



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA
CRIMINAL CASE NO. 20 OF 2010

REPUBLIC ----- PROSECUTOR

VERSUS

ROSHALI IPALI WERE-----1st ACCUSED

JERAD ITEBA WERE----- 2nd ACCUSED

JUDGMENT

1. ROSHELI IPALI WERE (the 1st Accused) is the mother to JERAD ITEBA WERE (the 2nd Accused). The two are charged with jointly murdering Naaman Were (the Deceased) contrary to Section 203 as read with Section 204 of the Penal Code. The murder is said to have happened on the nights of 4th and 5th of August 2009 at Koitamer village, in Teso North. The Deceased was the husband of the 1st Accused and father of the 2nd Accused.
2. On the fateful night Calvin Nancy Imodia (PW5) was at home. She is the daughter to the 1st Accused and the Deceased. On the evening of 4th of August she took her supper sometime between 7.00p.m. and 8.00 p.m. She then retired to bed. She left the 1st Accused in the kitchen. At that time the Deceased was in the main house. At about 4.00 a.m. she heard some people knock her door twice and force it open. She noticed that they were 4 people. The four entered the room and shone a torch light on the occupants. And warned them not to raise an alarm. Two of the four intruders were left in the room while the other two proceeded to the direction of the house where the Deceased slept. The witness says that she heard a knock on her father's door, and later and shortly thereafter, her father was screaming "why are you killing me". It is her evidence that she never heard the Deceased mention the name of any person. She heard the attackers ask the Deceased in Kiswahili "toa pesa yote yenye ulitoa Malakisi." She could hear noises of a commotion. All this time, she did not know where the 1st Accused was. Thereafter the two persons who had kept guard left. Shortly thereafter, the witness put it to be about 10 minutes, she saw 1st Accused with her (the witness) two uncles Jaffra Erukan (PW2) and Boaz Ijaka (PW 3). Together they all went to the house of the Deceased. There they found the Deceased already dead. His body was on the floor.
3. Emmanuel Omusugu Were (PW6) is also a child of the 1st Accused and the Deceased. That on that night a time which he put to be 2.00 a.m. he heard a bang at their door. The door was forced open and a torch was shone on him. He was in shock and because of fear he did not scream. Soon thereafter, he saw the lights of the torch at the direction of the Deceased's house. He then heard a bang at his father's house. That the intruders entered the Deceased's house and he could hear that someone was being assaulted. The Deceased was screaming for help. The witness heard the

- Deceased ask in Kiteso “why are you beating me.?” The witness was to add that while he was screaming for help the Deceased mentioned the name Jared. However in answer to a question posed by Court, the witness said that the Deceased asked “Iteba why are they beating me”. All this while the witness stood at the door to his house. He saw four people leave the house of the Deceased and go round the back. At this point, the 1st Accused came to where he was and asked him not to leave the house as it was dangerous. Shortly, the 1st Accused returned with PW1 and PW2 and they entered the house of the Deceased.
4. Boaz Ijakaa (PW1) is the older brother of the Deceased. On 5th of August 2009 at about 4.00 a.m., the 1st Accused knocked at his door and informed him that they had been invaded by robbers. The two left the house and PW1 passed this message to Jafred Erukan (PW2) and his nephew Dixon. Together with the 1st Accused PW1 made his way to the compound of the Deceased. As they entered the compound they did not hear any noise but on entering the house of the Deceased they found that it had been turned inside out. The witness saw the Deceased but he was already dead. He had injuries to his head. Although there was blood stains on the place where the Deceased lay, the blood had dried. The witness thought that the Deceased must have died much earlier. It was the evidence of this witness that he never saw the 2nd Accused on that night.
 5. PW2 gave evidence that supported the testimony of PW1. The witness added that police officers visited the scene on the morning of 5th August 2009 at about 8.00 a.m. That upon conducting a search, the police found a sweater which was stained with blood. That the sweater belonged to the 1st Accused.
 6. Another person who visited the scene on that night is Dixon Murunga (PW4). It was his testimony that he was woken up by the 1st Accused who told him that the Deceased had been attacked. He and other family members rushed to the home of the Deceased and surrounded the house. They exercised caution because the 1st Accused had informed them that the assailants were still in the house. PW1 volunteered to make a move and entered the house of the Deceased. But on doing so, he screamed out that the Deceased had been killed. PW4 also entered the house and confirmed that the Deceased was dead and had dry blood on his head. There was also blood on the floor to the room. At this point, the witness went to the house of the 2nd Accused which is about 50 metres from the house of the Deceased. When he knocked, the 2nd Accused opened but he appeared sleepy, confused and drunk. That on being told that his father had died, he responded “where is my mother”. The witness also entered the cottage of Maina which was next to that of the 2nd Accused. That it seemed that some people had been there because inside the house were two empty bottles of soda and a matchbox. That the bed was not spread and there were blood stains on the curtain.
 7. Bildad Masake Okwakau (PW3) also visited the home of the Deceased on the morning of 5th August 2009. He got to the scene when other people, including PW1, were already at the scene. He too saw the body of the Deceased. He too saw that household items and documents were scattered all over the room of the Deceased. He too saw dry blood on the floor and on the nose of the Deceased. The witness added that the 2nd Accused was at the scene. The witness was also present at the time when police visited the scene at 7.00 a.m. The witness saw a blood stained sweater belonging to the 1st Accused and that the door to the bedroom of Maina stained with blood. The witness explained that Maina is the brother to the 2nd Accused.
 8. A Post Mortem was conducted on the body of the Deceased on 7th of August 2009 by Dr. Olunga but as the Doctor was not available to testify, his report was produced by Dr. Were Mbire (PW7). PW7 was conversant with handwriting and signature of Dr. Olunga. The significant finding of the Doctor were that the body of the Deceased had multiple bruises on the chest, face and lower limbs. The Doctor also observed a cut wound on the left supraorbital area about 2 cm deep and measuring 4 cm long. Internally, there was subdural hemorrhage to the head and nervous system. The Doctor formed the opinion that the cause of death was Cardio Pulmonary arrest secondary to subdural hemorrhage caused by a head injury that resulted from trauma.
 9. Invited to make their Defence, the Accused persons made sworn statements. The 1st Accused is the wife to the Deceased. She denied the charges. It was her evidence that on evening of August

