



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

Coram: F.A. Ochieng J

CRIMINAL CASE NO. 100 OF 2003

REPUBLIC.....APPLICANT

- VERSUS -

JULIUS MBOYA BWETETE.....RESPONDENT

JUDGMENT

1. The accused person, **JULIUS MBOYA BWETETE**, was charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence were given by the prosecution, as follows;

*“**JULIUS MBOYA BWETETE** between the 6th and 7th day of July 2001 at Mwamba Village, Mwamba Sub-Location, Lumakanda Location in Lugari District within Western Province murdered **VENLEY M'MBONE**”.*

2. The trial first started before Dulu Ag J. on 26th April 2005.
3. At that stage in the criminal justice system in Kenya, murder trials were conducted with the help of Assessors.
4. Regrettably, the Assessors became difficult to get to attend court, and the learned trial Judge ordered that the trial should start afresh, with the help of other Assessors.
5. After some considerable delay, the trial started *de novo* before Kaburu Bauni J, on 19th April 2007.
6. After the learned Judge had received the evidence from six witnesses, he passed away.
7. Thereafter, the case was placed before Mwilu J. (as she then was). The learned Judge directed that the further hearing of the case would proceed from the stage where Kaburu Bauni J. had left it.
8. The learned Judge gave due consideration to the evidence adduced by the prosecution and came to the conclusion that the accused person had a case to answer.
9. As if the case was jinxed, Mwilu J. was transferred before the learned Judge could receive the evidence from the accused person.
10. Once again, the delay in the hearing was directly attributable to the difficulty in procuring the attendance of Assessors.
11. Eventually, after the law was amended, so that persons charged with the offence of murder could be tried by a Judge alone (without any assessors), the trial started *de novo* on 5th October 2011, before Karanja J.
12. By 5th December 2011, the learned Judge had heard evidence from seven witnesses.
13. Regrettably, the said Judge was transferred from Eldoret before he could conclude the case.

14. Eventually, the last prosecution witness testified on 24th March 2014. Thereafter, the court delivered its Ruling on 30th April 2014, declaring that the accused had a case to answer.
15. The Defence case was received on 21st May 2014.
16. I am now ready to deliver the Judgment. But before I do so, I wish to make it clear that before writing the Judgment, I was transferred from Eldoret to Nairobi. However, it was imperative that I finalize this case.
17. A total of eight (8) witnesses testified for the prosecution. Thereafter, the accused person gave an unsworn defence. He did not call any other witness.
18. **PW1, PHINORAH KABEE MUJIVANE**, is the mother of the victim, **VENLEY M'MBONE**.
19. On the material day, PW1 sent Venley to the home of their neighbour **FRANCIS ADAGI (PW3)**. Venley was sent to go and buy vegetables from the shamba belonging to PW3. That was not the first time for Venley to be sent to do so. However, on this occasion, she did not return home.
20. After PW1 had waited for a while, she sent her son **FELIX ABASI SUAIRU (PW6)** to go and look for Venley at the home of Francis.
21. Felix went to look for Venley but he did not find anybody at the home of Francis. When he reported that fact to his mother, she decided to go personally, to look for Venley.
22. When Venley's mother reached the home of Francis, she found the accused person, **JULIUS MBOYA BWETETE**.
23. PW1 explained that JULIUS was well known to her as he is the person who used to work at the home of her neighbour Francis. According to PW1, Francis used to work at Lumakanda, everyday.
24. Whenever Francis had gone to work, it is Julius who remained at that home.
25. PW1 asked Julius if he had seen Venley. He told her that Venley had arrived at the home of Francis, with Kshs. 50/-, and she said that she wanted to buy vegetables worth Kshs. 15/-.
26. Julius told PW1 that because he was busy looking after the cows, he directed Venley to go into the garden where she would fetch the vegetables she wanted to buy.
27. At that stage Julius went with Venley's mother into the garden, but they did not find Venley.
28. When Julius and Venley's mother got back to the home of Francis, they found that Francis had arrived back from his place of work.
29. Julius led Francis and the mother of Venley back to the shamba, where there was only maize. There were no vegetables on that shamba. By then, darkness had started setting in, and Julius advised Venley's mother to return to her home.
30. When PW1 reached her home, she found that Venley had still not re-surfaced. Later that evening, Venley's father got back home and PW1 told him about what had happened.
31. Venley's father, **HARRISON SUAIRO INDAZI (PW2)** went with his wife (PW1) to report the matter to the Village Elder, **PATRICK BARASA (PW7)**.
32. The Village Elder gave to Venley's father a note which they took to the Turbo Police Station when he and his wife went to make a report at the police station.
33. The time was after midnight when they reported at the police station. The police told the parents of the girl to return to the police station in the morning.
34. On the next morning, Venley's parents went to the Village Elder (PW7), with a view to asking him to accompany them when they would be returning to the police station, in the company of the accused.
35. Patrick Barasa (PW7) contacted another Village Elder named **RASHID LUSICHI OMAR (PW4)** and asked him to accompany him in the task at hand.
36. The two village elders and the parents of Venleys went to the home of Francis, where the elders questioned the accused about the missing girl, Venley.
37. After questioning the accused, the two Village Elders were not convinced by the story he gave them. Therefore, they told him to accompany them to the police station.
38. Both the Village Elders, as well as the parents of Venley testified that the accused agreed to go with them to the police station.
39. However, after they had all walked a short distance, the accused told them that he needed to return to his house to get his shoes. He went back to his house as the others waited for him. But he then did not rejoin them.
40. Instead, he climbed through the roof of his house and started running away. It took the pursuit of

