



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KITALE.

CRIMINAL CASE NO 25 OF 2012.

REPUBLIC ::: PROSECUTOR.

VERSUS

EVANS LOLEM NAPAS ALIAS HONDA ::: ACCUSED.

J U D G M E N T.

The two accused, **Evans Lolem Napas alias Honda (accused one)** and **Boniface Ekai (accused two)**, are charged with murder contrary to section 203 read with section 204 of the penal code, in that on the 1st July, 2012 at Turkwel location Loima District, Turkana County, jointly murdered James Nang'rot Ewoton.

The case for the prosecution was that on the material date, the deceased was attending a funeral ceremony at a homestead in their village. The ceremony was attended by many people including the two accused. In the process, a disagreement arose between the deceased's brother, **Moses Ekale Ewoton (PW1)**, and the second accused over a loin cloth. This led to the deceased being hit on the abdomen with a stone and suffering serious injury. He was taken to hospital where he died while undergoing treatment.

Moses (PW1) said that the deceased was hit with a stone by the second accused who appeared drunk and was in the company of the first accused.

Another brother to the deceased, **Wilson Ekai (PW2)**, was also at the ceremony. He indicated that the second accused and the deceased quarrelled and a fight broke out leading to the second accused hitting the deceased with a stone on the chest and the first accused kicking the deceased on the abdomen.

The mother to the deceased, **Anna Karebir (PW3)**, proceeded to the scene after the incident and found the deceased having been injured. He told her that he was hit with a stone by the second accused. She kept the stone as an exhibit and took the deceased to hospital but he died while undergoing treatment.

CIP Evans Omuga (PW4), investigated the case and later caused the two accused to be charged with the present offence. He indicated that the two were drunk during the incident and that the deceased died while undergoing treatment. He arranged for a post mortem examination and produced in court the necessary report (P. Exh. 1) showing that the deceased died from volemic shock as a result of hemorrhage secondary to splenic rupture.

Both accused denied the offence in their respective defence.

The first accused confirmed that he attended the material funeral ceremony where a commotion arose and in the process he engaged in a fight after being attacked by a certain young man. He was however, on the following day, informed that people were looking for him with the intention of assaulting him. He went

to the police station but was instead arrested and charged with the present offence.

The second accused also confirmed that he attended the funeral ceremony and that a commotion occurred in the process. He was held and beaten up by a certain person thereby causing the first accused to come to his rescue while being engaged in a fight with others.

Thereafter, he (accused two) went home but was later arrested while in Kitale and charged with the present offence.

From all the foregoing facts availed by both the prosecution and the defence, it is clearly evident that the deceased suffered injuries which later proved fatal after being engaged in a brawl or fight with the two accuseds and others at a funeral ceremony. It is also evident that in the course of the brawl or fight, the deceased was assaulted by the two accused but it was not made clear by the prosecution who between the two of them inflicted the fatal injury upon the deceased.

The post mortem report indicates that the deceased suffered splenic rupture thereby indicating that the fatal injury was in the abdominal area.

Moss (PW1) implicated the second accused saying that it was him who hit the deceased with a stone on the abdomen.

The dying declaration made by the deceased to his mother (PW3) also alluded to the second accused hitting the deceased with a stone.

However, Wilson (PW2), implicated both the first and second accused. He said that the deceased was kicked on the abdomen by the first accused and was also hit with a stone on the chest by the second accused.

Be that as it may, there is no doubt that the two accused acted in concert when they assaulted the deceased during the material brawl or fight. It mattered not which one of them inflicted the "killer" injury. They were together at the time. They were protective of each other. Therefore, they had a common intention to assault the deceased and in the process they used excessive force which resulted in fatal injury. The two must therefore be held criminally liable for the consequences of their unlawful act. However, it is evident that the demise of the deceased was unfortunate as it has not been proved by the prosecution that the two accused acted with the intention to kill him. Consequently, the charge established against them is that of manslaughter contrary to section 202 (1) of the penal code. They are accordingly convicted.

[Delivered and signed this 21st day of January, 2014.]

J.R. KARANJA.

JUDGE.