

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL CASE NO. 21 OF 2007

REPUBLIC.....PROSECUTOR

V E R S U S

CHARLES CHITECHI WANGA KASAMANI.....ACCUSED

J U D G M E N T

The accused with charged with the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code**. The particulars of the offence are that the accused *on the 16.12.2005 at Mumias Nucleus Estate Block G 12 in Khalaba sub-location within Butere-Mumias District of the Western Province murdered ALI CHEBII EKAKA. Eleven witnesses testified for the prosecution.*

PW1 RAMADHAN WATAKO testified that the deceased was his brother. On the 28.10.2005 the deceased went home and informed them that the accused had robbed him of his bicycle. They went to the accused's house but did not get him. The accused started sending threats to the deceased's family. The matter was reported to the village elder who advised them to report the matter at Booker police post. The issue remained pending. On the 15.12.2005 in the morning one **JOYCE (PW5)** went and informed them that the deceased had been killed near sugarcane plantation. He went to the scene and saw the deceased's body with several injuries. His hand had been chopped off. The police went to the scene and collected the body. **PW2 OMARI ONYANGO's** evidence is similar to that of PW1. He is related to the deceased. He testified that on the 26.10.2005 the deceased went home and told them that the accused had robbed him of his bicycle at Nuclear. The matter was reported to the police at Mumias. The accused ran away from home. On 15.12.2005 they got information that the deceased had been killed and they went to see the body at the scene.

PW3 HASSAN SHIKUKA NGERESA is the village elder. He testified that on the 28.10.2005 the deceased reported to him that the accused had robbed him of his bicycle. He advised the deceased to report the matter to the police. He looked for the accused but he had disappeared from home. On the 16.12.2005 he got information that the deceased had been killed. He went to the scene and saw the body. The accused was later arrested in Nakuru. **PW4 HADIJA NANZALA MANADA** is the wife of the deceased. She testified on 28.10.2005 the deceased went home shouting that he had been robbed of his bicycle by the accused Charles Chitechi. On the 15.12.2005 PW5 went early in the morning and informed that her husband had been killed. Her husband had not gone home that night. Since then they did not see the accused at home.

JOYCE WUNORO THOMAS testified as **PW5**. On the 15.12.2005 at about 6.00 a.m. she was going to tend to sugarcane when she met two men who told her that there was a dead person. She went to the scene and saw the deceased's body. His hand had been cut off. She went to notify the deceased's family. They recovered a panga and the deceased's mobile phone at the scene. **PW6 JULIUS OMUSULA INGANGA** is a radio repairer at Mumias. He was with the deceased on the 14.12.2005 at his place planning the burial of PW6's father who had died. They parted ways at about 5.00 p.m. and the burial was the following day. The deceased had told him that the accused had threatened to kill him as he had reported him about his bicycle. On the 16.10.2010 he heard that the deceased had been killed.

RAJAB OPARE was **PW7**. On the 15.12.2005 at about 4.30 a.m. he was in the company of one **ISMAIL MAKOKHA** and **YUSUF NGERESA** going to work at Mumias Sugar Company. They saw

three people who ran into the sugarcane plantation. He was able to identify the accused Charles Chitechi alias Kasamani Wanga. He saw them at about 500 meters away. Yusuf had a torch that enabled them to see the accused. They kept walking and shortly saw the deceased's body lying on the ground. They knew the deceased. PW5 approached at the scene and they sent her to notify the deceased's family. They recovered at the scene a panga, a Somali sword and a voter's card belonging to the accused. The items were taken by the police. **PW8 RAJAB SHIKUKU** was at home on the 16.12.2005. He heard screams and was told that the deceased had been killed. He went to the scene and saw the body.

PW9 SAIDA KASSIM testified that on the 9.12.2005 he met the accused at 3.00 p.m. who told him that he will do something to the deceased as he had reported him to the police on allegations of stealing a bicycle. He informed the deceased's wife as the deceased was not at home. The deceased was his brother in law while the accused is a neighbor. **PW10 IP ANDREW MACHEMO** testified that a report was made to the police on the 2.5.2007 that the accused had been arrested at Eldama Ravine police station. He went to Eldama Ravine and arrested the accused. He was based at Booker police post at Mumias. He looked at the records of the file and noted that Snr. Sgt. Kipsang who had been transferred had investigated the matter. He looked for the witnesses who had recorded statements and forwarded the file to the State Counsel. In his opinion he was not able to get any evidence against the accused. He could not get any of the materials mentioned by the witnesses. There were no recoveries. **PW11 DR. DICKSON MCHANA** produced the post mortem report on the deceased that was performed by Dr. Habel Alwanga on 16.12.2005 at Bungoma District Hospital mortuary. There was amputation of the left wrist joint and several multiple cuts on the body. There was also fracture of the skull. The doctor formed the opinion that the cause of death was due to external blood loss following assault.