- neighbours to catch-up with the accused, and thereafter escort him to the police station.
41. After the report had been made at the police station, in the company of the accused, he led the police back to his employer's property, where he worked. A search at the place where Venley was last seen, yielded nothing.
 42. Venley's father corroborated the evidence of his wife.
 43. He added that when the accused was apprehended, after he had tried to run away, he told them that he was afraid that he would be jailed.
 44. Venley's father was with the two police officers who escorted the accused back to the scene. He was present when the search yielded nothing positive.
 45. When the police officers were walking with the accused and Venley's father back towards the police station, they suddenly heard screams from some villagers who had been assisting in the search for Venley.
 46. Upon going to the source of the screams, the police officers, Venley's father and the accused became aware that the body of Venley had been discovered in a bush.
 47. Francis, who is the employer of the accused confirmed that the bush where the body was recovered from, was within his property.
 48. Francis also said that the accused used to be his only employee. Therefore, it was only the accused person who remained at the home of Francis whenever Francis and his wife went off to work.
 49. **PW5, PRISCILLAH INGASIANI**, is a neighbour to the family of Venley. She was in the search party that was looking Venley.
 50. PW5 was the first person to sight Venley's body.
 51. **PW6, FELIX ABASI SUAIRU**, is a brother to Venley. He confirmed having been sent by his mother to go and look for Venley at the home of Francis.
 52. The rest of his testimony corroborated the evidence of his mother.
 53. **PW7, PATRICK BARAZA ODONGO**, was a Village Elder. He corroborated the evidence of Venley's parents concerning the search for Venley; the attempt by the accused to run away; and the eventual recovery of Venley's body.
 54. **PW8, DR. INWANI NICHOLAS** produced the post-mortem report on the deceased. He testified that the post-mortem examination was conducted on 11th July 2001.
 55. The person who conducted the examination was DR. WANJALA, who was working at the Webuye District Hospital, at the material time.
 56. The reason why **Dr. INWANI** produced the Report of Dr. Wanjala was that Dr. Inwani was working at the Webuye District Hospital at the time when he was called as a witness for the prosecution case. Dr. Inwani explained to the court that he had come to court on behalf of the hospital.
 57. The post-mortem report indicated that Venley's death was caused by Asphyxia with severe bleeding, leading to acute cardio-respiratory failure.
 58. The body of the deceased had extensive bruises on the facial region, with other bruises around the ears and also other bruises just below the arm-pit.
 59. The body also had injuries around the genital area. Specifically, there were perineal tears and bruises on the peri-labial area, with blood-stains.
 60. Finally, there was a lenial bruise on the neck.
 61. During cross-examination, Dr. Inwani said that he could not tell what exactly caused the injuries on the deceased.
 62. After the accused was put to his defence, he denied committing the offence.
 63. The accused insisted that he was completely innocent. According to him, if he had been complicit in the death of Venley, he could easily have escaped.
 64. He recalled that even after the girl was found missing, he joined in the search for her, and then spent the next night at his house. At that time, there would have been nothing to stop him from escaping, if he had wished to do so. The fact that he remained at home meant, in his view, that he was innocent.
 65. Having given due consideration to the evidence on record I make the following findings;

1. **VENLEY M'MBONE** is dead.

2. *None of the persons who testified in court saw the person or persons who committed the offence.*
3. *Nobody saw the accused person committing the offence.*
4. *All the evidence on record is of a circumstantial kind.*
5. *There was no evidence of the weapons or instruments which may have been used to kill the deceased.*
6. *The doctor who produced the post- mortem report had never worked with the doctor who had conducted the post-mortem examination on the body of the deceased. The witness was still in class 3 in primary school, by the time the deceased died. He therefore had no way of proving that the post- mortem report was prepared by Dr. Wanjala.*
7. *The cause of death was thus not proved by the prosecution.*
8. *There was no evidence that pointed exclusively at the accused as the person who could have committed the offence.*
9. *The evidence did not establish the nexus between the accused and the offence. At most, the evidence pointed at strong suspicion against the accused person.*
10. *Suspicion, however strong it may be cannot ever be a substitute for evidence. And for an accused person to be convicted, the prosecution must prove the case against him beyond any reasonable doubt.*
11. *In this case, the prosecution did not discharge the onus of proof. Accordingly, there is no basis upon which a conviction of the accused could be founded.*
12. *I therefore dismiss the case against the accused. I declare him "Not Guilty".*
13. *I direct that the accused be set at liberty forthwith unless he is otherwise lawfully held.*

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

Miyienda for Okara for Accused

Ms. Oduol for State.