



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KITALE
CRIMINAL CASE 26 OF 2007

REPUBLIC PROSECUTOR

VERSUS

BENSON WAFULA JUMA ACCUSED

J U D G M E N T

The accused, **Benson Wafula Juma**, is faced with a charge of murder contrary to Section 203 read with Section 204 of the Penal Code, in that on the 29th October, 2007 at Yuya Farm Trans-Nzoia District, murdered Douglas Saidi.

The Prosecution case arises from the facts that the deceased's brother **Peter Nyongesa Saidi (Pw 1)**, arrived home from church on the material date and was informed that the deceased had been beaten by two people. He went to see the deceased on the following day and found him in a bad state.

Peter and others took the deceased to the hospital where he died while undergoing treatment.

Patrick Sumba (Pw 2), heard screams emanating from the homestead of one Florence. He went there and found the deceased sitting down. A brother of the deceased arrived at the scene and carried him (deceased) away on a bicycle.

Patrick learnt that the deceased had been beaten but did not notice any visible injuries on the deceased. An elder brother to the deceased, **Wycliff Saidi Simiyu (Pw 3)**, was with the deceased on the material date at the home of **Florence Kimoi (Pw 4)** where they had gone to drink traditional drink commonly known as "Busaa".

Wycliff saw the accused herein at the scene. He (accused) was in the company of a person called Cleophas Nyirongo and at one point, the accused followed the deceased and a fight erupted between them. Cleophas joined the accused and both assaulted the deceased with the accused hitting the deceased on the head with a piece of wood. Blood gushed out of the deceased's head.

Wycliff saw the deceased falling down after being hit. He (Pw 3) pursued the accused and Cleophas as they ran away from the scene. He managed to apprehend the accused but not Cleophas.

Wycliff (Pw 3) indicated that the deceased was attacked by Cleophas and that it was him and others who

took the deceased to a nearby clinic before taking him to Kitale District Hospital where he died while undergoing treatment.

Florence (Pw 4) indicated that on the material date at 3.00pm there was a gathering at her home. She had prepared drinks and traditional brew for her visitors who streamed in from 9.00 am and left at 2.00pm. thereafter, she saw people running and the deceased having fallen down. She implied that the deceased and his brother (Pw 3) were at her home where they ate food and drank alcohol, she noted the presence of two young men who were chasing one another and also noted the deceased falling down. She indicated that the deceased was hit with a piece of wood by the two young men. She screamed when she saw the deceased bleeding. She administered first aid on him before his brother carried him away.

It was on the following day that Florence (Pw 4) learnt of the death of the deceased.

Dr. Odhiambo Edward Festus (Pw 5), produced a post mortem report on behalf of his colleague Dr. Mogoi. The report (P. Ex 2) indicated that the cause of death was severe head injury secondary to trauma by a blunt object.

The doctor also produced a P3 form (P. Ex 3) indicating that the accused had no history of mental illness.

Cleophas Wanjala Simiyu (Pw 6), another brother of the deceased was informed that the deceased had been beaten up. He proceeded to the scene and found that the deceased had been carried away to his house. He (P w 6) was among those who made the attempt to apprehend the accused. He indicated that the accused was hostile such that he was left at the scene while efforts were made to assist the deceased who passed away while at the Kitale District Hospital.

P. C. Benson Muinde (Pw 7) of Cheranganyi Police Station received a report from Wycliff (Pw 3) that the deceased had died after being assaulted by the accused. He (Pw 7) booked the report and arrested the accused while his colleague **P. C. Nicholson Kimeli (Pw 8)** followed up the case.

P.C. Kimeli visited the scene and summoned witnesses for purposes of recording statements. A brother of the deceased handed over to him a piece of wood allegedly used to assault the deceased. He (Pw 8) gathered from people present at the scene at the material time that a fight had erupted between the accused, the deceased and another person called Cleophas.

IP. Musyoki William Wambua (Pw 9), investigated the case and charged the accused with the present offence. He visited the scene and interrogated members of the public who informed him that the accused and the deceased had fought. He was handed a piece of firewood allegedly used by the accused to assault the deceased.

IP. Musyoki indicated that the deceased was assaulted by the accused and another person at large.