- 2009, she performed the usual domestic chores expected of a housewife. That she prepared supper at about 8.00 p.m. and she ate together with the Deceased. After that the Deceased went to sleep in a house where he had stored some tobacco produce. That the husband slept in that house as the theft of tobacco had become rampant and he needed to keep guard. The 1st Accused says that she later retired to bed in the main house. With her were her younger set of children, Sophie, Nancy and Ken. She woke up in her sleep at between 2.00 a.m. and 3.00 a.m. when she heard a loud bang at the door. Some four people forced entry into the house. They shone a torch at her and she was unable to identify any. The intruders warned her not to raise an alarm. Two of them stood guard in her room and two left.
10. Shortly, she heard them bang the door to the house in which her late husband was sleeping. She heard them demand money from her husband. She heard her husband shout out, "They are beating me." It was her testimony that the assailants stayed in the Deceased's house for about 30 minutes after which they called out the two who were standing guard. All of the four left together. Out of fear she remained in the house for another 30 minutes. After which she informed PW1, PW2, PW4 and Mama Milka what had happened. When she returned home with them and entered the house she found the Deceased on the floor bleeding from his head. The Deceased was dead and had a wound on his forehead. That they all started to scream.
 11. The 1st Accused told Court that she had a good relationship with Deceased and had no reason to kill him. She explained that although they had some domestic quarrels, it was the usual challenges of marriage. She further told Court that she could not seek help from Accused 2 because she feared to go to his house which was at the back of the main house.
 12. The 2nd Accused is a son of the Deceased. On 4th August 2009, he served himself food and retired to his house. After eating, he drank some alcohol which was in his hut. This, when alone. He thereafter entered bed and slept. Sometime between 3.30a.m. and 4.00 a.m., Dixon Murunga (PW4) woke him up and informed him that his father had been attacked and killed. The 2nd Accused accompanied PW4 to the house of the Deceased. There he found PW1, PW2 and Mama Melisa. They had already entered the Deceased's house. He too entered the house and found that his father had died. And that he was bleeding from his head. The witness denied committing the offence and told the Court that the name Iteba is a clan name. And that at least four people are known by that name in his family.
 13. The witness was cross-examined about the relationship of his mother (the 1st Accused) and the Deceased. It was his evidence that although, there were some domestic quarrels and disputes between the Deceased and Accused the disputes were minor in nature. And that the disputes were resolved without the intervention of neighbours.
 14. Both the Prosecution and Defence submitted that the Prosecution case rested on circumstantial evidence. Mr. Obiri, State Counsel, submitted that the following circumstances proved the guilt of both Accused persons:

From the testimony on record, it is very clear that:

- a. **There were domestic difference between the Deceased and the 1st Accused.**
- b. **That all the witnesses who responded to distress call from A1 state that upon viewing the Deceased's body, the blood stains had long dried up. Infact one Bildad Masake estimated the period of death to be 4 hours before A1 raised alarm.**
- c. **That the Deceased while being attacked, asked the attackers – "Oteba why are they beating me"**

There was no other person by the name Oteba in the Deceased's family.

15. On the other hand, Mr. Onsongo submitted that the Prosecution evidence merely raised a suspicion against the Accused Persons but that was not enough to found a conviction. Counsel urged this Court to give regard to the warning by **Lord Norman in Teper vs R [1952] A.C.** in which he said-

"Circumstantial evidence must be always narrowly examined, if only because evidence

of this kind may be fabricated to cast suspicion on another. It is also necessary before drawing the inference of the accused's guilty from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference".

