That a Clinical Officer inquired whether the Deceased had taken poison and A1 handed the bottle of pesticide to the Clinical Officer.

23. The Clinical Officer then requested some Security Officers, presumably, PW3 and PW4, to escort the Accused person to Busia Police station. There the Accused person recorded a statement and was released. He returned to the Police station on the next day as requested but he was arrested and later charged.

24. A2 accompanied A1 to the home of the Deceased on the morning of 29th March 2013. On reaching the home of the Deceased they inquired about the whereabouts of the Deceased from his brother. The Deceased who was asleep in his house woke up and that is when they confronted him as to why he had left the home of A1 without informing anyone. He explained that he had informed the Mother of A1. Later the Deceased's mother called them and spoke to A1. After which the Deceased and A1 and A2 left together. The witness carried the Deceased on the back of his bicycle. Somewhere on the way they fell because the bicycle skidded on the slippery road. It was then that the Deceased bruised his arm and knee.

25. On reaching the home of A1, A2 went to wash his bicycle. After he did so, A1 left for the home of the Deceased while he remained behind with the Deceased. After 20 minutes, A1 returned and informed them that the mother of the Deceased was not interested getting involved in the matter. At this point a decision was made that they refer the matter to the Village Elder. In the process of preparing, A1 called him and told him that he had found the Deceased holding a bottle of some poisonous substance and had attempted to drink it.

26. When the three went to the Village Elder, the Village Elder directed them to report the matter to the Airstrip AP camp and thereafter to take the Deceased to hospital for checkup incase he had drunk the poisonous substance. Again, it fell to A2 to carry the Deceased on his bicycle. They at some point in journey, A2 asked the Deceased to alight as he was unable to carry him up a steep road. It was at that point that the Deceased told A1 that he was unable to walk. The Deceased sat down and later lay on the ground. He started to foam from his mouth. Together with A1, A2 assisted the Deceased to a shade. A1 then continued the journey to the AP camp and returned after 5 minutes.

27. The two looked for transport to take the Deceased to hospital but more than 5 Boda Boda operators declined to avail transport. At last they got a volunteer. At this point A2 left the scene but on returning he found that the deceased had already been taken to hospital and so decided to return home. He later, at 2 p.m., was told by the mother of A1 that she had received a call that the deceased had passed on. A2 denied assaulting or causing the death of the deceased.

28. That is the evidence that requires this court's further evaluation. But first let me highlight, in brief, the closing arguments of both the State and the Defence. Mr. Obiri for the State submitted that the Deceased was of sound health when A1 and A2 picked him on 29th March 2013 from his home. He was picked up by the two because he was suspected of stealing Kshs. 1,200/-. That later on that day A1 took Deceased to the hospital. The State submitted that the evidence of the Security Officers PW3 and PW4 was that the Deceased died before reaching the hospital. A Postmortem conducted on the body of the Deceased showed that he had a ruptured spleen. The argument for the Prosecution was that this was evidence that the Deceased had been beaten and those responsible for his death were the Accused Persons.

29. The Prosecution implored this court to disregard the Defence theory that the Deceased authored his own death by taking poison. It was submitted that:-

- i) There was no evidence that the Deceased indeed drank the poison.

ii) The bottle said to contain the poison was not produced by the Defence.

iii) If indeed the Accused persons were aware that the Deceased had drunk poison then why did it take them such a long time to take him to hospital, posed the State.

iv) None of the Good Samaritans who were alleged to have helped the Accused persons in administering first aid on the Deceased was called by the Defence.

30. Mr. Wanyama for the Defence urged the court to evaluate the evidence of the Prosecution witnesses in the context of the medical evidence. Counsel pointed out that the finding of the post mortem was indeterminate and so the cause of death is unknown. Counsel also argued that the Post Mortem report infact supported the version of the Defence that the victim took poison. That lacerations found was consistent with the corrosive effect of poison.

31. Giving regard to the evidence before me and the submissions by Counsel, I propose the following to be the issues for determination:-

(i) Was the Deceased last seen alive or in sound health in the company of A1 and/or A2?

(ii) Was the cause of death established by the Prosecution?

(iii) If so, was that death caused by A1 and/or A2?

(iv) And if so, did the Prosecution establish Mens Rea?

32. There is overwhelming evidence by PW1 and PW2 that on the morning of 29th March 2013, both Accused persons went to fetch the Deceased from his home. Although the Accused persons explained that their mission was simply to get an explanation from the Deceased as to why he left the home of A1 suddenly and without informing his employer, at the heart of the matter was the issue of Kshs.1200/- allegedly stolen by the Deceased from that home.

33. The evidence of PW1 and PW2 and confirmed by the accused persons in their sworn testimony is that A1 and A2 left the home of the Deceased on the morning of 29th March 2013 together with the Deceased. That was the last time that PW1 and PW2 saw the Deceased alive.

