



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL CASE NO.77 OF 2009

REPUBLIC.....
PROSECUTOR

VERSUS

THOMAS WAIKAMA NDUGU.....1ST
ACCUSED

JOHN NDEGWA WAMBUI.....2ND
ACCUSED

JUDGMENT

The two accused persons are charged that on 15th September 2009 they jointly with others not before court murdered **Tyson Mukala Musoga**, the deceased.

To prove this charges the prosecution called ten (10) witnesses whose evidence may be summarized as follows: On 14th September 2009 at about 5.30pm, **PW2, Joseph Ngugi (Joseph)** while working with the deceased at the market lost his mobile phone. He called his number later that day and the phone was answered by the deceased whose voice he was familiar with. The deceased also confirmed that indeed he had his phone and promised to avail it the next day. The following day when the two met, the deceased failed to avail the phone but kept on changing the story as to where it was. This did not please Joseph who slapped him once. Joseph hired a tuktuk driven by the 1st accused. Part of the crowd that had formed boarded the tuktuk to search for the phone in various places as the deceased directed. The search did not bear fruits and Joseph gave up and left but directed that the deceased be taken to the police station.

Those who remained with the deceased in the tuktuk instead continued with the search which took them to the sewage area. While passing by, a young man by the name Gichangi noticed the deceased being beaten. He went to the nearest Chief Camp at Baruti where he reported to **PW4, AP CPL Joel Chege Kimani** and **APC Macharia**. The two officers proceeded to the scene where they only found the deceased. They got transport to take him to the hospital but as they were helping him on to the motor vehicle he died. In the meantime, the police got information of the incident and begun to trace the tuktuk in which some of those alleged to have attacked the deceased had used. They found it at the municipal market and arrested its driver, the 1st accused. A description of the 2nd accused was also given to the police and with that he too was arrested.

It may be noted that earlier before the arrests, the police officers had stopped the tuktuk in an operation to track down bank robbers who were fleeing. But after searching, it was released. It had three passengers and a driver. The police officers were able to identify the 1st and 2nd accused persons, 1st accused being the driver and the 2nd accused had a marked growth on the ear. It was also the case for the prosecution that the 2nd accused had a whip.

The body of the deceased was taken to the mortuary and a postmortem done by Dr. Omboga but the report was produced by Dr. Onchere under **section 77** of the **Evidence Act**. According to the report, the deceased suffered bruises all over the trunk, hemorrhage in the brain as a result of multiple skull fractures. In the doctor's opinion, the deceased died as a result of severe head injuries secondary to blunt Trauma.

Both accused persons gave sworn defense. The 1st accused confirmed having been hired by Joseph and six others to take them to the sewage area. From the sewage, they went to Railways. He returned his passengers to the Bus Stage where Joseph alighted while the rest of the passengers continued with the search for the stolen phone. From the Bus Stage, the 1st accused drove the remaining passengers back to sewage area. He was asked to stop by his passengers. One of them left the tuk tuk while the rest followed. The 1st accused remained in the tuk tuk. After a while, four of the passengers returned and told him the third person had fallen down and with that they left for town. On the way, the police stopped them, searched the tuk tuk interrogated them and released them. The only thing the police found in the tuk tuk was a whip. The 1st accused drove his passengers to the bus stage and they left. Shortly, the police came and arrested him in connection with the death of the deceased. He described some of the passengers he had driven to the sewage area including one with a growth on the ear.

The 2nd accused, for his part recalled that Joseph suspected him too of stealing his phone and held him with the deceased; that he was in the tuk tuk throughout but as a suspect. He however, confirmed that unlike the deceased, he was not beaten. According to him they were seven people in the tuk tuk. At some stage Joseph and others left the tuk tuk. The 1st accused, the 2nd accused, the deceased, a young man and another remained in the tuk tuk. Two other men joined them and proceeded to sewage area. He denied having had the whip. The 2nd accused also confirmed that the deceased was only beaten in town before the search for the phone began.

That, in summary, is the evidence presented in the trial. I have considered it together with submissions of counsel for both sides. The deceased died as a result of the injuries sustained during the beating to extract information as to the whereabouts of Joseph's mobile telephone. It is also common ground that the deceased was attacked by a large mob before a smaller mob took him on a tuk tuk to trace the phone. It is further in evidence that both the 1st and 2nd accused persons were in the tuk tuk that took the deceased all over the town to trace the phone. The 1st accused was the driver while the 2nd accused was, according to the prosecution, a member of the mob that attacked the deceased.

The only two related questions for determination are whether the two accused persons jointly with others and with common intent inflicted the fatal injuries on the deceased and whether in inflicting those injuries they had malice aforethought.

Starting with the first question, the burden was, as is always the case to criminal trials, upon the prosecution to prove beyond any reasonable doubt that the accused persons attacked and injured the deceased. There is, however, no direct evidence that any of the two accused persons were seen beating the deceased. The prosecution case is based on circumstantial evidence. It is now established that a conviction will be based on circumstantial evidence if that evidence points irresistibly to the guilt of the suspect(s) and if there are no co-existing factors or circumstances that would weaken or destroy the inference of guilt.

The circumstantial evidence relied on by the prosecution against the 1st accused person is that he was the driver of the tuk tuk and that he appeared scared when the police approached him. Against the 2nd

accused, the prosecution led evidence that he had a growth on the ear and that he had a whip. There is evidence that Joseph hired the services of the 1st accused. There is no evidence that he ever left his tuk tuk throughout the search for the phone. He cannot be held liable for only playing this passive role.

Regarding the 2nd accused, there is no dispute that he was present in the tuk tuk throughout; that he has a growth on the right ear. Once again that alone cannot be a basis for his liability. The only person who stated that he saw the 2nd accused with the whip was **PW3, P.C Harun Kipchumba**. But that evidence was not supported by that of **PW8, I.P Boniface Mutie** who was in the company of P.C Kipchumba. P.C. Kipchumba's testimony on the issue of the whip was also confused. In examination in chief, he said that the 2nd accused had the whip. However, in cross-examination he admitted that he did not record that fact in his statement.

That was a critical aspect of evidence that ought to have gone into the officer's statement. It is the only circumstantial evidence that the 2nd accused participated in attacking the deceased. It is therefore doubtful in view of all these that the 2nd accused had a whip. The circumstantial evidence presented by the prosecution falls below the standard of proof expected in a criminal trial. There are also co-existing factors which certainly weakened the inference of guilt of the two accused persons, the presence of a mob beating the deceased without evidence as to who specifically among them attacked the deceased.

For the reasons given, this trial fails as the charges have not been proved. The accused persons are acquitted and shall be set at liberty unless lawfully held.

Dated, Signed and Delivered at Nakuru this 14th day of February, 2012.

W. OUKO
JUDGE