



REPUBLIC OF KENYA

High Court at Kakamega

Criminal Case 25 of 2005

REPUBLIC PROSECUTOR

V E R S U S

ENOCK ARAMBBE OKUMU 1ST ACCUSED

ALEX LUMUMBA MASAKHWE 2ND ACCUSED

BONOFACE IKOCHELI 3RD ACCUSED

J U D G M E N T

The three accused persons are 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 night of 11th and 12th July 2005 at Emutaho Village, Shisere Location of Kakamega district within Western Province, jointly murdered JACKSON OKUMU. The prosecution called five witnesses.*

PW1, ELIJAH MASINDE EKUMU, was the father of the deceased. He testified that on the 11th of July 2005 at about midnight he was asleep in his house with his wife (PW3) when people knocked his door. He opened the door and saw many people. He had his torch on and the people also had torches. He saw the 1st and 2nd accused and he was ordered to put off his torch. They told him that they had gone to collect his son and they were vigilantes. They were armed with a bicycle lock, a stick and pangas. The vigilantes went to remove the deceased from his house and brought him to PW1’s house. They told him that they were going away with his son and they would bring him back. Shortly he heard screams coming from the deceased. At about 4.30 a.m. the deceased was brought back and handed over to PW1 together with some beans that were in a plastic bag. The deceased could not stand or sit. PW1 noticed some injuries on the deceased. The deceased died at 5.00 a.m. and PW1 went to inform the area chief who referred him to the police. PW1 reported the matter to the police who visited the scene and took the body to Kakamega General mortuary. On 13th July 2005 at 1.00 p.m. PW1 went to the mortuary and identified the body to the doctor who performed the post mortem. The body was buried on the same day after the post mortem. It is the evidence of PW1 that he knows the 1st accused who is his cousin. The 2nd accused is his neighbor. PW1 did not see the 3rd accused person that night.

DAVID INDANGASI testified as PW2. He is a brother to the deceased. He testified that on the 11th of July 2005 he was sleeping in his house when his door was opened and saw someone standing

close to his bed. It was dark. The person flashed his torch on him and asked for the deceased. He told him that the deceased was in his house and that the person told him to accompany him to where the deceased was. PW2 dressed up and when he came out of his house he saw many people. He identified the 1st accused as the person who had woken him up. PW2 knows the 1st accused as his uncle. They went to the deceased's house only to find that he had already been placed outside by some people. The deceased was made to lie down and he was being caned using a rubber whip. PW2 heard the people who were assaulting the deceased asking him where he had taken the beans. The deceased informed them that he had sold the beans at WERE's home. The people went with the deceased and shortly PW2 heard screams from the deceased. The deceased was brought back at 4.00 a.m. by the same people. This time around PW2 identified the 2nd accused. The group called PW2's father (PW1) and told him that they had brought back his son. They also dropped some beans at the door of PW1's house. They took the deceased to his house. The deceased had injuries and was not able to walk. The group then left. The deceased died at 5.00 a.m. The police were informed and went to remove the body.

PW3, is **SALOME ASEMBO MASINDE**. She is the mother to the deceased and PW1's wife. She testified that on the 11th of July 2005 at about midnight she was asleep when she heard the deceased crying. She heard people walking outside the house and the 1st accused asked PW1 if the deceased was his son and PW1 answered in the affirmative. The 1st accused and other people left with the deceased and later brought back the deceased. The 1st accused took the deceased to his house. The deceased had injuries and he died at about 5.00 a.m. The deceased's wife ROSE (PW4) went to inform PW3 that the deceased had passed on. The police were informed and went to collect the body. It is PW3's evidence that when the deceased was brought back she identified the 2nd accused who told the deceased to go to church on Sunday and get saved. PW3 knows the 1st accused as her brother in-law. She had not reported that she had lost her beans.

PW4, **ROSE IKUMU** was the deceased's wife. On 11th July 2005 at about midnight she was with the deceased in their house when she heard people knocking the door. She opened the door and the deceased came out. Those people who had knocked the door were about twenty in number and had torches. PW4 identified the 1st accused whom she knew as her uncle. PW4 was asked whether her husband was a thief and she answered in the negative. The deceased was hit with a black whip and taken away. PW4 was told to close the door. At about 3.00 a.m. the deceased was brought back and the 1st accused was among those who returned the deceased. The 1st told PW4 to look at the deceased as they had cut him several times. The deceased had injuries and the group had a torch which they used to flash on the deceased. They left and the deceased started crying. He died at 5.00 a.m. PW4, informed PW3 about the death. The police were called and they took the body to the mortuary.