34. PW7 is a Village Elder of Asokoti village. In the course of giving evidence for the Prosecution, the State Counsel successfully applied that he be declared a hostile witness. Ordinarily a hostile witness is an untrustworthy witness whose evidence is unreliable (*see for instance Abel Monari Nyanamba & 4 others vs Republic ([1996] eKLR)*). This court would have disregarded the entire evidence of PW7 but chooses to evaluate one aspect of his evidence that supported the Prosecution theory and was conceded to by the Defence. It is not therefore a contested fact. It was the evidence of PW7 that on the fateful day, A1 and A2 while in the company of the Deceased, visited him at his farm. The Accused persons confirmed that in their testimony. This court accepts as true that PW7 saw the Deceased alive sometime on 29th March 2013 and that the Deceased was in the company of the two Accused Persons.

35. On that same day, at a time put by PW3 to be 12.00, noon PW3 saw a young man bring a patient to Busia Hospital. It would appear that at the time of his arrival to hospital the patient was still alive, as PW3 said as follows:-

“I went to the outpatient section. I found a Doctor. His name is not known to me. He told me that a patient been brought was in a critical condition. He asked me to arrest the person who had brought him”

That patient died shortly thereafter. That patient is the Deceased herein. The young man who brought the patient to the hospital was A1. A1 himself, in his Defence, confirmed taking the Deceased to Busia

District Hospital on 29th March 2013. He also confirmed that on reaching the hospital the condition of the Deceased was critical. This was his sworn testimony,

“On reaching the Hospital, the Deceased was unconscious. We were directed to the casualty room. A worker came with a stretcher. The deceased was placed on the stretcher and taken into the casualty ward. The Clinical Officer asked us, “has this man taken poison?” He was critical”.

36. On the evidence of the Prosecution and confirmed by the Defence, I find as a fact that A1 and A2 left the home of the Deceased on the morning of 29th March 2009 together with the Deceased. At that point, the Deceased was alive and well. Later on that day, together with the Deceased, A1 and A2 visited PW7. The Deceased was still alive. A1 and A2 left with the Deceased. According to A2, he parted ways with A1 and the Deceased somewhere on the way to the hospital. By this time the Deceased condition had begun to deteriorate. I find as a fact that A1 took the Deceased to hospital when the Deceased was in a critical condition and that the Deceased passed on shortly thereafter.

37. If this court was to find that the cause of Deceased death was unnatural, then A1 and A2 would bear a legal duty to explain how the Deceased health deteriorated so rapidly. Section 111 of the Evidence Act places a duty on A1 and A2 to offer a reasonable and plausible explanation. Where the Accused fails to make that explanation then by dint of section 119, a presumption is raised that the Accused persons, acting alone or with others caused the death of the Deceased (**See the Court of Appeal Decision in Samwel Ndungu Kamau & Another Vs Republic (2007) eKLR**) 111 provides :-

(1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross- examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilty of the accused person in respect of that offence.

(2) Nothing in this section shall-

(a) prejudice or diminish in any respect the obligation to establish by evidence according to law any acts, omissions or intentions which are legally necessary to constitute the offence with which the person accused is charge; or

(b) impose on the prosecution the burden of proving that the circumstances or facts described in subsection (1) do not exist; or

(c) affect the burden placed upon an accused person to prove a defence of intoxication or insanity.

38. But before I evaluate the explanation offered by A1 and A2, it is necessary for me to make a finding as to whether or not the prosecution established, beyond reasonable doubt, that the death of the Deceased was caused by the act of another human being or beings. A postmortem on the body of the Deceased was conducted by Dr. Rabarenina on 3rd April 2013. This would be about 5(five) days after the death of the Deceased. The Doctor was unable to return any opinion as to the cause of death of the Deceased. His own words the examination was **“indeterminate (sic)”**.

39. The Postmortem Report was produced (P exhibit 3) by Dr. Patson Kubuta (PW6) as Dr. Rabarenina was away and was not available to attend court. The Doctor took the Court through the findings of the

examining Doctor. The highlights are that on the external appearance:-

- i. The body was rigid and cold.
- ii. No cyanosis was found which the Doctor explained meant no sign of deficiency of oxygen.
- iii. A few Abrasions on the anterior (front) left upper arm but no subcutaneous hemorrhage (explained as no bleeding under the skin).
- iv. Predation of the left medial part of body (Torso)
- iv. No subcutaneous hemorrhage on the Exterior Aspect of the upper limb (bilateral)
- v. No bruises on the trunk and head.

