



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA

AT KITALE.

CRIMINAL CASE NO. 33 OF 2010.

REPUBLIC.....PROSECUTOR.

VERSUS

CALEB LIHASI WANYAMA.....ACCUSED.

J U D G M E N T.

The accused, **Caleb Lihasi Wanyama**, is charged with murder, contrary to section 203 read with section 204 of the penal code, in that on the night of 26th May, 2010, at Meteitei village Kwanza district, murdered Felix Shemi Wanyama.

The case for the prosecution was that the accused and the deceased were brothers and sons of **Donald Wanyama (PW1)**. They quarreled and fought on the material date at 10.30 p.m. while intoxicated. Their brother, **Chrispinus Wanyama (PW2)**, separated them but the quarrel persisted to the point that Caleb was overcome by sleep and slept.

He was awakened by wife to the deceased, **Hellen Nasimiyu Wanyonyi (PW5)**, and informed that the deceased was dead. Hellen indicated that the quarrel was over maize and that during the fight, the deceased was hit with a stone by the accused. She only saw the stone after the incident which she did not witness but noted that the deceased was in a state of injury when he returned to their house at about midnight after leaving the house to go and restrain the accused who had banged their house door. She also noted that the deceased was in pain and could not sleep. He eventually passed away and the matter was reported to the police.

Cpl. Jairus Mutoro (PW3), of Kwanza police post received the initial report and proceeded to the scene. He found the body of the deceased but did not see injuries. He removed the body to the mortuary and arrested the accused.

Dr. Blastus Kakundi (PW4) carried out the post mortem and compiled a report showing that the cause of death was possibly blunt severe head injury and possibly intestinal obstruction.

P.C. Caleb Biator (PW6), investigated the case and in the process collected the suspected murder weapon (i.e. a stone). He did not notice any visible injury on the body of the deceased but charged the accused on completion of investigations.

The accused denied the offence. His defence was that he returned home from a drinking spree and found the deceased shouting in his house while with his wife. He (deceased) complained of having not been fed by his wife and was very angry. He picked a quarrel with him (accused) and they fought. The deceased's

wife separated them and he (accused) went to his house. He was alerted by the deceased's wife on the following day that the deceased was dead. He saw the body of the deceased. It had no visible injury.

What killed him was unknown but his wife blamed him (accused) for the death. He was later arrested and charged.

From all the foregoing evidence, it is apparent that the deceased and the accused quarreled and fought and were separated. The fight appears not to have been witnessed by anybody save Chrispinus (PW2).

He did not talk of any weapon having been used and therefore the introduction of a stone (P. Exh. 1) as the murder weapon was strange.

The wife of the deceased (PW5) referred to the stone and said that it was used by the accused to hit the deceased. However, she did not witness the fight and only saw the stone after the incident. Therefore, her evidence with regard to the fight and the stone was not reliable. She noted that the deceased was in pain and could not sleep in the night but was not in a position to indicate the cause of the pain. She was also unable to say what actually killed the deceased.

Chrispinus (PW2), indicated that the accused and the deceased fought and he separated them only once. He did not say that the fight continued at a later stage but said that the quarrel continued upto the time he fell asleep. He implied that the two combatants were well when he fell asleep.

None of the prosecution witnesses could tell with certainty what killed the deceased.

The deceased's wife suspected that the deceased was fatally injured by the accused when they fought. The post mortem report by the doctor (PW4) was not conclusive with regard to the cause of death. On the one hand, the doctor opined that the deceased died from severe head injury yet none of the witnesses who saw the body of the deceased after death said that it had visible injuries. On the other hand, the doctor opined that the deceased died from intestinal obstructions but did not say that it was related to the fight between the deceased and the accused.

Even if the deceased suffered severe head injury, there was no evidence to show that it was related to the material fight.

It would therefore follow that the charge against the accused remained unproven by evidence adduced by the prosecution. It would also follow that the arraignment of the accused was hurried up without proper investigations being carried out.

Consequently, the accused must and is hereby found not guilty as charged and is acquitted accordingly.

[Delivered and signed this 22nd day of July, 2014.]

J.R. KARANJA.

JUDGE.