



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

Coram: Fred.A. Ochieng J

CRIMINAL CASE NO. 11 OF 2006

REPUBLIC.....PROSECUTOR

• VERSUS –

FLORENCE NAMALWA MASASI.....1ST ACCUSED

PETER MASASI MUKHAWANA.....2ND ACCUSED

MUSA MASASI.....3RD ACCUSED

JUDGMENT

1. **FLORENCE NAMALWA MASASI, PETER MASASI MUKHAWANA and MUSA MASASI** were all charged with the offence of **Murder, contrary to Section 203 as read with Section 204 of the Penal Code.**
2. Pursuant to the Information, the three accused persons, jointly with other persons who were not before court, murdered **DENNIS KHAEMBA** on 24th December 2005. The incident is said to have taken place at Vumilia “C” Farm, which is situated in Uasin Gishu District of the Rift Valley Province.
3. Eight witnesses testified for the prosecution. After the close of the prosecution case, the court acquitted the 1st accused, Florence Namalwa Masasi. However, the other two accused persons were put to their defences.
4. Apart from their own defences, the two accused persons called three other witnesses.
5. I will now proceed to evaluate all the evidence on record and determine whether or not the case against the accused persons had been proved beyond any reasonable doubt.
6. **PW1, JOSEPH WANYAMA SIRENGO** is a neighbour to the 3 accused persons.
7. The said accused persons are all relatives. The 2nd Accused, Peter Masasi Mukhwana, is the father of both Florence Namalwa Masasi and Musa Masasi.
8. On 24th December 2005, PW1 was at his house, when he heard screams at about 3.00 a.m. He opened his door and went outside.
9. PW1 testified that he saw four people, being the deceased (Dennis); Peter Masasi (2nd accused); Musa Masasi (3rd Accused); and Mark. Those four people were outside the home of Peter.
10. According to PW1, Peter was holding a lantern, whilst the other 3 persons beat up the deceased. They used sticks to beat him up.
11. However, PW1 did not see Florence (the 1st Accused) at the scene.
12. After seeing what was going on, PW1 went to call his neighbour, JOHN WAMALWA MUSAMBAYI (PW2). Although PW1 told PW2 about what has happened, they did not return to

- the scene. Instead, he went back to his house whilst PW2 also returned to his house.
13. It was the evidence of PW1 that on the following day, he got GODFREY NYONGESA to take the deceased to the hospital.
 14. During cross-examination PW1 said that on the material night there was no moonlight. He also added that on that night there was no “*kesha*” in that residential area. He emphasized that if there had been a “*kesha*”, he would have known about it.
 15. As regards the material night, PW1 said that he was not wearing his spectacles when he left his house.
 16. PW1 did not know whether or not the deceased was drunk at the time when he met his death.
 17. **PW2, JOHN WAMALWA MUSAMBAYI**, is a neighbour to PW1. He said that PW1 woke him up on the night of 24th December 2005, at about 3.00 a.m.
 18. PW2 testified that Peter (2nd accused) was holding a lantern whilst others beat up the deceased. However, PW1 did not give to PW2 the names of those “*others*”.
 19. PW2 confirmed that he did not go near the scene, and that he did not witness the incident.
 20. When PW2 was being cross-examined he said that on the material night, there was a “*night religious meeting*”, which is normally called a “*kesha*”. Therefore, because PW1 was a neighbour to him, PW2 said that PW1 should have known about the said “*kesha*”.
 21. PW2 also said that the deceased did not live together with the 1st Accused at her house which was located within the compound of Peter (the 2nd accused). He explained that the deceased only used to visit the 1st accused, Florence.
 22. That testimony is the very opposite of what PW1 had told the court, as that witness had emphasized that the deceased and Florence lived together.
 23. PW2 also said that;

“The deceased complained that the 2nd accused did not like him living with the 1st accused. The deceased just used to visit the 1st accused. The 1st accused had her own house”.

