



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
CRIMINAL CASE 33 OF 2010

REPUBLIC.....PROSECUTOR

VERSUS

CHARLES INDIKA BUSUTU.....ACCUSED

JUDGEMENT

The accused, **Charles Indiakka Busutu**, is charged with the offence of murder contrary to section 203 as read with section 20 of the Penal Code. The allegation, as set out in the information dated 7th June, 2010 is that on 26th May, 2010 at about 3:00p.m., at Majengo Village, Lumakanda Location in Lugari District within Western Province, the accused person murdered **Blasio Keya** (hereinafter “the deceased”).

The accused was first brought before the court on 8th June, 2010 but his plea was taken on 30th September, 2010. The accused pleaded “not guilty” to the charge. The trial commenced before me on 6th April, 2011. The prosecution called five (5) witnesses in support of their case. The brief facts of the case are as follows:- **Margaret Areyo David** (PW1) was, on 26th May, 2010 at about 3:00p.m., going home from her farm when she heard screams emanating from the home of **Charles Indiakka**. The home was only 10 metres from where PW1 then was. PW1 then heard members of the public urge the deceased to run as the accused said “**finish him if you have caught up with him**”. As PW1 advanced, she met sons of the accused, one of them **Wilson Indiakka** carried a blood stained fork. When she reached the scene, she found the deceased, who was her husband, lying down injured. The deceased was taken to Lugari District Hospital where he died.

Moses Kashi Busutu (PW2), was, at about the same time (3:00p.m.) at his home at Majengo Lumakanda. He had just witnessed the eviction of the accused from the land of **Philemon Avisa Busutu**. He then left for the shops. He was followed by **Philemon Avisa** who informed him that the deceased had been injured. PW2, hurried to the scene and confirmed that the deceased was badly injured. He took him to Lumakanda Hospital where he died. The following day the body of the deceased was released to them for burial after the post-mortem examination had been conducted by **Dr. Munyendo** (PW5).

Philemon Avisa testified as (PW3). He recalled the 26th May, 2010 at 3:00p.m., when the accused was evicted from his land. After the eviction, he went to his mothers’ house 100 metres away. The deceased joined him there but left shortly afterwards. A few minutes thereafter, PW3 heard screams and he went to Lumakanda Police Station to report. He met PW2 there who informed him that the deceased had been

killed. They both returned to the scene and took the deceased to hospital where he died.

PC Oscah Kitonyi (PW4) was the investigating officer. He visited the scene and re-arrested the accused after surrendering himself. According to (PW4), the accused admitted causing the death of the deceased.

Dr. Munyendo Alex (PW5) carried out the post-mortem examination on the body of the deceased. He concluded that the cause of death was severe head injury with intra cerebral hematoma with brain laceration due to trauma by blunt object. PW5 produced the post-mortem form which documented those findings.

After the testimony of the five (5) prosecution witnesses, the prosecution closed its case.

The accused gave a sworn statement and called his wife **Loice Busolo** as a witness. He testified that the deceased was his step brother and so was PW2. He shared a boundary with the deceased in accordance with wishes of their father. He recalled the 26th May, 2010 when he was evicted from his land. After the eviction he went to his neighbours to ask for space to keep his property. At about 3:00p.m, the same date, he went back home and received a report from his wife that the deceased had been injured and had been taken to hospital. He went to Lumakanda police station to report what his wife had said. He was however placed in cells. He denied killing the deceased.

Loice Busolo (DW2) recalled the 26th May, 2010. She was then with the accused when their property was destroyed in an eviction. After the eviction the accused went to their neighbour's home to seek assistance. He returned and then left for the District Commissioners Office and the police station where he was arrested. Later DW2 heard that the deceased had been injured. She concluded that she did not know who had killed the deceased.

This is a criminal case. That being the case the onus rests on the prosecution to prove beyond reasonable doubt that the accused committed the murder of **Blasio Keya**. The accused bears no legal responsibility in proving his innocence since he is presumed to be innocent until and unless the prosecution proves him to be guilty.

There is no direct evidence, by the prosecution that any witness saw the accused kill the deceased. The key witness for the prosecution is **Margaret Areyo David** (PW1). She heard members of the public urge the deceased to run as the accused stated "**finish him if you have caught up with him**". She then met the sons of the accused including **Wilson Indika** who was armed with a blood stained fork. She did not however witness the deceased being killed. She also said the accused at the time was not armed with any weapon.

The 2nd witness who connected the accused with the death of the deceased is **PC Oscah Kitonyi** (PW4). He testified that the accused surrendered himself to the police and informed him in particular that he had caused the death of the deceased who had given him many problems. In cross-examination, PW4 stated that he had not included in his statement the said allegations.

Besides the fact that PW4's statement was discredited in cross-examination, his testimony was not admissible as he was not qualified to receive the alleged statement from the accused by virtue of the provisions of Sections 25A and 29 of the Evidence Act.

The prosecution case was further weakened by the testimony of **Dr. Munyendo** (PW5). Whereas PW1's testimony was that one of the son's of the accused was armed with a fork which was blood stained, Dr. Munyendo opined that the cause of death was due to trauma caused by a blunt object. There is therefore the possibility that the deceased met his death at the hands of persons other than the accused.

On the evidence adduced by the prosecution, there is no doubt that the offence of murder was committed given the injuries found on the body of the deceased. There is however doubt as to who committed the murder. The accused may have been an obvious subject given that he had just been evicted from land he had been occupying and the allegation that the deceased testified against him. However suspicion is not

enough to found a conviction.

No one saw the accused kill the deceased or do grievous harm to him. Circumstantial evidence does not lead to the inference that the accused committed the murder of the deceased. The evidence relied upon by the prosecution could lead to an inference that others may have been involved in the murder of the deceased.

In the premises, I find and hold that the prosecution has failed to prove the charge of murder or any other offence against the accused person beyond all reasonable doubt. In the event, I find the accused person not guilty. He is therefore acquitted of the offence of murder under the provisions of Section 203 as read with section 204 of the Penal Code. The accused is set at liberty unless he is otherwise lawfully held.

Judgment accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT

THIS 19TH DAY OF JULY, 2012

F. AZANGALALA

JUDGE

Read in the presence of:-

**Mr. Chirchir for the State and
The Accused.**

F. AZANGALALA

JUDGE

19TH JULY, 2012