EVERLYNE MUNAI WERE, testified as PW5. Her evidence was that on the 9th of July 2005 the deceased took to her some beans that were in a paper bag. The deceased told her that he had some visitors who were his brothers in-law and wanted to buy sugar and tea leaves as well as to grind some maize. PW5 bought the beans for KShs.33 and the deceased left. Shortly the deceased's wife (PW4) went to her and inquired what the deceased had brought her. PW5 showed PW4 the beans that had been brought by the deceased. PW4 stated that the beans belonged to her mother in-law (PW3) and she was going to inform her father in-law (PW1). PW5 further testified that PW1 later went to her home and inquired what the deceased had sent her. PW5 informed him that the deceased had brought her some beans. PW1 informed PW5 not to take anything from the deceased. According to PW5 PW1 informed her that he was going to call the vigilante to teach the deceased good manners. On 11th July 2005 at about 2.00 a.m. she was asleep at her home when people went to knock her door. She opened the door and saw many people together with the deceased. They asked her what the deceased had sold her. She responded that she had bought some 2 kg of beans from the deceased. The group wanted the beans and PW5 told them that she had sold them. PW5 was hit with a whip on her back and she produced the beans. The group left and she was told to close her door. PW5 could not identify any of the attackers and she heard them whipping the deceased. The following morning she heard that the deceased had passed on.

The accuse persons were put on their defence. The 1st accused **ENOCKARAMBEE OKUMU** in

his sworn testimony stated that he left his rural home on the 2nd of July 2005 for his place of work at **AKATSA** junction about 13 km away. He had rented a house near his place of work. On the 11th of July 2005 he slept in the house at his place of work. On 14th July 2005 he went on with his work. The accused's work involves booking passengers for a bus. His employer is called **KARIUKI** who lives in Nairobi, Eastleigh area. The accused works as an agent of the bus company owned by his employer. He produced his employment card, certificate of good conduct, identification card and the book he used to issue tickets from. The 1st accused admits that PW1 is his cousin and he denied committing the offence. He was arrested on 14th of July 2005 after he had escorted his employer's bus by police from Isulu Police station. Later police from Kakamega police station went to Isulu police station and collected him. The accused denied that he is a vigilante or that he collected the deceased from his house. The accused further testified that there was a land dispute between him and PW1 but the same had been resolved by the elders.

The 2nd accused person **ALEX LUMUMBA MASAKWI** gave sworn testimony and denied committing the offence. He testified that on the 11th of July 2005 he was at his house where he slept and did not hear anything. Again on 12th July 2005 he did not hear anything. On the 14th of July 2005 he left his house at about 10.00 a.m. heading to EMUJENJE shopping center to sukuma wiki seed when he met three people who identified themselves as police officers from Isulu police station. He was arrested and taken to Kakamega police station where he stayed for 1 ½ months before he was charged with the offence. He denied that he was a vigilante. His further evidence is that he had taken PW1's cow and had not paid for it.

The 3rd accused person **BONFACE IKOCHERI** in his sworn testimony testified that on the 11th of July 2005 he slept at his house. He knows nothing about the case and none of the witnesses stated that he was involved. On the 12th of July 2005 he heard that the deceased had died and he went to deceased's homestead. The police went and took the body. He was arrested on 20th of July 2005 and taken to Kakamega police station. He knew the deceased and he had no problem with him. The deceased was his relative and PW1 is a younger brother to his father.

The main issue for determination is whether it is the accused persons who killed the deceased and whether the accused were positively identified. The court notes that the doctor who performed the post mortem report did not testify and the post mortem report itself was not produced. A simplistic approach to the matter would be to conclude that since the post mortem report was not produced then no one was murdered and the accused persons be freed. However, the evidence on record does establish that the deceased was picked from his house on the night of 11th July 2005. He was alive and healthy as per the evidence on record. He was taken by a group of people at about midnight and returned to his house at about 4.00 a.m. when he was injured. The deceased passed on at about 5.00 a.m. from the injuries he sustained that night. According to PW1 he attended the post mortem on 13th July 2005 and the deceased buried that day. From the prosecution evidence I am satisfied that indeed the deceased was killed on the night of 11th and 12th July 2005. I do also note that the investigating officer or the arresting officer did also not testify. However, it is clear from the evidence on record that the 1st and 2nd accused were arrested on the 14th of July 2005 while the 3rd accused was arrested on the 20th of July 2005. The prosecution closed its case before calling the investigating officer. This case went through the hands of five judges and it is possible that the prosecution decided to close the case after taking into account the long period the matter had taken to be finalized.

