REPUBLIC OF KENYA

High Court at Kitale

Criminal Case 7 of 2006

REPUBLIC ::: PROSECUTOR.

VERSUS

JOHN SOTINI ::: ACCUSED.

J U D G M E N T.

The accused, **John Sotini,** is charged with murder, contrary to section 203 read with section 204 of the penal code, in that on the 4th April, 2005 at Marram area Kapkoi Trans Nzoia District, jointly with another not before court murdered Bernard Werunga.

The case for the prosecution was that on the material 4th April, 2005, **Bernard Wekesa (PW1),** was at his place of work at a local market when he heard that a person had been murdered along the Kapkoi-Kanyarkwat road. He proceeded to the scene and realized that the murdered person was his uncle. The deceased was at the time bleeding from the head and had injuries on the stomach. Later, on the 6th April, 2005, he (PW1) identified the body of the deceased for purposes of postmotem.

A casual worker, **John Naliacho (PW2)**, was on the material date walking home while in the company of one Alfred Wandwa and the deceased. They were walking along the Kanyarkwat/Kolongolo road when they were confronted by a group of thugs and ordered to lie down. The thugs were armed with an AK 47 rifle.

John (PW2) and Alfred were behind the deceased as they walked. The deceased was stopped by the thugs first and told to lie down. John and Alfred who were behind him managed to run away. It was at that juncture that the deceased was shot by the thugs.

John and his colleague ran to Kanyarkwat police station and reported the matter. Later, he (John) learnt that a suspect had been arrested. He was called to Kitale police station where he identified the accused as having been one of the thugs. He said that the accused was the one in possession of the firearm and that the incident occurred at about 2.00 p.m. He also said that the deceased was his young brother.

P.C. Evans Sabisa (PW3), was on duty at Endebess police station on 29th December, 2005 when the accused was arrested and taken there on suspicion of having been involved in a series of stock theft within Trans Nzoia area. The matter was handed over the C.I.D Kitale for further investigations.

On 4th January, 2006, P.C. Sabisa (PW3) was again on duty when two brothers of the deceased arrived there and allegedly identified the accused at an I/D parade as the person involved in the murder of the deceased on the material 4th April, 2005.

Cpl. Herman Orunga (PW4), was on duty on 5th April, 2005 at Endebess police station when he

received a report from Kapkoi police post to the effect that there was a dead body lying on the road near Kanyarkwat. He proceeded to the said scene and found some blood at the spot where the body was lying. The body was not at the scene but he (PW4) was instructed to open the necessary investigation file. Later, the accused was arrested but he (PW4) was transferred to Nairobi.

Dr. Chesori Eric (PW5), produced a postmortem report on behalf of a colleague who performed a postmortem on the body of the deceased.

The report indicated that the case of death was brain damage due to penetrating bullet shot to the head and injury to both lungs by bullet shot.

In his defence, the accused denied the offence and stated that he was a herds boy in West Pokot and that on the material date of the offence he was herding cattle at Kanyarkwat West Pokot but on the 29th April, 2005 while at home at about 1.00 p.m., he saw villagers running up and down while making noises. He then heard gunshots and decided to run away to safety. He learnt that there was a police operation in the area. He met a contingent of police officers while he was running. They shot him on the leg at the ankle joint. He fell down and was confronted by the police officers. They questioned him about cattle rustling and possession of firearms. He knew nothing about those things. He was arrested and taken to the police station where a group of men and women were brought together with a young person who had been shot dead.

He (accused) was injured and bleeding. He was taken to a nearby GSU camp before being transferred to Endebess police station and thereafter to Kitale District Hospital. He was admitted to the hospital for several days and thereafter taken to Kitale police station where he was questioned in the presence of a certain lady. He was shown photographs of people he could not identify. The lady produced a photograph and showed him but he did not recognize the photographed person. The lady then let out a cry saying that he had killed her son. It was at the police station that he saw John (PW2) and a person called Alfred Wamalwa. He was thereafter placed at an identification parade where he was purportedly identified by John and Alfred who were persons known to him. He was eventually charged with the present offence which he did not commit.

From all the foregoing evidential facts, it is apparent that there is no particular dispute that the deceased was shot dead by a group of armed thugs. The deceased and others including John (PW2) appear to have been way laid by the armed thugs prior to the unfortunate incident.

John and a person called Alfred ran away when the thugs ordered the deceased to lie down but the deceased ended up being shot dead. The basic issue for determination is whether the accused was positively identified as having been among the thugs that shot and killed the deceased.

The postmortem form confirmed that the deceased died from gunshot injuries.

The accused has vehemently denied the offence and narrated at length the circumstances under which he was arrested. P.C. Sabisa (PW3) indicated that the accused was suspected and arrested for allegedly being involved in a series of stock theft. He also indicated that two brothers of the deceased whom he did not name came to the police station and purportedly identified the accused as the person responsible for the death of the deceased. The said identification was said to have taken place during an identification parade.

John (PW2) also indicated that he identified the accused at an identification parade. However, there was no evidence that indeed that an identification parade was held and if it was held, there was no evidence to show how it was conducted and if indeed the accused was identified as the murderer as alleged. The police officer who conducted the parade was not called to testify nor were the parade forms tendered in evidence.

Therefore, even if John (PW2) was in the company of the deceased when the deceased was shot dead by thugs, there was no way that he could have identified the accused at an identification parade if in the first place he did not indicate how he saw and identified him at the scene of the offence.

John (PW2) was the most significant witness for the prosecution in relation to the identification of the offenders. He was the sole identifying witness. Therefore, his evidence required some form of corroboration and if such was lacking, the evidence required credibility.

There was no corroboration of John's evidence either directly or indirectly. It stood on its own and cannot be said to have been credible considering the fact that the armed thugs were many and no sooner had they ordered the deceased to lie down, John and his colleague Alfred ran away from the scene. The anxiety created by the entire episode and the duration within which the offence occurred rendered it most probable that John (PW2) was not in a position to make a positive and/or correct identification of the thugs or any one of them.

There was strong suggestion that the accused was mistakenly identified and implicated with this offence merely because he had been shot and wounded by the police after being suspected to be a dangerous and armed cattle rustler.

There is absolutely no cogent and credible evidence showing that the accused was involved in the murder of the deceased. His defence is therefore sustainable and in the end result, he is found not guilty as charged and is acquitted accordingly.

[Delivered and signed this 19th day of December, 2012.]

J.R. KARANJA.

JUDGE.

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