



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL CASE NO. 40 OF 2005

REPUBLIC PROSECUTOR

V E R S U S

DENNIS OKACHA WANYAMA 1ST ACCUSED

BENJAMIN WANYAMA 2ND ACCUSED

BONFACE WANYAMA 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 three accused *on the 5.9.2005 at Eshisenye village, Isongo sub-location, Shibinga location in Butere/Mumias district within Western Province jointly murdered MICHAEL ANSELIMO MWANDIA WASWA.*

FEBIAS ABUKUSE WASWA testified as **PW1**. He is a brother to the deceased. On the 5.9.2005 at about 8.00 p.m. he was in his house when he heard someone screaming that he is being killed by people. He took his torch and went out. He met the deceased walking and showed him a stab wound. His clothes were soaked in blood. The deceased told him that it was **DENIS, KHUKA** and **WANYAMA** who had stabbed him. These are the three accused persons. PW1 informed members of his family including their father and the deceased was taken to Kakamega Provincial General Hospital. The deceased died the following morning. PW1 attended the postmortem on the 8.9.2005 and identified the body to the doctor. It is his evidence that he heard one **BASIL BARASA** a brother to the deceased's first wife, **VIOLET**, was arrested in connection with the offence and he has since not seen him again.

ANZELIMO WASWA MWANDIA, is the deceased's father and PW2. He was at his home on the 5.9.2005 at about 8.00 p.m. when he heard screams and went to where the deceased had been placed. The deceased had a stab wound on the stomach. The deceased informed him that it was Dennis and Benjamin Wanyama who had stabbed him. The deceased was taken to hospital and died the following day at about midday. The deceased told him that he was coming from his first wife's home. The first wife had gone back to her parents' home as they had disagreed. He is aware that one Basil Barasa was arrested but does not know the reason and he does not see him now days. Violet returned to the deceased's homestead and is still living there. PW2 testified that his family and that of the accused had no dispute.

ALEX WASWA, testified as **PW3**. He is a brother to the deceased. He heard the screams and went out on the material day. The deceased mentioned the names of the three accused. He went with the deceased

to hospital and signed the authority for the deceased to be operated. He donated blood but the deceased died the following day at about 12.30 p.m. He attended the postmortem on the 8.9.2005 at 11.00 a.m. at Kakamega General Hospital. It is his evidence that his family had not disagreed with that of the accused. **PW4**, is **PAUL WEBUKHA RUIA**. He is a neighbor and went to where the deceased was on the 5.9.2005 when he heard the screams. The deceased mentioned Khuka and Dennis. The deceased was taken to hospital but died the following day. It is his evidence that where the deceased was found is a major road and it leads to Violet's home as well as to Malaha market. Blood stains were traced up to the bridge and as one crosses the bridge the road leads to Violet's home. He heard during the burial ceremony people saying that the deceased was coming from Violet's home.

VIOLET MUSENYA WAEMA, is **PW5**. She is the deceased's first wife while the second was called **CAROLINE WAEMA**. She left her husband on the 2.9.2005 and went to her parents' home. The dispute involved her dowry. The deceased visited her on the 5.9.2005 at about 3.00 p.m. and they talked nicely together with her parents. She was to go back on the 12.9.2005. The deceased left at about 6.00 p.m. with his camera as he was a photographer for over 9 years. On the 6.9.2005 at about 2.30 p.m. she got information that her husband had been killed. **PW5** lost consciousness and when she recovered the body was brought to her home and saw that the deceased had a cut on the stomach. It is her evidence that she escorted the deceased with her brother Basil Barasa and the deceased was fine.

PW6, **PC RICHARD SHIKAMI** was based at the Mumias police station and on the 8.9.2005 he went to Kakamega Provincial General Hospital with the deceased's family members and identified the body for postmortem purposes. **PW7**, **PC PATRICK NZIOKA** was based at the Butere police station. On the 22.9.2005 at about 12.40 p.m. the 2nd accused Benjamin Wanyama was taken to the police station by his father together with another man on allegation that the accused was wanted by the Mumias police station for the offence of murder. **PW7** received the report and the accused was later taken by police officers from Mumias. **PW8 DR. NYUMBILE BONFACE NDALU** produced the postmortem report that was done by Dr. Jason Amukonye. The body had one stab wound externally and internally the spleen was ruptured and there was blood in the abdomen. The cause of death was hemorrhagic shock secondary to ruptured spleen.