The accused's defence was that he proceeded to the homestead of one Kimon to drink traditional liquor (busaa). He found many people at the said home. These included one Cleophas who gave him (accused) a cigarette to light for him (Cleophas). The deceased arrived at the scene and demanded the lit cigarette. The accused declined to hand over the cigarette to the deceased. The deceased then held and hit the accused who fell down and briefly lost consciousness. On regaining consciousness, the accused found the deceased fighting with Cleophas. He saw Cleophas running away after hitting the deceased on the head with an object.

The accused indicated that he left the scene after the incident but on the following day, he was asked by brothers of the deceased to assist them investigate the matter. He was arrested at the Police station where he had gone to record a statement. While there, he learnt that the deceased had died. He was asked about Cleophas but he was not very familiar with him. He (accused) contended that he did not assault the deceased as alleged and that it was the deceased who became angered and provocative after being refused the cigarette belonging to Cleophas. He (accused) produced his statement to the Police to

fortify his defence.

From all the foregoing facts, there emerges no dispute with regard to the death of the deceased from a severe head injury inflicted on him by a blunt object. The blunt object appears to have been a piece of wood which may not have been recovered.

Prosecution witnesses (i.e. Pw 3, Pw 4, Pw 7 and Pw 8) mentioned a piece of wood which was however not produced in evidence and confirmed to be the murder weapon. This gives the impression that the blunt object used to fatally assault the deceased was never recovered even though it goes without dispute that indeed a blunt object was the weapon of choice for the assailant.

As indicated by the Prosecution witnesses and the accused, the circumstances leading to the fatal assault pointed towards a drunken brawl involving the deceased, the accused and one Cleophas Nyirongo. Such circumstances negated any intention to kill and indicated that the death of the deceased was rather unfortunate but occasioned by an unlawful act of assault against him by those with whom he engaged in the drunken brawl arising from a dispute over a cigarette stick.

The blame was directed at the accused by a brother of the deceased (Pw 3) who was at the scene at the material time. However, the same Wycliff (Pw 3) directed the blame at the person called Cleophas Nyirongo.

Wycliff confirmed that the brawl involved the deceased, the accused and the said Cleophas. However, Wycliff was not in a position to state with certainty who between the accused and Cleophas administered the fatal strike or blow on the deceased with a blunt object.

Florence (Pw 4) was also at the scene at the material time but was unable to identify the person responsible for administering the "killer" strike or blow on the deceased. She stated that she was not known to the two young men whom she saw hitting the deceased with a piece of wood. However, in cross-examination, Florence (Pw 4) specifically indicated in her statement to the Police that Cleophas was the person who hit the deceased with a piece of wood.

Peter (Pw 1), Patrick (Pw 2) and Cleophas (Pw 6) were not at the material scene at the material time. They relied on and stated what they were told by others. They were not in a position to say whether it was the accused or the runaway Cleophas who inflicted the fatal injury on the deceased.

In following up the matter after necessary report had been made, P. C. Kimeli (Pw 8) heard from persons who were at the scene at the material time that a fight erupted between the deceased, the accused and Cleophas.

The investigation Officer (Pw 9) gathered that the deceased was assaulted by the accused and Cleophas as the three engaged in a fight. The conclusion reached by him (Pw 9) was that the deceased was killed by the accused and Cleophas who remains at large to date. But, in his defence, the accused maintained that the fight involved the deceased and Cleophas. He thus implied that he never took part in the fight as alleged.

However, the evidence by Wycliff (Pw 3) and Florence (Pw 4) coupled with the investigations carried out by the Police clearly indicated that the fight involved three people i.e. the deceased, the accused and Cleophas.

The death of the deceased was a direct result of that fight. It was immaterial who between the accused and Cleophas inflicted the fatal blow. The fact remained that the two ganged up against the deceased and assaulted him following a drunken brawl occasioned by a cigarette stick. The assault against the deceased was excessive. It resulted in his death. Therefore, both the accused and Cleophas must be held criminally responsible for the consequences of their unlawful action even though they clearly had no intention to kill the deceased.

In the end result, this Court must find that the Prosecution has proved the offence of manslaughter rather than murder against the accused. Accordingly, the accused is found guilty of manslaughter contrary to Section 202 of the Penal Code and is convicted.

[Delivered and signed this 28th day of July, 2012]

J. R. KARANJA
JUDGE