24. As PW2 knew that the deceased did not live with the 1st accused. I therefore understood PW2 to have been saying that the complaint which the deceased had, was factually incorrect.
25. **PW3, ANNA NAFULA KHAEMBA**, is the mother to ERASTUS JUMA. She testified that Erastus was a cousin to the deceased, as she (PW3) is a sister to the father of the deceased.
26. On the night of 24th December 2005 Erastus and the deceased (Dennis) arrived at the home of PW3 at about 11.00 p.m. Both Erastus and Dennis were drunk.
27. After PW3 had cooked for the 2 young men, they left her house, saying that they were going to a “*kesha*”. But after 30 minutes, the 2 returned.
28. This time, the young men took 2 blankets and 2 bed-sheets, which they were going to use at the house of their uncle, Richard Wafula.
29. Although the young men were scheduled to stay at the house of Richard Wafula for the night, Erastus returned home, alone. Erastus told his mother (PW3) that Dennis had gone to his house.
30. On the next day, PW3 learnt that Dennis was dead. However, she did not know what caused his death.
31. When PW3 testified, she did not know the whereabouts of her son, Erastus. She said that Erastus had been away for three (3) years. Erastus had left his wife and his 2 children at home. But the wife had eventually left that home.
32. During cross-examination, Anna candidly testified as follows;

“I have heard that the deceased fought with Erastus. After Erastus and the deceased left with beddings I do not know what happened. I do not know whether the accused was involved in the death of the deceased”.

33. **PW4, EZEKIEL KIPSANG BIWOTT**, saw the body of Dennis in the water. But he had no idea how the deceased met his death.
34. In his own assessment, the water could not have caused the death of Dennis.
35. But when cross-examined, PW4 said that it was possible for a person who was drunk to drown in water.

36.**PW5, DISMAS SIMIYU WEKESA**, is the person who phoned the chief, after seeing the body of Dennis in the water.

37.PW5 also phoned the OCS of Soy Police Station.

38.The evidence of PW5 was as follows;

“I also remember the 25/12/2005. The 1st accused said people fought at her house. She mentioned her father (the 2nd accused) and Erastus who is the 1st accused in-law. As Florence tried to separate them she was hurt on the right hand. She said her father and her brother separated those fighting”.

39.PW5 added the following;

“The 1st accused stated that the 2nd accused had only tried to separate Erastus and the deceased”.

40.Notwithstanding that testimony, PW5 made it clear that he did not know how the deceased met his death.

41.An interesting aspect of the evidence tendered by Dismas (PW5) was in the following words;

“I knew Dennis. He used to take alcohol. He could take alcohol the whole day. He used to use the same well he was found in. At the scene, we found 2 containers. They were alleged to be his”.

42.**PW6, MARK NYONGESA KENGARA**, is a grandfather to Dennis. He identified the body of the deceased, for the purposes of the post-mortem.

43.**PW7, PC EDWARD TUNGE** was the Investigating Officer, together with Inspector Waswa who was then the OCS Soy Police Station.

44.According to PW7, it was Sirengo (PW1) who told the police officers that he witnessed the accused assaulting the deceased. From the information received by the police, they arrested the 3 accused persons.

45.Of course that testimony is curious, considering that PW1 testified that he never saw the 1st accused at the scene. Therefore, the information from PW1 cannot have been the foundation upon which the police made their decision to arrest and charge Florence (1st Accused).

46.P.C. Edward Tunge also said that;

“The 1st accused was screaming, calling people to go to assist her, as the deceased was beating her. Accused 2 responded to the screams. He held a lamp. He found other people beating the deceased. He gave orders that the deceased be beaten thoroughly. The 3rd accused beat the deceased with an iron bar. We did not recover the bar. The deceased was assaulted by about 6 people. Others are at large”.