The three accused were placed on their defences. In his sworn testimony the 1st accused **DENNIS OKACHA WANYAMA** testified that he is a photographer based at Malaha market in a studio. The deceased was his neighbor and they used to work together at Alpha Studio. On the 5.9.2005 the deceased did not report to work as he had gone to attend to his family issues. The deceased had gone to his wife's home. On the 6.9.2005 it was a Tuesday and at about 8.00 a.m. he heard people saying that the deceased had been killed. He heard that the brothers of the deceased's wife had assaulted the deceased. At about midday he heard screams from the deceased's compound and he went there. He attended the burial ceremony and the relatives of Violet did not attend as they were the suspects. On 7.9.2005 members of the public, arrested Basil Nyongesa Barasa, a brother to Violet and was taken to Mumias police station. He was later released. It is his evidence that he fully participated in the burial and if indeed the deceased had mentioned his name he could have been killed. He was arrested two weeks later on the 18.9.2005 which was a Sunday while at home. The deceased was his friend. The two other accused are his brothers. The deceased was buried on Friday September 9th. There was no dispute between the two families.

The 2nd accused Benjamin Wanyama Desterio gave sworn testimony. He stated that he was a student at Mukangu Primary and was at school on the 5.9.2005. He was arrested on the 22.9.2005 when his father informed him that his two brothers had been arrested and taken to Mumias police station. He went with his father to the police station and when he said that the other two accused were his brothers he was arrested. The 3rd accused Bonface Okacha Wanyama also gave sworn evidence. He knew about the deceased's death on the 6.9.2005 at about 11.00 a.m. when he heard screams from the deceased's home. He went there and participated in the burial. He was arrested on the 17.9.2005 while at home. The information at the burial was that the deceased had been assaulted by Violet's people. He had no grudge with the deceased.

Mr. Nandwa, counsel for the accused, submitted that no eye witness saw the accused commit the offence. All the witnesses are from the same family. The allegation that the deceased mentioned the accused does not meet the threshold of a dying declaration. It took sometime before the accused were arrested. The relatives of the deceased's wife were the suspects and the deceased's wife was the last person to be seen with the deceased.

From the evidence on record, it is established that the deceased was stabbed on the 5.9.2005 at about 8.00 p.m. According to the postmortem report there was one stab wound on the stomach which led to the rupture of the spleen. The main issue for determination is whether it is the accused persons who assaulted the deceased. According to PW1, PW2, PW3 and PW4 the deceased gave the names of the accused. It is stated that the 2nd accused held the deceased while the 1st accused stabbed him. No one saw the incident taking place. Section 33 of the Evidence Act allows statements of a person who is dead to be admitted as evidence where the statement gives the circumstances of the transaction which resulted to the death. The prosecution case is that the accused's names were given to the witnesses by the deceased. The evidence on record shows that the deceased had gone to visit his wife PW5 on the material day. The deceased had a camera and left his wife's home at about 6.00 p.m. Although PW5 indicated that the deceased left at about 4.00 p.m., her statement to the police indicated that he left at about 6.00 p.m. PW1 heard the deceased screaming at about 8.00 p.m. Other than the contention that the accused were mentioned by the deceased, there is no evidence connecting the accused to the offence.

It is not clear how the 1st and 3rd accused were arrested. The investigating officer did not testify. The 2nd accused went to the police station to inquire about his brothers in the company of his father and he was arrested. This evidence is in line with the evidence of PW7 PC Patrick Nzioka. The 1st accused and the 2nd accused participated in the burial and were not arrested immediately. It is not clear why PW1 to PW4 did not go to the police station and inform the police that the suspects were at the burial for them to be arrested. The prosecution evidence shows that there was no bad blood between the family of the accused and that of the deceased. The 3rd accused was arrested on 17.9.2005 while the 1st accused was arrested the following day. There is no evidence that the accused persons had gone into hiding. The 2nd accused went to the police station by himself and it is not clear that the police were looking for him. The prosecution evidence also shows that the family Violet was the suspect and members of that family did not attend the burial.

Given the prosecution evidence, I am satisfied that the prosecution has not proved its case beyond reasonable doubt. PW4's evidence is that the blood stains were traced up to the bridge and the road from there leads to Violet's home. the circumstances under which the deceased met his death can be attributed to other people other than the accused. It is possible that the deceased left Violet's home after 6.00 p.m. and was assaulted shortly thereafter and robbed of his camera. The long period it took to arrest the accused raises doubt as to their guilt. The incident occurred at night and it is not clear how the deceased identified his attackers. The investigations leading to the arrest of the accused was not explained to the court. I do find that the case has not been proved beyond reasonable doubt and the accused are hereby acquitted of the offence of murder as charged. The accused shall be set at liberty unless otherwise lawfully held.

Delivered, dated and signed at Kakamega this 11th day of December 2013

SAID J. CHITEMBWE

J U D G E