The accused was put on his defence and gave sworn evidence. He testified that he is a driver and also does business. On the 16.10.2005 he was at his place of work. He was working for an Indian man called Chepatia who had been contracted in Mumias and Webuye to build sewage works. He was carrying sand from Malakisi to Bungoma when he met the family members of the deceased coming from the mortuary in Bungoma. He stopped the vehicle and enquired from the family members what was wrong. He learnt about the death of the deceased that day. He went for the burial of the deceased. He denied that he had robbed the deceased of his bicycle. He used to meet Rajab who testified in Bungoma selling chicken. His house got burnt and reported the matter at Harambee police station on the 3.2.2003. He later recovered his driving license. His ID card and voter's card got lost and he was issued with a police abstract. The matter is recorded at the Police Occurrence Book. He later processed new documents.

The accused's further evidence is that although they live in the same village they have different village elders. He went to the police station where he was arrested to claim his money KShs.3,800/= from Mr. Maritim who was a police officer. The officer threatened him and he was arrested that evening. He was taken to five identification parades but nobody identified him. He stayed at the police for five months before he was charged.

The main issue for determination is whether the prosecution has proved its case beyond reasonable doubt against the accused. The prosecution case is based on the contention that the accused robbed the deceased of his bicycle on the 28.10.2005. The matter was reported at Booker police post and Mumias police station. The accused informed family members that he was going to kill the deceased because he had reported him to the police. On the 16.12.2005 the deceased was killed. The next issue connecting the accused to the offence is the evidence of **PW7 RAJAB OPARE**. According to him he saw three men at the scene at a distance of 500 meters and identified the accused. They had a torch and were able to see the accused at that distance. They also recovered the accused's voters' card at the scene. According to PW5 they found a panga and the deceased's mobile phone at the scene. The investigating officer PW10 testified that he found nothing to connect the accused with the offence. He also did not recover the exhibits. The recovered panga, mobile phone and voter's card were not produced. It is therefore not possible for the court to conclude that a voter's card belonging to the accused was recovered at the scene. The investigating officer was of the view that there was no evidence connecting the accused to the offence.

Another line taken by the prosecution is that the accused had run away from home. He had moved his

family. The charge sheet shows that the accused was arrested on the 30.3.2007. This was a period of over two years. He stayed in custody until the 29.8.2007 when he was brought before the Ag. Senior Principal Magistrate in Kakamega for plea. The judge was not present that is why the matter was mentioned before the magistrate's court. The plea was taken on the 17.10.2007. The sequence of events is quite in line with the accused's defence that he was arrested not for the current offence but for having gone to demand his money from a police officer. The accused stayed for over five months from March 2007 up to August 2007 when he was arraigned in court. There is no evidence from Eldama Ravine police station indicating the cause of the arrest or the circumstances leading to the accused's arrest. I do find that the defence evidence raises doubt on the prosecution case. There is no evidence that police used to visit the accused's home in Mumias and failed to get him. Two years period elapsed before the accused was arrested. There is no evidence of follow up of the matter in between that period.

Given the evidence on record I do find that the prosecution has not proved its case beyond reasonable doubt. The alleged recovered voter's card belonging to the accused was not produced. At least that evidence could have convinced the court that the accused was at the scene of crime. When PW7 was being reexamined he reiterated that he saw the accused at a distance of 500 meters. That is not possible. Even the torch light cannot enable somebody to identify someone at that distance. Even if it was 50 meters still the evidence would be doubtful. In the end I am satisfied that this case has not been proved as required. The accused is not found guilty of the offence of murder as charged and shall be set at liberty unless otherwise lawfully held.

Delivered, dated and signed at Kakamega this 18th day of September 2014

SAID J. CHITEMBWE

J U D G E