



REPUBLIC OF KENYA

High Court at Kitale

Criminal Case 20 of 2009

REPUBLIC :::
PROSECUTOR.

VERSUS

MOSES WAFULA WANYONYI

VINCENT OUMA ODHIAMBO ALIAS MANCHESTER:::::::::::::::::::::::::: ACCUSED.

J U D G M E N T.

Moses Wafula Wanyonyi alias Okuku and Vincent Ouma Odhiambo alias Manchester are charged with murder contrary to section 203 read with section 204 of the penal code, is that on the 8th April, 2009 at Kipsongo Estate Trans Nzoia West District jointly with others not before court murdered David Muganda Manyoa.

The case for the prosecution was that on the 8th April, 2009 at about 11.30 p.m., a village elder at Kipsongo called Rael Nekesa Nabwire (PW1), was asleep at her house situated near a road when she heard movements of people towards a neighbouring plot. It appeared that it was a group of youth. She heard them saying that a person had been up beaten. She left her house and went to enquire. She then saw a group of people beating a person. The group included the two accused. The first accused (Moses) was using a piece of metal to assault the person while the second accused was stepping on the person who was found to be the deceased.

Rael (PW1) was able to spot the two accused with the help of light emanating from nearby shops situated twenty (20) metres away. She was however unable to identify the rest of the assailants. She went back to her house and slept.

On the following day, a daughter of Rael by name Elizabeth informed her that it was the deceased who had been assaulted. She (PW1) proceeded to the scene and confirmed the information. She noted that the deceased was injured. Blood was oozing from his nose and mouth. He could not talk. He died the next day.

Mason Wanaswa Wanyonyi (PW2), also heard noises outside his house on the material night. He looked at the nearby road side and saw two people standing. One of them appeared intoxicated and the other appeared wounded. One said that he was Manchester and not a joker. He (PW2) knew the said Manchester whom he heard saying that they wanted a vehicle to take the drunkard home. The scene had electric light. The group consisted of three people and the drunkard. Mason (PW2) heard screams but could not see anything. A police land rover appeared at the scene and people ran away. On the following morning, he learnt that a person had been beaten and taken to hospital. He also learnt that the drunkard was the deceased.

Vincent Kogo Muhanda (PW3), was asleep at his home when he was awakened and informed that his brother, the deceased, had been assaulted and thrown at a corridor. He proceeded to the scene behind some shops. He found a crowd of people including two village elders among them Rael (PW1). He saw his brother lying down without talking. He (deceased) was bleeding from the nose. His head had been hit and tied with a sweater which was said to belong to the second accused.

Vincent (PW3) took the deceased to hospital. He was later transferred to Moi Referral Hospital Eldoret where he died on the 15th April, 2009.

Wycliff Wanyonyi (PW4), reported the incident to the area chief and to the police at Kitale police station.

P.C. Bernard Ndiwa (PW5), was told that members of the public had assaulted a person. He proceeded to the scene and the village elder (PW1) identified the first accused whom he arrested. PC. Paul Ngesa (PW6) carried out the necessary investigations After being instructed to do so by his superior officer. In the process, he gathered that the deceased had been assaulted by the two accused who could not be traced immediately. They were arrested later and charged with the present offence.

In his defence, the first accused said that he is a second hand clothes vendor in Kipsongo Kitale. He was accosted and arrested by a police officer on 2nd May, 2009 on allegation that he was a thug. It was alleged that he had committed robbery but when he was brought to court, it was alleged that he had murdered. He said that the village elder (PW1) bore a grudge against him due to a previous dispute. She implicated him for nothing. He contended that he did not commit the offence.

The second accused said that he stays at Kipsongo and a cook by occupation. He went to work on 8th April, 2009. Thereafter, on his way home, he met the deceased who was his friend. They proceeded to a local pub and drunk traditional liquor. After a while, the deceased left leaving him at the pub. He went home later. On the following day, he learnt that the deceased had been assaulted and killed. He was called by a village elder on 15th May, 2009 and taken to the police. He was later charged with the present offence which he did not commit. He contended that the elder (PW1) told lies against him.

In their final submissions, the accused attacked the evidence of the key witness i.e. the village elder (PW1) and contended that it was insufficient and unworthy of belief.

The prosecution in its final statement opted to rely on the evidence on record.

Indeed, the evidence on record does not raise any dispute with regard to the cause of death. The post mortem report (P.Ex 2) showed that the deceased died from severe head injury due to blunt trauma.

The issue for determination is whether the two accused persons were responsible for the fatal head injury occasioned to the deceased on the material night. Both of them denied the offence. They implied that they were implicated by the village elder Rael (PW1) for no apparent reason.

Undoubtedly, the deceased was assaulted by a group of people . He sustained serious injuries which resulted in his death while undergoing treatment in hospital.

Other than the village elder (PW1) none of the other prosecution witnesses could state with certainty that the two accused were among those who assaulted and fatally injured the deceased.

The first accused said that he was arrested after being suspected of involvement in a robbery case only to appear in court later charged with the murder of the deceased.

Mason (PW2) said that the incident occurred at Midnight. He saw the happenings from a distance while in his house. His evidence in both examination in-chief and cross-examination portrayed him as a person who really did not identify any of the persons involved in the material incident and as a result resought to conjecture.

Vincent (PW3) did not at all witness the incident. He only confirmed that the deceased was his brother and had suffered a head injury. He said that the deceased's head was covered with a red and yellow sweater allegedly belonging to the second accused who was commonly known by his nick name of "Manchester". However, there was no proof that indeed the sweater belonged to "Manchester".

Wycliff (PW4) merely reported the incident to the chief and the police. He did not witness anything.

The role of P.C. Ndiwa (PW5) was only to arrest the first accused who was pointed out by the village elder (PW1).

P.C. Ngesa (PW6) investigated the case and charged the two accused mostly on the basis of what he was told by the village elder (PW1) who was the prosecution's key witness. Her evidence against the accused was basically that of identification. She said that she recognized the two accused as having been among the people who assaulted the deceased on the material night. She said that she was about twenty (20) meters away when she saw the two accused assaulting the deceased. She indicated that although it was in the hours of darkness, some light from a nearby shop or shops made it possible for her to see and recognize the two accused whom she had previously known. She however, did not indicate the distance between the source of light and the actual spot where the incident was taking place. She also did not indicate whether the light was strong enough and unobstructed by any object so as to allow a positive identification of the actual persons involved in the assault of the deceased. It is imperative to note that there was evidence from the prosecution that the deceased was assaulted by a group of people. In the circumstances, identification of respective members of the group and more so in the night was a difficult affair such that the possibility of mistaken or wrong identity could not be ruled out.

Without any knowledge of the intensity of the light or the distance between the light source and the place where the deceased was assaulted, it cannot be said with certainty that the village elder (PW1) made a positive identification or recognition of the two accused. This became quiet evident during her examination in chief and cross-examination. There was marked and vital contradiction in her evidence with regard to the alleged role each of the accused played during the assault of the deceased. It was not clear who assaulted the deceased using a metal bar and who stepped on his neck. All these went alongway to show that the village elder (PW1) was not in a position to identify the deceased's assailants or she chose not to speak the truth in court. Her evidence on the identification of the two accused was clearly insufficient and unreliable.

In the upshot, it cannot be said that the prosecution has proved beyond reasonable doubt that the two accused were responsible for assaulting and fatally injuring the deceased. They are therefore found not guilty as charged and are acquitted accordingly.

[Delivered and signed this 21st day of February, 2012.]

J.R. KARANJA.

JUDGE.