



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAKURU  
CRIMINAL CASE NO. 99 OF 2008

REPUBLIC.....  
.....PROSECUTOR

VERS

KISANDU  
SIOLOLO.....  
.....1<sup>ST</sup> ACCUSED

JACKSON KAYEKO  
SIOLOLO.....2<sup>ND</sup>  
ACCUSED

JOSHUA TONINIO  
SIOLOLO.....3<sup>RD</sup>  
ACCUSED

**JUDGMENT**

Kisandu Siololo, Jackson Kayeko Siololo and Joshua Toninio Siololo are jointly charged with the offence of murder contrary to **Section 203** and **204** of the **Penal Code** (Accused 1, 2, 3). They are alleged to have murdered James Kilangash Nambaso on 16/9/2008 at Ololongai Area in Narok. The prosecution called a total of 10 witnesses. The 1<sup>st</sup> accused is the father of the 2<sup>nd</sup> and 3<sup>rd</sup> accused. The facts that are not disputed are that on 16/9/2008, there was a chiefs Baraza at Ololongai Trading Centre to reconcile the Kalenjin and Masai communities. It was attended by the accused persons, the deceased, the witnesses who testified herein and many other people. After the Baraza, a number of them went to a bar within the said trading centre, where they drank alcohol and later, the deceased was assaulted a few metres from the bar while on his way home. The incident took place at night.

PW1, James Passiany, an army Officer recalled that after the baraza, he went to the bar and sat with the chief, Nampaso, the Assistant Chief, Sablit and the deceased. The Chief and Assistant Chief left him with Masikonde, Yengo and Ngolia. Later they left the deceased behind. After walking about 100 metres, he heard screams from the bar, returned and saw the three accused beating the deceased and the 2<sup>nd</sup> accused was telling the deceased that the scar he caused him could not go unpunished. PW1 asked why they were fighting and the accused person disappeared in the bush. With the help of police, they took the deceased to hospital at Elburgon. He had injuries on the head and chest. On the next day, they transferred him to the Provincial General Hospital but he died before being attended to. On 2/9/2008 PW1 identified the body of the deceased to the doctor for purposes of post mortem. PW1 recalled that by the time he left the bar, the 1<sup>st</sup> and 2<sup>nd</sup> accused had left the bar. He took five tuskers from about 5.00 p.m. to 7.30 p.m. Although there were no electricity lights, PW1 said that it was not very dark and he was near enough to be able to see but that none of the accused talked to him. All the accused were known to PW1 while the deceased was his brother-in-law.

PW2, Joshua Masikonde, a resident of Ololongai went to the bar at about 6.00 p.m. on 16/9/08. In the bar were Chief Nampaso, his assistant chief, PW1 and the 1<sup>st</sup> accused and his sons, 2<sup>nd</sup> and 3<sup>rd</sup> accused who sat on a different table. Both chiefs left about 7.30 p.m. After 10 – 15 minutes, the 1<sup>st</sup> and 2<sup>nd</sup> accused left the bar via the rear door, leaving accused 3. They remained briefly and also left. After walking for about 100 metres, they heard screams near the bar, went back and found accused 1 & 2 beating the deceased. He identified the runkus which each of the accused had. When PW2 asked why the accused were beating the deceased, they ran away. PW2 then assisted to take the deceased to hospital and also helped arrest accused 3. All the persons he saw at the bar were taking alcohol but that they were not drunk. There were no electric lights at the scene.

PW3, Joshua Ole Nambaso, a farmer at Ololongai identified the body of his brother to the doctor before the post mortem was performed.

PW4, APC Reuben Kandago was based at AP's Ololongai Post, Narok. On 16/9/08 while at work, one Swagi Bashiazi reported to him and his colleague that he had seen the accused persons beat the deceased who had fallen unconscious and taken to Elburgon Hospital. He arrested the accused on the same night.

PW5, Dr. Daniel Wainaina produced the post mortem report that had been prepared by Dr. Daniel Makau, a forensic pathologist, who performed the post mortem on the body of the deceased. The Pathologist found large bruises on the left side of the head, facial soil in the left ear. The deceased had suffered severe head injuries, fracture to the skull and intracranial haemorrhage. He opined that the cause of death was due to head injury caused by a blunt object (Ex.4). The three accused were examined by Dr. Njau the Provincial Psychiatrist who found them to be mentally fit to stand trial (Ex.5).

