

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL CASE NO. 49 OF 2010

REPUBLIC PROSECUTOR

V E R S U S

SAMWEL NDONYO ACCUSED

J U D G M E N T

The accused person is 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 1.12.2010 at Hamisi market, Hamisi Location in Vihiga District with Western Province murdered **NEWTON BUSOLO**.

Seven witnesses testified for the prosecution. **PW5 JOSEPH AMANI** is the deceased's father. On the 8.12.2010 he went to Vihiga District Hospital where he identified the deceased's body to the doctor for post mortem purposes. **PW1 DR. MASIKA COLLINS** was based at the Vihiga District Hospital and he performed the post mortem on the 8.12.2010. Externally the deceased had a cut wound on the skull that extended to the brain. He opined that the cause of death was intra cranial hemorrhage secondary to trauma.

PW2 CHARLES ADEMBESA CHISAMBI is a motor bike rider. It is his evidence that the deceased used to operate a motorbike and bicycle repair garage at Hamisi. On the 1.12.2010 at about 3.00 p.m. he was at the deceased's garage when the accused went there and borrowed the deceased's bicycle. The accused left his rungu and went away with the bicycle. He came after a short time and returned the bicycle. He noticed that his rungu had cracked and inquired who had damaged his rungu. The accused hit the deceased with the rungu on the head. The deceased collapsed and started bleeding. They rushed him to the nearby hospital at Hamisi and they were referred to Mbale hospital. The deceased died that night. It is his evidence that the accused was a friend to the deceased and he used to borrow the bicycle from the deceased. There were many people at the deceased's garage at that time. The deceased and the accused did not quarrel.

PW3 WILSON ABERE testified that he is a mechanic who used to work with the deceased. The accused used to work at a nearby school as a watchman. On the 1.12.2010 at about 3.00 p.m. the accused borrowed the deceased's bicycle and returned it. He collected his rungu (club) but complained that it had been damaged. The deceased was busy repairing a motorbike and told the accused that he did not know who had broken the accused's rungu (club). The accused then hit the deceased on the head with the rungu and it split into two. The deceased fell and started bleeding. He was taken to Hamisi District Hospital where first aid was administered and later taken to Mbale District Hospital. He died that evening. **PW3** reported the matter to the Hamisi AP camp. It is also in the evidence that the deceased was also a friend to the deceased.

PW4 DENNIS ARUCHOLA is also a boda boda rider who was at the deceased's workshop that afternoon. He saw the accused borrowing the deceased's bicycle and returned it after a few minutes. The accused asked the deceased who had cracked his rungu and the accused hit the deceased with the rungu on the head. The deceased was taken to a nearby hospital but succumbed to the injuries that night. The deceased's workshop was at an open space. **PW6 APC MOSES KAHUGIRI** was based at the Hamisi AP Camp. On the 2.12.2010 he went to arrest the accused at Cross-road Academy where the accused was working.

PW7 CPL GILBERT EKIRAPA was based at the Serem Police station. He investigated the matter and

had the accused arrested. His investigations revealed that the accused hit the deceased with the rungu and it split into two. The rungu was produced in court as an exhibit. The deceased died of those injuries. He had the accused charged with the offence after recording evidence from witnesses.

The accused was placed on his defence and he gave sworn testimony. He stated that he is a watchman at Cross-road Academy at Hamisi. On the 1.12.2010 he worked at the school during the day and at night. On the 2.12.2010 police officers went to arrest him alleging that he had killed someone. He denied that he killed the deceased and stated that he did not know the deceased.

The main issue for determination is whether the accused killed the deceased. The evidence shows that the accused borrowed the deceased's bicycle and used it for a short time. He returned the bicycle and noticed that his rungu which he had left at the deceased's garage had been damaged. According to the prosecution evidence the deceased and the accused were friends. There was no quarrel between the two. On his part the accused denies that he was at the garage at the material and that he assaulted the deceased. He denies that he knew the deceased. From the evidence on record I am satisfied that it is the accused who assaulted the deceased. The prosecution witnesses knew the accused and even knew that he was a friend to the deceased. PW3 used to work with the deceased in the same garage and knew that the accused was a friend to the deceased. PW3 knew where the deceased used to work. The evidence on record confirms that the accused borrowed the deceased's bicycle on the material day and returned it after a few minutes. The accused used to borrow the bicycle and it was therefore a routine matter. It is clear that it is the accused who hit the deceased with a rungu and the deceased succumbed to those injuries.

The main ingredient of murder is malice aforethought. From the evidence on record, it is clear that the accused acted very fast according to the evidence of PW3. **Section 207** of the **Penal Code** provides that whenever the accused acts in the heat of passion caused by sudden provocation and before there is time for his passion to cool he shall be held guilty of manslaughter. It is clear that the accused was a watchman and the rungu was his instrument of work. He was enquiring who had damaged his rungu and there were no answers. He acted immediately and hit the deceased with the rungu. I do find that the accused was provoked as he had left his rungu intact only to find it damaged. **Section 208** defines provocation and part of the element is any wrongful act or insult that is likely to deprive someone the power of self-control and to induce him to commit an assault. I am satisfied that the accused lost his self-control and committed the assault.

Section 9 of the **Penal Code** provides for intention and motive. It is stated that a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will. I do find that from the evidence on record the accused could not control himself as the rungu was his main working instrument and he had left it intact about 10 minutes before he returned. I therefore find that there was no intention to kill the deceased on the part of the accused. The main element of malice aforethought is missing in this matter.

In the end I do find that the accused is not guilty of the offence of murder as charged but is guilty of the lesser offence of manslaughter contrary to **section 202** as read with **section 205** of the **Penal Code** and is hereby convicted of that offence.

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

SAID J. CHITEMBWE

J U D G E