40. On examination on the interior parts of the body he made this significant findings:-

Heart walls intact. No pericardial nor mural Hemorrhage, valves intact. Large vessels intact. Blood in peritoneal cavity ½ litre, liver, pancreas, stomach to intestines, big to small intact. Stomach has yellowish semi-digested contents. PW7 explained that the abnormality was the rupture of vessels in the cardio-vascular system. However, the Doctor stated that the examining Doctor was unable to qualify the cause of death and in his own words Doctor Kubuta (PW7) stated,

“The Doctor was unable to tell what caused the death”

41. Dr. Rabarenina was requested by the Police at Adungosi police station to ascertain the cause of death of the deceased. Police Form 23A is a post-mortem Form. Ultimately, after examining the Body of a Deceased, the Doctor is expected to return his opinion on the cause of Death on a space provided in that form. In that space the Doctor remarked **“inderterminate”** (sic). Doctor Kubuta (PW7) who produced the report explained that the examining Doctor was unable to establish what caused the Death of the Deceased. On my part I have looked up the definition of the word **“indeterminate”** and it means,

- **not exactly known, established or defined.....**
- **medium (of a condition) from which a diagnosis of the underlying cause cannot be made”** (Concise Oxford English Dictionary 12th Edition)

42. The Epic of the Defence argument was that as the cause of death of the Deceased was not established then it cannot be attributed to the Accused person. On the other hand, the Prosecution urged me to find that the Doctors finding of a rupture was a clear sign that the Deceased was beaten. Am I able, as suggested by the Prosecution, to draw this conclusion?

43. I have anxiously considered this aspect of the case and I am aware that my finding here may well determine the outcome of these proceedings. In resolving this issue the court finds useful guidance in the following passage of the Court of Appeal decision in **Ndungu Vs Republic (1985) KLR 487 at page 492-493**

“The prosecution, relying on the decision in *Republic vs Cheya and another* (1973) EA 500, argued that the death and the cause of it could be established otherwise than by medical evidence and that the evidence of PW1 about the sickness of the deceased proved that the deceased’s death was as a result of the accused’s attack on him on January 18th, 1983. It was also submitted before the judge that a doctor gives only opinion evidence which the court can accept or reject. The judgment in Cheya gives no report of what injuries were sustained although there is a reference to vicious assault, bleeding in several places and that the deceased was assaulted by a group of people. That decision does not illustrate the proper application of the principle that in some cases, death can be established without medical evidence. Of course there are cases, for example where the deceased person was stabbed through the heart or where the head is crushed, where the cause of death would be so obvious that the absence of a post-mortem report would not necessarily be fatal. But even in such cases, medical evidence of the effect of such obvious and grave injuries should be adduced as

opinion expert evidence and as supporting evidence of the case of the death in the circumstances relied on by the prosecution. Where a post-mortem examination is performed and a report is prepared, signed and kept in safe custody, but the doctor is not available some other medical expert could give general evidence as an expert, on the basis of the report as to whether the findings of the report are consistent with the case for the prosecution. Even where the Doctor is available it is necessary for him to correlate his opinion with the case for the prosecution. Another class of case where there is no medical evidence is the exceptional case where the body has never been found; but we are not dealing with that class.” (my emphasis)

44. In the case at hand, a Doctor examined the body of the Deceased and made a finding that there was indeed a rupture in the cardio-vascular system. Yet the Doctor returned an opinion that he was unable to establish the cause of death. In returning this opinion, the Doctor must have had in mind, or so should expect, the rupture. The Doctor who produced the report on his behalf did not tell court that the rupture could have caused the death and that the rupture may have been as a result of physical blows inflicted on the Deceased. Indeed no questions were put to the Doctor, either by the prosecution or the Defence, on the possible correlation between the rupture and the death of the Deceased. This court is therefore unable to conceive a theory which is not supported by expert evidence. I cannot find that the death was caused by the rupture and that the rupture was as a result of an assault. This court yields to the opinion of the Doctors that the cause of death was not established.

45. Inevitably, this Court finds that the prosecution has failed to establish the cause of death of Evans Wanyama Masawa. As a result the Accused persons cannot be held responsible for it. It is for this reason that the Court finds it unnecessary to evaluate the Defence theory that the Deceased person may have committed suicide by taking a poisonous substance. In reaching this outcome, the Court is not unmindful of the victim and his family. However, the Court is obliged to examine the evidence before it in reaching its decision. The Medical evidence placed before this court could only lead to one outcome, an acquittal for the Accused Persons. I wonder, for I can only wonder, whether the outcome would have been different if the police or the family of the Deceased had insisted on a second postmortem opinion by another Doctor!

46. The upshot is that This Court holds that Samson Osenyi Emaase and Wycliffe Barasa are not guilty of murdering Evans Wanyama Masawa. The two are hereby acquitted and set at liberty unless held for some other lawful reasons.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 28th DAY OF MAY 2015.

F. TUIYOTT

J U D G E

IN THE PRESENCE OF:

OILE.....COURT CLERK

Wanyama.....FOR THE ACCUSED

Owiti h/b for ObiriFOR THE STATE