Swankei Passiany (PW6), a farmer in Ololongai was at the Ololongai centre at about 7.00 p.m. According to him, present in the bar was the Chief with whom he shared a table, while the three accused were on their own table. Later about 8.00 p.m. to 9.00 p.m. he went out, heard screams and as he went near, he saw the three accused ran away. There were no lights at the scene but he found the deceased on the ground with a head injury. While in the bar, he had seen accused 2 and 3 stand and go out about three times. When he found the accused beating the deceased he went back to the bar and informed others. He heard accused 2 tell the deceased that he had not forgotten what the deceased did to him. PW6 assisted to take the deceased to hospital on that day. He reported the matter to the police and on the same night they went to the accused's home and arrested accused 1 and 3. PW1 denied that the deceased quarreled or differed with anyone while at the bar.

PW7, Jackson Lekishon Tialila owns Ololongai bar. He recalled that the accused came to the bar at 6.00 p.m. and started to take soda while the deceased sat on a different table. About 7.30 p.m., the accused left through the back door while the deceased later left through the front door. He heard people talking outside and upon going there, about 10 paces from the bar, the deceased was lying down bleeding from the head. The place was dark. The deceased was taken to hospital. He found about 7 people where the deceased lay and it is the people who informed him that the person who was injured was the deceased. He was unable to see those who were present as it was dark.

PW8, Delamere Ole Nampasu was also at the bar where the accused persons were on 16/9/08. He left the bar about 7.30 p.m. He only heard the next morning that there had been a fight at the bar between the accused and the deceased.

On the same night Simon Kimursoi Passiany (PW9) of Ololongai sat on the table where the Chief, deceased and others were, while the accused persons sat on another table. At about 8.00 p.m. some people left and he remained with Daniel Koros, Swankei. They heard as if someone had been hit, went out and found Nderere Bilali. He left the bar with Nderere and 50 metres away, they found the deceased lying down, bleeding from the head, and not able to talk. He then heard the accused persons shouting like drunkards. He learnt on the next day that the deceased had died. PW8 denied there having been a disagreement in the bar on that evening.

PW10, PC Juma Kirera was the Investigating Officer. He found two of the accused at the police station on 17/9/08 and was handed over clubs which had bolts at one end and a piece of a club that was broken which were allegedly used in an assault (Ex.1-3). Later he learnt the victim of the assault had died, and he recorded statements from witnesses. He noticed some blood on the clubs.

When called upon to defend themselves all the accused persons gave sworn statements. Kisandu Siololo (DW1, 1<sup>st</sup> accused) recalled the 16/9/2008, he attended the chief's baraza at Ololongai. Later he went to a bar where many other people including, the Chief, Ole Sapit and Nderere were. He took 10 beers and ate meat and later they left the bar and headed home with his sons. He said that there was a drizzle on that night, no moonlight and in the bar was a tin lamp (koroboi). There was no disagreement in the bar. He denied ever disagreeing with the deceased nor had their families. He said the only family they had disagreed with over a boundary is that of Passiany and James was in the bar that night. He was not arrested with any weapon.

DW2 (2<sup>nd</sup> accused), Jackson Kayeko admitted having been in company of DW1 and DW3 over the evening of 16/9/08 at Lakishoni Bar. They drunk and ate meat and later left for their home. His father reached his home before him. He said the deceased was his friend and they had never quarrelled. He denied having been in possession of any weapon but saw the clubs in court. Though he was drunk, he was able to know what he was doing. Like DW1, he said that it is the family of Passiany which they have had a land dispute.

Joshua Toninio (DW3-Accused3) admitted to having been in company of DW1 & 2 and saw all the witnesses as having been in the bar but denied assaulting the deceased nor did they have any dispute there before except the Passiany family with whom they have had a land dispute. He said that outside the bar was dark, he did not hear any noises and in the bar they used a tin lamp (Koroboi). He denied assaulting the deceased or possessing the clubs that were produced in evidence as exhibits.

DW4 Daniel Matu Kuresho testified that he had attended the Chief's baraza and after the said meeting in company of the accused persons, went to drink alcohol and ate meat at Lekishoni Bar. The accused are his neighbours and so they left the bar together at about 7.00 p.m. and arrived at their home about 9.00 p.m. He denied seeing the accused assault the deceased. DW4 said he was in the bar from 5.00 p.m. to 7.30 p.m. when they left and the only other person he identified apart from the accused was Kimursoi Passiany.

It is not in dispute that the deceased met his death on the night of 16/9/2008 after he left Ololongai Bar at Ololongai. The incident occurred when it was dark after 7.30 p.m. There were no electric lights at the scene or nearby. The deceased was coming from the bar where he had been drinking alcohol with the witnesses who testified, the accused persons and many others. PW7 is the only one who testified as to the light in the bar. It was a tin lamp (Koroboi) which means it did not generate much light for those outside to see, leave alone those inside the bar.

