



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA**

**AT KITALE.**

**CRIMINAL CASE NO. 43 OF 2004.**

**REPUBLIC.....PROSECUTOR.**

**VERSUS**

**OGORI KIZITO ).....ACCUSED.**  
**BENARD WEPUKHULU NABISWA )**  
**FRED WAFULA NYONGESA )**

**J U D G M E N T.**

**1. Bernard Wepukhulu Nabiswa, Ogori Kizito and Fred Wafula Nyongesa** (herein referred to as the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> accused persons respectively) are jointly charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the 1<sup>st</sup> charge stated that on 11<sup>th</sup> day of August, 2004 at Serendet Centre, Kibomet location in Trans Nzoia District of Rift Valley province they jointly murdered **Joseph Sakwa Onwamasi**. They also faced a second count of murder contrary to the provisions of section 203 as read with section 204. The particulars of the 2<sup>nd</sup> count stated that on 11<sup>th</sup> day of August, 2004 at Serendet Centre, Kibomet location in Trans Nzoia District of Rift Valley province they jointly murdered **Juma Timoi**.

**2.** The prosecution relied on evidence by a total of ten (10) witnesses to support the charges against the accused persons. The prosecution's case is in support of the charges of murder regarding an incident that happened on 11<sup>th</sup> August, 2004 at about 7.30 p.m. within Senendet centre in Kibomet location. Three men one of whom was armed with a firearm raided the bar and butchery. The assailant who was armed with a firearm fired three bullets which killed Joshua Sakwa Onyamasi and Juma Temoi.

**Ndiwa Wanjae, (PW1)** testified that he was at the Senendet Shopping Centre on the material day with **Major Richard Matayo, (PW9)** who is the owner of the business premises where the attack took place. According to PW1, while they were sitting at the bar with PW9, at about 6.50 p.m. they saw a strange person looking around the premises. This stranger looked at PW1 and PW9 but he did not talk to them. The stranger hanged around for about 5 minutes and then left the scene without talking to anybody.

3. At about 7.30 p.m. while PW1 was still at the same scene, three men stormed the premises and ordered every body to lie down. One of the assailants who was armed with a gun, within no time fired 3 shots. PW1 said he lost consciousness for 20 minutes. He regained himself when he heard people talking from outside. That is when he realized **Joseph** and **Juma** were shot. On 30<sup>th</sup> September, 2004, PW1 was called at Kitale police station where an identification parade was mounted by the Inspector **Anna Wamalwa, PW5. (PW1)** was able to identify 3<sup>rd</sup> accused person as the stranger he had earlier seen, the stranger came later with two other assailants and attacked. PW1 was able to identify the 2<sup>nd</sup> accused person in the dock while giving evidence. No identification parade was held for the 2<sup>nd</sup> accused person because it is said he refused to attend the identification parade.
4. **Jared Wafula Wanyonyi, PW3** was also at the scene at about 8.00p.m. he said he was waiting to be paid his money by PW9. While sitting inside the shop three men entered, ordered them to lie down. One of them was armed with a firearm. He fired 3 shots, one hit Juma, the 2<sup>nd</sup> one hit Joseph and the 3<sup>rd</sup> one hit the wall. On 1<sup>st</sup> September, 2004 PW3 was called at Kitale police station where an identification parade was conducted and he was able to identify the 1<sup>st</sup> accused person but could not identify the 2<sup>nd</sup> and 3<sup>rd</sup> accused person. **Simon Kwemoi Cheprot, PW4** was also at the scene but when the 3 assailants ordered people to lie down, he managed to sneak outside and went round and put off the lights. Meanwhile he heard gunshots and he also scampered for safety and emerged after 15 minutes when he heard people speaking outside who had come to answer to the distress. He did not attend an identification parade but he was able to identify the 2<sup>nd</sup> accused person from the dock.
5. Apart from the investigating officer the other witnesses were formal witnesses who took the deceased persons to the hospital but they were pronounced dead on arrival. They also identified the bodies for the purposes of post mortem. The post mortem was carried out by Dr. Liru who was the MOH of Kitale District at the time. However he could not attend court and the report was produced by Dr. Mbutu who said he was familiar in the handwriting and signature of Dr. Liru. Both bodies had bullet wounds and the cause of death for both the deceased persons was hemorrhagic shock due to external bleeding.
6. This matter was investigated by **corporal Bramwel Saima, PW8**. He visited the scene and recovered 2 cartridges which he sent to the CID headquarters for ballistic examination. They however did not recover any firearm and although the exhibit memo was marked for identification, it does not appear to have been produced by the ballistic expert. PW8 testified that he commenced the investigations and arrested the 3 accused persons. The 3<sup>rd</sup> accused person was already in remand. An identification parade was carried out and the 1<sup>st</sup> and 3<sup>rd</sup> accused persons were identified by PW1 and PW3.
7. However, the 2<sup>nd</sup> accused person violently declined to attend the parade. As to how the accused persons were arrested, PW8 said he received information from an informer that the 1<sup>st</sup> accused person participated in the killings and when he was arrested he was identified by the witnesses. The arrest of the 2<sup>nd</sup> and 3<sup>rd</sup> accused persons was through information received from a remand prisoner who gave information on how the 3<sup>rd</sup> accused person had narrated a story of how they had carried out the attack at Senendet trading centre. PW8 traced the remandees who narrated the story to him. He recorded a statement from them but they were not called as witnesses.
8. The 3 accused persons were put on their defence. The 1<sup>st</sup> accused person gave unsworn statement of defence. Before his arrest, he said he was appointed as Kenya Police Reservist officer and was issued with a firearm. On 1<sup>st</sup> September, 2004 he was summoned at Kitale Police station and when he went there

he found a parade with was going on. He was taken to the parade and was surprised when Charles Wanyonyi (PW3) who is married to his neighbors' daughter identified him. DW1 complained to the parade officer that the witness who purported to identify him was well known to him. However, he was told that he would explain that to court. DW1 was led to his home where the police took the firearm and the bullets to Maili Saba police post. He was arrested and charged with the offence which he denied.