47.If the deceased was beating up the 1st accused, that meant that the said 1st accused was at the scene. Yet the only alleged eye-witness, Sirengo, said that Florence (the 1st accused) was not at the scene.

48.Sirengo said that he had only seen 3 people, with the deceased. Those 3 included Peter, Musa and Mark. Therefore, it is baffling that the Investigating Officer concluded that there were about six (6) people beating the deceased.

49.Again, Sirengo saw those who beat up the deceased, using sticks. Therefore, that begs the question about where the Investigating Officer obtained information concerning the use of an iron bar.

50.**PW8, DR. JOSEPH EMBENZI**, produced the Post-mortem Report which had been prepared by Ms. Koshoro. The said Ms. Koshoro had conducted the post-mortem examination on the body of the deceased.

51.She concluded that the cause of death was;

“Blunt head injury with fracture of the skull, overdilated lungs. Besides head injury there were

signs of drowning”.

52. Dr. Embenzi explained that the major cause of death was drowning, as the other injuries had occurred when the deceased was alive.
53. After the doctor testified, the prosecution closed its case. Thereafter, the court acquitted the 1st Accused. Thus, it was only the 2nd and 3rd Accused who were put to their defences.
54. **PETER MASASI MUKHWANA (DW1)** testified on oath. He said that on the night of 24th December 2005 he was at his house, sleeping. At about midnight DW1 heard noises outside his house. However, he was not too sure about the source of the noise as there were many people celebrating Christmas loudly.
55. After about 30 minutes Peter heard a knock on his door. He opened and found the children of his daughter Florence. The 2 children told him that their mother had sent them to call him, as there were some people fighting at her house.
56. Peter got a torch and then accompanied the children to their house. He found **ERASTUS** and **DENNIS**, together with Florence.
57. Dennis told Peter that he had bought a radio from his cousin Erastus. But Erastus had demanded the return of his radio, leading to the fight.
58. Peter persuaded Dennis and Erastus to go to their respective homes, so that their dispute could be resolved on the next day.
59. Both young men returned to Peter's house on the next day, at about 8.00 a.m. It is at that time when Peter noticed an injury near the right ear of Dennis.
60. He offered his bicycle to Erastus, who used it to take Dennis to hospital.
61. Peter told Dennis and Erastus that when they were returning from the hospital they should invite the father of Dennis to join them at Peter's house.
62. Peter and Constant (who is the father of Dennis) resolved the dispute. They persuaded Dennis to return the radio to Erastus, so that Erastus could refund the purchase price.
63. Peter testified that he was surprised to learn, on the next day (26th December 2005) that Dennis was found dead.
64. Peter also said that Erastus was arrested by the police, but he was later released in unclear circumstances.
65. **PETER MASASI (DW2)** also gave a sworn defence. He said that on the material night, he came out of his house after hearing noises. He met his father, Peter, who had just come back from the house of Florence. Peter told his son, Musa, that it was Dennis and Erastus who had fought.
66. As Peter had resolved the dispute, Musa got back into his house and slept.
67. Musa also witnessed a meeting involving his father (Peter) with Dennis, Erastus and the father of Dennis. Musa did not participate in the meeting. He only observed it from a distance, as he continued watering his vegetables in the shamba.
68. Musa denied any involvement in the death of Dennis.
69. **DW3, SILAS WANYONYI**, testified that he saw Dennis limping on 25th December 2005. When he asked Dennis what had happened, Dennis said that his brother is the one who had beaten him.
70. According to Dennis, he had disagreed with Erastus, leading to the fight between them.
71. DW3 accompanied Dennis to the house of Peter, where he hoped that Dennis could be given some medical treatment. Peter was a clinical officer. But when Peter assessed Dennis, he advised him to seek medical treatment at the hospital.
72. Peter even offered his bicycle to Erastus, which was used to take Dennis to hospital.
73. During cross-examination, DW2 said that Dennis did not tell him that either Peter or Musa beat him. DW3 emphasized that Dennis only said that it is Erastus who beat him.
74. **FLORENCE NAMALWA MASASI (DW4)** was originally the 1st Accused. She said that Dennis used to be her friend. However, they did not live together.
75. DW4 testified that both Erastus and Dennis were at her house on the night of 24th December 2005. Both men were drunk, by the time they arrived, but they continued drinking more alcohol.
76. Florence testified that Erastus started fighting with Dennis after Erastus demanded that Dennis returns the radio he had bought from Erastus.
77. Florence sent her two daughters to call their grandfather, Peter. When Peter arrived, the fight had ended, and Peter advised the 2 young men to go home.