According to PW1, PW2 and PW3 they saw the 1st and 2nd accused that night. PW1 had his torch on and saw the two accused persons before he was told to switch off his torch. The group of people who went to collect the deceased had torches and they were flashing them. The 1st accused person is a cousin to PW1 and they know each other. According to the three witnesses the 1st accused was the head of the vigilante group while the 2nd accused was the secretary to the group. It is PW2's evidence that he was woken up while asleep and made to dress up. When he came out of his house he noticed that it was the 1st accused who had woken him up. PW2 managed to identify the 2nd accused the second time when the

deceased was brought back home. According to PW4 who is the deceased's wife it is the 1st accused who took the deceased from his house. She also identified the 1st accused when the deceased was brought back and he told her to look at the deceased as they had injured him. According to PW3 the 2nd accused was present when the deceased was brought back home after having been assaulted. The 2nd accused told the deceased to go to church and get saved. The 2nd accused is their neighbor.

The 1st accused testified that on the night of 11th July 2005 up to 14th July 2005 he was at his place of work. He slept there and did not sleep at his rural home. In essence this is an alibi defence. It has to be weighed against the prosecution evidence. The accused testified that he works with a bus company and all along he was at his place of work. The 2nd accused slept at his house on 11th and 12th of July 2005. He had nothing about the deceased's death. He was arrested on 14th July 2005 and later charged with the offence.

It is clear from the evidence on record that the witnesses knew the 1st and 2nd accused. There is no evidence that the witnesses had any grudge against the two accused persons. The 1st accused is a cousin to PW1 and therefore knew each other. It cannot be held that this was a case of mistaken identity. None of the witnesses testified that they saw the 3rd accused that night. PW1 testified that he did not see the 3rd accused. Similarly PW2 testified that he did not see the 3rd accused. That was also the evidence of PW3. The 3rd accused testified that he went to the deceased's house on the 12th of July 2005. He saw the police who took the body to the mortuary. From the prosecution evidence I do find that the 3rd accused was not part of the group that went to collect the deceased. None of the witnesses saw him. The 3rd accused BONFACE IKOCHERI is hereby acquitted of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code and he shall be set free unless otherwise lawfully held.

The evidence of PW5 is that the deceased sold her some beans on 9th July 2005. The deceased's wife told PW5 that she was going to report to PW1 as it appears that the beans belonged to PW3. According to PW5, PW1 went to her to find out what the deceased had sent her. Upon finding that the deceased had given some beans to PW5, PW1 informed PW5 that he was going to notify the vigilante group so that they could teach a lesson to the deceased. PW5 was emphatic that PW1 stated that he wanted his son to know that theft was bad. The evidence of PW5 calls for the question as to whether the vigilante group had malice aforethought against the deceased. It is clear from the evidence on record that it is the vigilante group who inflicted the injuries that led to the death of the deceased. From the evidence on record I do find that it is PW1 who called in the vigilante to punish the deceased. The 1st and 2nd accused were the leaders of that group and they collected the deceased from his house. The vigilante group were to punish the deceased and return him.

Given the evidence on record, I am satisfied that the 1st and 2nd accused were in the group that collected the deceased from his house. The sell of the beans to PW5 was done on 9th of July 2005. The deceased was collected from his house on the 11th of July 2005. PW3 may not have reported about the theft of her beans by her son but it is clear from the evidence of PW5 that PW1, the deceased's father reported the matter to the vigilante. PW1 did not expect his son to die as a result of the punishment and when the deceased succumbed to the injuries, PW1 disbanded the plan and reported the matter to the police. According to the evidence on record the 1st and 2nd accused persons had no intention of killing the deceased but were merely called in by PW1 to teach the deceased a lesson.

In the end I do find that the 1st and 2nd accused are not guilty of the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The two accused persons are found guilty of the offence of manslaughter contrary to section 202 as read with section 205 of the Penal Code and are hereby convicted of that offence. The 3rd accused person is hereby acquitted of the offence of murder contrary to section 203 as read with section 204 of the Penal Code and shall be at liberty unless otherwise lawfully held.

Delivered, dated and signed at Kakamega this 31st day of January, 2013

SAID J. CHITEMBWE

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