



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CRIMINAL CASE NO. 26 OF 2009**

**REPUBLIC ..... PROSECUTOR**

**V E R S U S**

**EZRON AKONDE MISALA ..... 1<sup>ST</sup> ACCUSED**

**ZAKARIA MAUMBE ..... 2<sup>ND</sup> ACCUSED**

**JULIUS OKELLO ANAM ..... 3<sup>RD</sup> ACCUSED**

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

The three accused persons were 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 12<sup>th</sup> day of April 2009 at IsibebeEsitoyi village, Ekwanda sub-location of South Bunyore location in Emuhaya District within the Western Province, jointly murdered JOEL WILLIS ASTIBA.*

Six witnesses testified for the prosecution. **PAUL ATETWE MUNALA** testified as **PW1**. His evidence is that on the 12.4.2009 he was with the deceased at Maseno area. The deceased was drunk. The 2<sup>nd</sup> accused went and informed them that someone was calling the deceased. It was about 1.00 p.m. Shortly the 1<sup>st</sup> accused went to them and informed them that the deceased was required but the deceased did not go. After sometime the deceased left with the 1<sup>st</sup> and 2<sup>nd</sup> accused indicating that he wanted to see who was calling him. PW1 knew the two accused persons. On the 13.4.2009 PW1 was informed that the deceased had been killed.

**HEZEKIAH AWITI ONDUMBU** was **PW2**. He comes from Eshitoyi village in Bunyore South location. On the 12.4.2009 he was informed that the deceased who was his nephew had been injured and was at the Administration Police depot. He went there and found about 50 people. The deceased was there but he was unable to talk. The APs told PW2 to take him to hospital. PW2 took the deceased to Maseno hospital but he was pronounced dead. He does not know who killed the deceased. **PW3, MAURICE SHADRACK ATIBA** identified the deceased's body on the 17.4.2009 for post mortem purposes. The deceased was his younger brother.

**PW4, APC JERRY OKETCH** was based at the Luanda Division Headquarters in Emuhaya District. On the 12.4.2009 at about 7.40 p.m. he was on patrol with PW5 when they got information that some people had gathered at the AP depot which was a police post. They went there and found many people. One of them was injured and they were informed that he was a suspect who had stolen a blanket and a trouser. They booked the report. The suspect was badly injured and could not talk or stand. A relative of the suspect went to the depot and was told to take the suspect to hospital. On the 13.4.2009 the relative informed them that the suspect had passed on. They arrested the three accused persons as the 1<sup>st</sup> accused was the complainant and the two other accused had helped him to arrest the suspect. They reported the matter to Luanda police station and the police took the accused persons for further investigations. **PW5 APC PATRICK KINYUA** was with **PW4**. It is his evidence that there were about 20 people when they went to the AP post. The 1<sup>st</sup> accused was the complainant and he gave the names of the other accused as the ones who helped him to arrest the deceased. **PW6DR. DICKSON MCHANA** produced the post mortem report on behalf of Dr. Meshack Masika. The post mortem was done on 17.4.2009. According to the post mortem the deceased sustained contusion of both lungs and injury on the spinal column. The

cause of death was respiratory arrest due to the injury on the spinal column.

The accused persons were put on their defence. The 1<sup>st</sup> accused in his sworn evidence testified that on the 17.4.2009 he closed his house and went for a burial ceremony that was running overnight. The following morning at about 8.00 a.m. he went home and found his house had been broken into and some of his items stolen including a Raymond blanket, sufurias, curtains and trousers. He tried to make inquiries from the neighbours but there was no response. On the 12.4.2009 he was informed by one JUSTO that somebody had been seen wearing his stolen trouser. He went with Justo to the suspect's house but they did not find him. On the same day at about 4.00 p.m. they went back to the suspect's house and found him. They took him to the assistant chief but he was not there. They decided to take the suspect to the AP camp at Depo police post. While on their way they passed through the market and people asked them about the arrest. When the people learnt that the deceased was a suspected thief they started beating him. The accused informed the people that they were taking the deceased to the police. There were many people and the accused could not have stopped them from beating the deceased. When they reached the AP camp he was arrested and locked in a room. He was later charged with the offence. He informed the police that he had taken the deceased as a suspect who had stolen his belongings. It is his evidence that he went to arrest the deceased with Justo and not with the two other accused.

The 2<sup>nd</sup> accused also gave sworn evidence. He testified that on the 12.4.2009 in the evening he was at home when he heard someone being beaten near the AP camp. It was about 6.00 p.m. He went there and found the 1<sup>st</sup> accused had been arrested and put in the cells. The AP officers asked the crowd who knew the 1<sup>st</sup> accused amongst the members of the public and the 2<sup>nd</sup> accused informed them that he knew the 1<sup>st</sup> accused. The 2<sup>nd</sup> accused was also arrested. The 3<sup>rd</sup> accused in his sworn evidence gave similar evidence as that of the 2<sup>nd</sup> accused. It is his further evidence that he was 17 years old when he was arrested and in class 7. He went to the AP camp and found the 1<sup>st</sup> accused arrested and the informed the officers that he knew the 1<sup>st</sup> accused and he was arrested and later charged with the offence.

The evidence on record indicates that the deceased was a suspect of a theft at the 1<sup>st</sup> accused's home. PW1 testified that the 1<sup>st</sup> and 2<sup>nd</sup> accused are the ones who took the deceased from his home. PW1 did not see the accused assault the deceased. PW4 and PW5 were on patrol when they heard that a crowd had gathered at the AP camp. The 1<sup>st</sup> accused informed them that they had brought to the station a suspected thief. The 1<sup>st</sup> accused was the victim of the theft and he informed the two witnesses that the deceased had stolen a blanket and a trouser. The deceased passed on at Maseno Hospital. From the evidence on record none of the witnesses saw the accused persons assaulting the deceased. The evidence is circumstantial. Although PW1 testified to the effect that it is the 1<sup>st</sup> and 2<sup>nd</sup> accused who took the deceased to the AP post, the evidence of the 1<sup>st</sup> accused is to the effect that they took the deceased to the area assistant chief. It is PW1's evidence that when the 1<sup>st</sup> and 2<sup>nd</sup> accused took the deceased they had no weapons. The evidence of the 1<sup>st</sup> accused raises doubt as to the circumstances under which the deceased met his death. It is possible that the deceased was assaulted by members of the public as he was being taken to the AP camp. According to PW5 there were over 20 people at the camp while PW2 estimated the number as 50. The evidence shows that the accused had no intention of killing the deceased but wanted to have him arrested by the police. I do find that the accused persons are entitled to the benefit of doubt and they did not kill the deceased.

In the end, I do find that the prosecution has failed to prove its case beyond reasonable doubt. The accused persons are hereby set at liberty unless otherwise lawfully held.

**Delivered, dated and signed at Kakamega this 9<sup>th</sup> day of October 2013**

**SAID J. CHITEMBWE**

# **JUDGE**