78. Florence said that her father was not involved in the fight between Dennis and Erastus. She also said that Musa did not even go to her house, where the fight took place.
79. **DW5, RUTH NELIMA MASASI**, is the wife to Peter (the 2nd Accused). She was home with her husband (Peter) when the 2 daughters of Florence came and called their grandfather.
80. Peter left his house holding a torch. Ruth followed Peter towards their daughter's house. However, neither of them entered the house where the fight took place.
81. After Ruth testified, the accused persons closed their defences.
82. An analysis of the evidence on record reveals that there was only one alleged eye-witness to the incident. That person is **JOSEPH SIRENGO (PW1)**. He was about 20 metres away from the scene of the fight, when the said fight took place. The time was said to be 3.00 a.m, on a dark night.
83. SIRENGO used to wear spectacles, but he did not put them on before leaving his house at that time.
84. As there was no moonlight, it is not clear what was the source of the light which enabled Sirengo to see clearly, the persons who were involved in the fight. Therefore, the court cannot be sure whether Sirengo actually saw what he alleges happened before his very eyes.
85. Florence was not at the scene, according to Sirengo. And it would have been convenient for Florence to go along with that story, to ensure that she was completely exonerated from any role in the death of Dennis. But Florence said that she was at the scene when Dennis fought with Erastus. That evidence of Florence leads me to further doubt the accuracy of the evidence tendered by Sirengo.
86. The doctor who conducted the post-mortem examination concluded that the cause of death was drowning. The deceased died on 26th December 2005.
87. Meanwhile, the physical attack on the deceased took place at about 3.00 a.m on 25th December 2005.
88. Indeed, both PW1 and PW2 put the date and time as 3.00 a.m on 24th December 2005.
89. After being attacked, Dennis first went to his house. Thereafter, he went to the hospital. Although the deceased was injured, he was walking without any help. However, he was limping and was in pain.
90. The prosecution has suggested that Dennis drowned because of the effect that he had from the beatings. But there was proof of the nexus between the beatings and the drowning.
91. As the deceased used to drink almost always, the prosecution conceded that there was a possibility that he drowned because he was drunk.
92. It is to be noted that the deceased had 2 jerry-cans with him, at the watering point. The said watering point is the very same one which Dennis used to draw water from. Therefore, it is possible that he fell into the water and drowned because he was drunk.
93. In the result, I find no basis in law or in fact for holding any of the accused persons responsible for the death of Dennis.
94. Accordingly, I find the accused persons as being Not Guilty. They are thus acquitted. The case against them is dismissed.
95. The prosecution may well consider pursuing ERASTUS JUMA, who is still at large. It would appear that he was placed at the very centre of the incident which gave rise to the death of Dennis.
96. For now, I order that the accused persons be set at liberty forthwith unless they are, or either of them is, otherwise lawfully held.
97. Finally, I thank Mr. Job Mulati, learned Senior Prosecution Counsel, and Mr. Chepkwony advocate, for their respective roles during the trial. Their industry provided the much needed support to the court in the determination of the case.

DATED, SIGNED and DELIVERED at **ELDORET** this 25th day of July 2014.

FRED A. OCHIENG

JUDGE

Judgment read in open court in the presence of

Miss. Kiptanui for Chepkwony

N/a for the State

All accused are present`