That warning was approved by the Court of Appeal in **Kisumu Criminal Appeal No. 134 of 2004 Charles Wanyonyi & 3 Others Vs Republic** (unreported)

16. The evidence of PW1, PW2 and PW3 is that A1 and the Deceased quarreled often and had a strained relationship. Even their children (PW5) and the 2nd Accused were aware of these marital disagreements. Although in her Defence, 1st Accused explained the disagreement to be the normal expected between a Husband and Wife, there was evidence that the two did not share a bed and in fact slept in different houses. It would seem that the relationship between the two was more strained than the 1st Accused was willing to admit.
17. There was also evidence that there was some passage of time from the time the Deceased was attacked upto the time the 1st Accused went to the home of PW1 to seek help. The Prosecution witnesses who visited the scene soon thereafter saw that the blood on the floor of the room and on the body of the Deceased had dried up. The 1st Accused herself stated in her testimony that the blood on the floor had dried up. The State Counsel asked this Court to believe the evidence of PW3 that from the state of the blood the Deceased would have been attacked about 4 hours before the Prosecution witnesses got to the scene. Of course, this Court cannot give much regard to the estimate of time given by PW3 because it had no scientific backing. And the Prosecution did lead any scientific evidence that could assist the Court reach such a decision. That said, the Court is willing to accept that some time had passed between the time of attack and when PW1 was called to assist. The Defence in fact conceded to this.
18. There was further evidence that after the said attack the 1st Accused chose to first seek help from PW1 notwithstanding the presence of her adult son (the 2nd Accused) in a house that was closer to her. Both Accused persons conceded that the cottage of the 2nd Accused was closer to main house and kitchen of the 2nd Accused than they were to the house of PW1.
19. There was also evidence by PW6 that while the Deceased was under attack he called out the name of the 2nd Accused. The witness stated that he heard the Deceased screaming and ask in Kiteso, "why are you beating me" and that while he screamed for help he mentioned the name Jared. The witness was later to change his testimony and state that the Deceased called out the name "Iteba". This evidence was not supported by PW5 who also says she heard the commotion and her father scream while under attack. On her part, PW5 did not hear the Deceased call out or mention any name.
20. There was evidence by some Prosecution witnesses (PW2 and PW3) that a sweater belonging to the 1st Accused with blood stains was recovered by the police from the scene. The Prosecution saw all these as pointing to the culpability of both Accused persons. How did the Defence respond?
21. In her Defence, the 1st Accused explained that the attack on the Deceased took about 30 minutes. At that time she was under the guard of two of the assailants in a separate house. That for that reason she could not raise an alarm. That after she saw the other assailants leave the house of the Deceased she still could not leave her house immediately in the fear that they were still within the compound. This is what the witness told Court

"They stayed in the room where the Deceased slept for about 30 minutes after that they called out to those standing guard and asked that they leave. I could not scream as I was under guard. Because of fear, I remained in the hut for about 30 minutes."

22. That is the Defence explanation for the delay in the 1st Accused raising an alarm. If the 1st Accused is to be believed the delay was about 1(one) hour after the attack. The Prosecution has argued that from the state of the blood, the delay was much longer. But the Prosecution did not lay any scientific evidence or opinion that could discount the Defence theory. The Prosecution relied

on the opinion by a lay person.

23. The explanation given by the 1st accused was made in a sworn statement to Court. The witness was cross-examined on her explanation and on her testimony generally. But from the cross-examination and the other evidence, the Prosecution was unable to debunk the Defence explanation as untruth, unreasonable or preposterous.
24. As to why the 1st Accused never sought the help of the 2nd Accused, she said

“Because of fear, I did not go to the back where the house of Jared stood”

The Prosecution put nothing before this court that would disprove that explanation as unreasonable or improbable.

25. As to the blood stained sweater, this was not produced before Court and no explanation was given for this failure. In addition, there was no evidence that the blood on the sweater was that of the Deceased
26. The evidence against the 2nd Accused is equally tenuous. Firstly, PW5 and PW6 were both woken up by the invasion into their room. Both say they then heard the Deceased scream while under attack. Both witnesses were in the same room and place. It would have been expected, short of an explanation that one of them is hard on hearing or was under some other disability, that both would have heard the Deceased call out the name Jared or Iteba. But the Prosecution case is that only PW6 heard the Deceased mention the name of the 2nd Accused. That aside PW6 was not consistent as to which name the Deceased called out. Was it Jared or Iteba? The 2nd Accused in his Defence said the name Iteba is a clan name and that it could not be safely concluded that by calling out Iteba then the Deceased was necessarily referring to the 2nd Accused. The Prosecution on the other hand was unable to prove that the Iteba referred to by the Deceased was the 2nd Accused and no other person.
27. The evidence is in my view insufficient for the Court to use a basis for a conviction. In reaching this decision, the Court has given regard to the evidence of the 2nd Accused. He told Court that after eating supper he drank alcohol and slept. At about 4.00 a.m. he was woken up from his sleep by PW4. PW4's testimony was that the 2nd Accused appeared sleepy, confused and drunk. The evidence of PW4 makes the evidence of the 2nd Accused believable.
28. The result is that I am unable to convict either of the Accused persons. Both are hereby set free forthwith unless held for some lawful reason.

Dated, signed and delivered at Busia this 17th day of November 2015

F. TUIYOTT

J U D G E

In the presence of :-

Oile – C/Assistant

Obiri - for State

Onsongo - for Accused Persons.