It is also not in dispute that the accused persons were at the Ololongai bar where the deceased had also been drinking on that night. That places the accused persons at the scene of crime and there is therefore possibility that they may have committed the offence.

It is worth noting at this stage that the accused and all the witnesses who testified had been taking alcohol. Though the prosecution witnesses deny having been drunk, that is a subjective test as it depends on the amount each one can withstand. But what is true is that alcohol does affect people and impairs the senses. Having found that there were no electric or any other light at the scene, I find that the conditions and circumstances prevailing at the scene were not suitable for proper identification or recognition of the assailants. The question then is whether the witnesses who testified having drunk some alcohol were able to see who assaulted and fatally injured the deceased. PW1 and 2 testified that they had left the deceased drinking in the bar and after going for about 100 metres, heard screams, ran back and found the accused persons beating the deceased with clubs. PW1 said he went near the accused persons and asked why the accused were beating the deceased and they ran away. PW1 did not state how close he came to the accused persons and the deceased in order to be able to see who they were. It was not enough for PW1 to say he was near. He should have been more specific – 10 metres, 5 metres or one metre away. PW1 even said he heard accused 2 say that the scar which the deceased inflicted on him could not go unpunished. Although PW2 was with PW1, he does not seem to have heard accused 2 swear that he would ensure the deceased paid for injuring him. PW1 never explained whether he was able recognize the voice as that of accused 2. Although PW2 admitted that there were no lights at the scene where the deceased was assaulted, he went on to describe the clubs that each of the accused had. If it was night with no lights, the court wonders how PW2 was able to see the clubs to be able to describe in so much detail. This court is in doubt as to whether that was possible. The said weapons were not found in accused's possession and have therefore not been directly linked to them.

To demonstrate that the conditions and circumstances at the scene were not conducive to proper identification, PW7, Tialila, the owner of the bar testified that when he went where the deceased was lying, he was unable to see the people he found outside and it is the people who he found outside who told him who was lying on the ground. It means that it was so dark he was not able to identify any of the people. PW6, Swankei also admitted that he was not able to see the accused persons but heard accused 2 say that he had not forgotten what the deceased did to him. He later contradicted himself when he said that he saw the accused persons ran away as he approached. Contrary to PW1 and 2's evidence that there was moonlight or light, PW9 also said that it was a very dark night. I do appreciate that the witnesses and the accused are people who knew each other well and sometimes it is possible to identify a person you know well even when there are no lights but it would depend on the distance from one another and the intensity of the darkness. It is also possible to mistake a person well known to you in the dark.

From the testimony of PW6 and 9, it seems they were the first to arrive at the scene where the deceased had been assaulted. PW6 heard a scream while outside, then went back to call the others from the bar, who included PW9. PW9, testified that he had been left seated in the bar with PW6 (Swankei). Whereas PW6 says he heard accused 2 speak and that the accused persons ran off as he approached the scene PW9 who seems to have arrived at the scene with PW6 says the assailants had already ran off and the accused persons were only heard making noises like drunkards. It was not disclosed how far they were or what the accused persons said.

In his testimony, PW9 recalled being the first at the scene with one Nderere whom he found there. It means that the other people arrived there after him. The same old man Nderere and another person who was named as Swagi Bushiai who are supposed to have been the first at the scene and who saw the accused allegedly assault the deceased were not called as witnesses. It is Swagi who made the first report of the assault to PW4, APC Kandago. The court was not told why they were not called yet they seem to be eye witnesses. The court can only assume that their evidence might have been adverse to the prosecution case.

The three accused persons gave sworn statements in their defence generally denying involvement in the offence. They are prime suspects considering that they were at the scene, and are people who were known to the witnesses. DW4 was not truthful and cannot have been with the accused persons in the bar. He could not tell who was in the bar on that day. He must have just been called to help the accused persons get off the hook. However, it is not for the accused persons to prove their innocence but the burden is upon the prosecution to prove its case beyond any doubt. The prosecution failed to attain that standard. It was dark and there is contradictory evidence as to what the witnesses saw and heard. That raises doubt in

the prosecution case as to whether the accused persons were properly identified as the offenders. In the circumstances, the court must resolve that doubt in favour of the accused persons and they are hereby acquitted of the charge of murder under Section 322 of the Criminal Procedure Code. They are set free forthwith unless otherwise lawfully held.

**DATED and DELIVERED this 20<sup>th</sup> day of February , 2012.**

**R.P.V. WENDOH**  
**JUDGE**

**PRESENT:**

Mr. Otieno holding brief for Mr. Ogola for the accused.

Mr. Omari for the State.

Kennedy – Court Clerk.