



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT KITALE.**

**CRIMINAL CASE NO. 31 OF 2010.**

**REPUBLIC ::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::: PROSECUTOR.**

**VERSUS**

**VICTOR WEKESA WANYAMA )**

**SILVESTER WANYAMA MKERE ) ::::::::::::::::::::::::::::::::::::::::::::::::::::::: ACCUSED.**

**ANDREW WAFULA WANYAMA )**

**J U D G M E N T**

The three accused, **Victor Wekesa Wanyama, Sylvester Wanyama Mkere** and **Andrew Wafula Wanyama**, are charged with murder, contrary to section 203 read with section 204 of the penal code, in that on the 16th May, 2010, at Namanjalala village Trans Nzoia County, murdered Judith Nekesa Barasa.

The case for the prosecution was that the accused are all related in that the first and third accused are sons to the second accused. On the material date in the morning hours, the three accused demolished a toilet belonging to **Nancy Nasimiyu (PW1)**, a daughter-in-law of the deceased. They left the scene after being restrained from going any further but returned later armed with crude weapons such as an axe and slasher and vowing to kill two people. They seized the husband to Nancy (PW1) by the name Hamisi and assaulted him. They were joined by a person called Omosh and in the process the deceased appeared at the scene and attempted to restrain them. She (deceased) and the accused had an ongoing land dispute relating to their common boundary as they were neighbours. She was hit on the head with a hammer by the third accused. She fell down and was slashed with a panga by the first accused. The two were encouraged and incited by their father, the second accused. The deceased suffered serious injuries which proved fatal. The three accused were later arrested and charged with the murder of the deceased. The fourth person called Omosh disappeared and remains at large.

**Zainabu Nafuna Muna (PW2)**, confirmed that the three accused and another confronted and firstly assaulted Hamisi before turning their attention to the deceased whom they assaulted when she attempted to come to the rescue of Hamisi. This was also confirmed by **Teresia Nafula (PW4)**.

**Dr. Blastus Kakundi (PW3)**, produced the post mortem report showing that the deceased died from severe head injury secondary to blunt trauma while **Dr. Judy Kamau (PW6)**, examined the three accused and confirmed that they were mentally stable and fit for trial.

**Pius Kimutai Kirui (PW5)**. A security guard at Kitale District Hospital confirmed that he was on duty on the material date when the deceased and her son were taken there with head injuries and also when the

first and third accused went there seeking treatment. He (PW5) apprehended the first accused when he and the third accused were implicated with the assaulting the deceased who passed away while under treatment. The third accused however escaped.

**P.C. Michael Muchiri (PW7)**, investigated the case after it was reported at the Kitale Police station. He later preferred the present charge against the three accused.

In their defence, the three accused denied the offence.

The first accused indicated that he was at their farm with the third accused when they were confronted by the deceased and her son. He was then hit on the head with a panga by the deceased and fainted. He did not know what happened thereafter and only found himself at the Kitale District Hospital where he was again attacked and injured by persons unknown to him.

The second accused indicated that he was not at the scene on the material date and did not know what happened there. He was at the time in Kiminini.

The third accused confirmed that he was at their farm with the first accused when they were confronted and attacked by the deceased and her son. A fight erupted and in the process the deceased sustained serious injuries and rushed to hospital. He was later arrested and charged with the present offence.

From all the foregoing evidence, it is not disputed that the deceased died after being assaulted and seriously injured. She died while undergoing treatment for the injuries suffered.

The post mortem report confirmed that the cause of death was severe head injury secondary to blunt trauma.

The basic issue for determination was therefore whether the accused were responsible for assaulting and causing fatal injuries to the deceased and if so, whether they acted with malice aforethought.

The incident occurred in broad daylight in the presence of persons who knew both the deceased and the accused. These included May (PW1), Zainabu (PW2) and Teresia (PW4). The three clearly testified that it was the three accused and another who confronted and assaulted a son to the deceased (i.e. Hamisi) and then set upon the deceased when she interfered with a view to rescuing her son. The three (PW1, PW2 and 4) therefore discredited the accuseds' defence that it was the deceased and her son who confronted them while they were in their farm. The three witnesses indicated that the deceased was attacked with crude weapons and seriously injured by the accused and in particular the first and third accused. They all placed the second accused at the scene but indicated that he played the role of encouraging and condoning the unlawful action of the first and third accused against the deceased and her son. His alibi defence was thus effectively, discredited.

The investigation officer (PW7) indicated that the weapons used in the attack were however not recovered from the accused. He also indicated as was confirmed by PW1, PW2 and PW4, that a boundary dispute between the deceased and the accused may have triggered the unfortunate incident which led to the death of the deceased but which incident was premeditated as the three accused and another could not wait for the boundary dispute to be resolved by legal means and instead attacked the deceased and caused her fatal injuries. The evidence against them was cogent and credible. It proved beyond reasonable doubt that they were responsible for assaulting and injuring the deceased who later died from the injuries. The second accused aided and abetted the unlawful act of his two sons. He was also criminally responsible in as much as they were. The fact that they confronted the deceased's son while armed with crude weapons and having been earlier told to wait for the boundary dispute to be resolved by the chief was clear indication that they intended to cause maximum harm to not only the son of the deceased but also to anyone who attempted to prevent them from executing their macabre mission. It was unfortunate that the deceased fell victim to their action.

This court therefore finds the three accused guilty as charged and convicts them accordingly.

**[Delivered and signed this 9th day of December, 2014.]**

**J.R. KARANJA.**

**JUDGE**