



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KITALE.

CRIMINAL CASE NO. 46 OF 2012.

REPUBLIC ::: PROSECUTOR.

VERSUS

PATRICK OKIRING)

BONFACE MUTUNGA) ::: ACCUSED.

BENARD OLUOCH)

J U D G M E N T.

The three accused, **Patrick Okiring**, **Boniface Mutunga** and **Bernard Oluoch**, are facing a charge of murder, contrary to section 203 read with section 204 of the penal code, in that on the 19th March, 2009, at Chepareria shopping centre in West Pokot County, murdered Ezekiel Pkiech Kitiar.

The case for the prosecution was that on the material date at about 9.00 p.m., the deceased and his wife, **Agnes Namalwa (PW1)**, were quarreling along the tarmac road heading to Kapenguria after a disagreement occasioned by the closure of their house by a landlord due to none payment of rent. In the process, a group of about five uniformed administration police officers including the first accused (Okiring), the second accused (Mutunga) and the third accused (Oluoch) appeared at the scene and got hold of the deceased whom they assaulted and handcuffed before taking him to their camp on a motor cycle operated by **Robert Juma Wafula (PW2)**. At the time, the deceased was in a state of injury such that on arrival at the A.P camp he could not talk and was lying on the ground from where he was stepped on by an administration police officer before being placed in the cells.

On the following morning, the deceased was taken to Kapenguria police station where a direction was given for him to be taken to hospital as he appeared to have been seriously injured. He returned to the police station from the hospital but was released and instructed to return to the hospital. He did not return to the hospital immediately and instead slept at his sister's place where he complained of pains below the stomach and told his brother-in-law, **Emmanuel Jacob Pkerio (PW3)** that a police officer had stepped hard on his stomach as he lay down facing upwards. He was then taken to Kapenguria District hospital where he died while undergoing treatment. His sister, **Elizabeth Jacob Pkerio (PW4)**, identified his body for post mortem purposes and **Dr. Nicholas Rono (PW5)**, produced the necessary post mortem report (P. Exh. 1) signed and completed by his colleague one Dr. Chirchir. The report indicated that the cause of death was severe peritonitis secondary to perforation of the distal ileum, possible cause of perforation being blunt trauma.

Sgt. George Ochieng (PW6), carried out necessary investigations and traced the movement of the deceased from the time he was arrested by the three accused to the time he was taken to the Kapenguria police station and then the hospital where he died on 23rd March, 2009 meaning that he did not die on the

19th March, 2009 as indicated in the particulars of the charge. The investigations officer (PW6) opened an inquest file and after the conclusion of the public inquest the presiding magistrate ruled that the three accused be charged with the murder of the deceased.

In their respective defence, the three accused denied the offence. The second and third accused adopted the statement made by the first accused and treated it as their own defence. The first accused stated that they were at the material time stationed at Chepareria Division of West Pokot County and were on duty on the date the deceased was arrested by themselves when they were attracted by wails from a woman along a road at Chepreria shopping centre. The woman sought their help as she was being assaulted by a man with whom she was fighting. The man was intoxicated. They arrested and thereafter took him to their camp on motor cycle. He was taken there by the first accused while the second and third accused followed on foot. The man was handed over to the duty officer at the camp one APC James Mutunga.

Thereafter, the three accused departed for their residential quarters for the night and on the following day the arrested man was escorted to Kapenguria police station by the first and second accused in the presence of his wife who was the complainant woman. After handing over the man to Kapenguria police officers, the first and second accused recorded their respective statements but on the 23rd March, 2009, they were surprised by information that the arrested man who was the deceased herein had died. Angered by the death of the deceased, irate members of the public invaded the AP camp and razed it to the ground on suspicion that the deceased had been killed by the three accused.

They (three accused) were moved to Kapenguria District headquarters and asked to record statements at Kapenguria police station before being locked up for ten days and then transferred to Nakuru for their own safety. They later received summons to attend a public inquest at the Chief Magistrate's court in Kitale but were in the year 2011 charged with the present offence which they did not commit as they did not irregularly arrest the deceased nor did they assault him.

From all the foregoing evidential facts, the issues arising for determination are firstly, whether the death of the deceased was caused by an unlawful act and secondly, whether the three accused were responsible for the said act and if so, whether they acted with the necessary intention to kill the deceased i.e. malice aforethought.

With regard to the first issue, the post mortem report (P. Exh. 1) clearly indicated that the cause of death was severe peritonitis secondary to perforation of the distal ileum possibly due to blunt trauma although other pathologies were to be ruled out from the histology i.e. the perforated ileum, kidneys and blood.

Dr. Rono (PW5), who produced the post mortem report on behalf of a colleague stated that the report did not mention the probable weapon or object which was used to cause injury to the deceased. He said that the perforated ileum (small intestine) was taken to the Government Analyst for further examination and that the report from the Analyst indicated that additional blood samples and sample from the liver were required for a more comprehensive report.

Dr. Rono, held the opinion that the post mortem report was incomplete and hence inconclusive.

The incomplete or inconclusive nature of the post mortem report was an express statement that the cause of death could not be ascertained and be linked to the three accused or any one of them to the exclusion of any other person or factor.

The report was also a clear indication that the condition known as severe peritonitis could have been caused by something else other than a blunt trauma or that blunt trauma could not by itself have caused the death of the deceased. This explains why samples of the perforated ileum, blood and kidneys were forwarded to the Government Analyst for a conclusive determination of the cause of death. It was rather unfortunate that the prosecution did not deem it fit to tender in evidence the material government Analyst report. It may therefore be construed that the report was unfavourable to the prosecution case or that it added no value to the case in establishing a nexus between the three accused and the death of the

deceased.

In the absence of a conclusive determination on the actual cause as opposed to the probable cause of death, it would follow that the charge against the three accused was misconceived and was unsupported by cogent medical evidence right from the beginning and perhaps this is what informed the decision to have a public inquest conducted rather than prefer any charge against the three accused in the first instance.

In view of the aforementioned observations the second issue for determination is rendered obsolete. The question as to whether the three accused were responsible for inflicting fatal injury upon the deceased does not arise any longer.

So that, even if the three accused executed their lawful duty of arresting the deceased in a manner which was unorthodox, they cannot be said to have caused his death for them to face a murder charge. They should have been dealt with administratively in accordance with the rules governing disciplinary proceedings pertaining to the administration police force or any disciplinary force.

In the end result, this court must and hereby finds that the prosecution has failed to prove its case against the three accused jointly and severally beyond any reasonable doubt. The three are therefore not guilty as charged and are hereby acquitted accordingly.

[Delivered and signed this 23rd day of December, 2014.]

J.R. KARANJA.

JUDGE.