9. **Ongosi Kizito**, the 2<sup>nd</sup> accused person gave a lengthy story of how he used to be disturbed by police officers from Kitale police station from the year 2000. He claimed that the police impounded his motor vehicle Reg. No. KZS 533 and that issue was being followed by **Sergant Isaboke** with whom they had a land dispute. The 2<sup>nd</sup> accused person testified that he was arrested on 16<sup>th</sup> September, 2004 when he presented himself to the police regarding the issue of the motor vehicle. He claimed that on the material day when the offence is said to have taken place, he was living and working as a preacher in Ruringo in Nyeri, Central Province. He was not at the scene and he only met the co-accused persons in remand. According to the 2<sup>nd</sup> accused person his name was mentioned by somebody called Kizito who was in remand prison but who did not give evidence. The investigation officer said that he relied on information given to him by a remandee by the name Timothy Barasa who was also not called as a witness.

10. The 3<sup>rd</sup> accused person gave unsworn statement of defence and narrated how he was arrested on 1<sup>st</sup> September, 2004 for an offence of robbery with violence. He was charged before the Chief Magistrate's court and remanded at the farm prison. On 25<sup>th</sup> September, 2004 he was taken to the police station where PW1 purported to identify him at an identification parade. He was then charged with the offence of murder. Both counsel for defence and the prosecution made submissions in support of their clients in respective positions.

11. The trial of the accused persons has had a checkered history of having been handled by four different Judges. It started before **Karanja – J.** who recorded evidence of some witnesses. She was transferred from this station and **Ochieng – J.** started the matter *denovo*. He recorded the prosecution's witness's evidence. He was transferred from this station. Parties agreed before **Ombija – J.** that the matter do proceed from where **Ochieng – J** left it but no proceedings took place. I took over the matter on 3<sup>rd</sup> November, 2010 and recorded the defence evidence.

12. I have gone through the evidence recorded from the prosecution's witnesses as I have summarized it above. The only evidence that links the accused persons with the offence of murder is principally that of PW1, PW3 and PW8. PW1 said that he identified the 3<sup>rd</sup> accused person as a stranger whom he had seen earlier at the scene at 6.45 p.m. At that time the place was raided by gangsters, he said he saw the stranger for about 5 minutes. PW1 narrated how everybody was ordered to lie down; he said that he recognized one of the assailants as the 3<sup>rd</sup> accused person. The identification parade was carried out one and half months after the incident. The attack took place at 7.30 p.m. to about 8.00 p.m. the witnesses were ordered to lie down and each one of them gave an account of how they scampered for their safety.

13. Indeed PW1 said that he passed out for about 20 minutes after the guns shots. At this moment of tension I am not satisfied that the identification of the 3<sup>rd</sup> accused person was positive and free from error. Although PW1 said he recognized the 3<sup>rd</sup> accused person from having seen them only for five minutes, this cannot be said to be recognition through personal knowledge. It is a splitting acknowledgement which was done under difficult circumstances. Moreover taking the defence of PW1, that PW1 was well known to him as somebody married to a neighbor's daughter, this also shakes the credibility of the identification parade. There are doubts in my mind as to whether the 1<sup>st</sup> accused person

was the person who committed the offence.

14. Furthermore this evidence of PW3, who claims to have identified the 1<sup>st</sup> accused person through an identification parade, this also has to be taken through the tests that is set out in a long line of authority by Court of Appeal regarding identification by a single witness. See the case of **RORIA VS. REPUBLIC [1967] EA 584** where the Court of Appeal held as follows:-

***“Subject to certain well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the condition favouring a correct identification were difficult.***

***In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness can safely be accepted as free from the possibility of error.”***

15. Thus it can safely be said that this was identification under difficulty circumstances which is compounded by the fact that there was no circumstantial evidence adduced. The firearm used in the attack was never recovered. The ballistic expert evidence was never adduced to show whether the cartridges recovered from the scene, were shot from the firearm that had been issued to 1<sup>st</sup> accused person as a KPR officer. Furthermore the evidence of the remandees who gave the information to the investigating officer that led to the arrest of 2<sup>nd</sup> and 3<sup>rd</sup> accused persons were not called as witnesses. The evidence before the court shows that the accused persons were merely suspected based on unsubstantiated information.

16. The prosecution has not proved its case to the required standard. There are several gaps as pointed in the above analysis and serious doubts on whether it is the accused persons who committed the offence as charged. Taking the totality of the evidence before court, the accused persons must be acquitted and I hereby acquit them of the charge of murder.

**Judgment read and signed this 25<sup>th</sup> day of February, 2011.**

**M. K. KOOME.**

**JUDGE**