



REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CRIMINAL CASE NO.36 OF 2008

REPUBLIC.....PROSECUTOR

VRS

FELIX KIMUTAI.....ACCUSED

JUDGMENT

The accused Felix Kimutai faces a charge of murder contrary to section 203 as read with 204 of the Penal Code. It is alleged that on the 30/12/2007 at Chemondi Village in Mt. Elgon District, he murdered Oscar Nabiranda Njalale. The accused pleaded not guilty to the charge. The facts of the case are that on the material day, the deceased and PW1 Oliver Cheseba were sleeping in their house at Chemondi Village. At around 11.00 p.m they were invaded by a group of about 20 people who forced the door open and dragged them out of the house. The attackers who were armed with guns and pangas separated into two groups, one attacking the deceased and the other PW1. The deceased was slashed to death while PW1 sustained serious injuries. The accused was later arrested and charged with the offence.

It was the evidence of PW1 that before the attackers entered the house, he heard and identified the voice of the accused whom he knew before the incident. The accused was calling upon PW1 and the deceased to open the door. Outside the house PW1 and the deceased were beaten up by the attackers. There was moonlight that night which aided PW1 to identify the accused and two others namely Mungau and Bomuchi. It was not until June 2008 when the accused was arrested by army officers who were on security operation in Mt. Elgon District. The witnesses told the court that there was a state of insecurity in the district which instilled fear among the residents to an extent that many criminal incidents were hardly reported to the police. PW2 the father of the deceased testified that he was not in his home at Chemondi on the material night. He had migrated to another village for fear of being killed by members of the Sabaot Land Defence Force (SLDF). It was on the 31/12/2007 that he learnt that his son and PW1 had been attacked at their home in Chemondi and that the deceased had passed away. He did not witness the incident. PW3 was a neighbour to the deceased. He told the court that on the material night he heard people calling for help from the home of Mwalimu Sola saying that the deceased identified the body of the deceased to the doctor during post mortem. Doctor Alex Munyendo formed the opinion that the cause of death was hypolaemic shock due to excess bleeding and asphyxia as a result of deep cut wounds at the neck. PW6 was a police officer from Chesikaki Police Station who visited the scene of the crime the following day. He found the body of the deceased outside his house with deep cuts on the neck and shoulders. PW1 was also found in the compound with injuries and in total shock. PW6 took the body of deceased to Webuye District Hospital where a post mortem was performed. He also recorded the statements of three witnesses.

The accused in his sworn statement of defence gave an alibi. He told the court that at the time he was arrested, he was a class 8 student at Kimama Primary School and was aged 15 years. On the material day the accused said that he was at home with his grandparents at Kaptabor. He parted with his parents at around 8.00 p.m and went to sleep in his room within the main house. The accused said that he did not leave the house on the material night. On the 16/6/2008 he was arrested by army officers from his home. He denied that he committed the offence. The accused complained that he was remanded in police custody for 17 days before he was arraigned in court.

It was the evidence of PW1 that he identified the accused person by his voice and by physical appearance. While PW1 was still in the house, he heard the voice of the accused demanding that the door to be opened for him. After PW1 and the deceased were dragged outside the house, PW1 was able to identify the accused and two others aided by the moonlight. The incident took quite some time based on the narration of the events. The accused and the deceased were at first attacked by the whole group before it separated into two with each attacking their own victim.

PW1 said that he was given a rifle by one young man to hold. The accused then came and snatched the said rifle from him. The accused also cut PW1 with a panga on the back of the neck. PW1 fell down on the ground. In his lying position, PW1 saw the accused join the group which was assaulting the deceased. PW1 further said that he saw the attackers cut the deceased with a panga. It was at this juncture that PW1 got a chance to escape.

The events as described took time and this gave the accused the opportunity to see and identify the accused. PW1 knew the accused well before the incident as the two used to meet at Chemondi Market and during school competitions.

It is important to note that the accused was identified by PW1 before the witness was attacked. Identification was both by voice and visual. PW1 was in a position to see and identify his assailants since he was still in good physical condition. If identification in this case had taken place after PW1 had been cut with a panga, this court would have treated such identification with doubt.

I take cognizance of the fact that this was recognition by a single witness. However I am satisfied that the evidence of PW1 leaves this court with no doubt that the witness recognized the accused positively.

The accused was among the attackers who set on the deceased with pangas and other weapons. When PW6 visited the scene, he found the body of deceased with deep panga cuts on the neck and shoulder. The doctor confirmed that the deceased died of the deep cut injuries transverse on the neck which severed the trachea and both carotid arteries.

It is my finding that the prosecution have established beyond any reasonable doubt that the accused with others not before the court, inflicted the injuries which caused the death of the deceased.

The next issue for determination is whether the accused had malice aforethought when he caused the death of the deceased. There is evidence that when the attackers arrived, they asked for the father of the accused. Fortunately, he was not at home that night having migrated from the insecurity prone area due to the on going attacks by Saboti Land Defence Force (SDLF) on civilians. The witnesses testified that the rag-tag army had terrorized the district forcing many residents out of their homes and out of the district. The attackers took cattle and goats from the residents during the said raids. With this background, it is highly improbable that the accused and his group had planned and prepared to kill the deceased. The motive of the attack could have been cattle raid or the normal terror operations. There is no evidence that their acts were premeditated. For these reasons, I find that the prosecution have failed to prove malice aforethought on the part of the accused in order to establish that he committed the offence of murder.

I therefore find the accused guilty of the lesser offence of manslaughter contrary to section 202 as read with section 205 of the Penal Code and convict him accordingly.

The accused person was arrested on 16/06/2008 and arraigned in court on 2/7/2008. He was in police custody for a total of sixteen (16) days. Section 72 of the former constitution limits the period police can remand a person charged with a capital offence to 14 days. The accused was therefore over-remanded in custody for two (2) days. This issue was not raised during the trial to give the prosecution an opportunity to explain the delay. The accused has a remedy of compensation under section 72 (6) of the former constitution which he may pursue. However, the over-detention of two days does not affect the criminal charge before this court.

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F. N. MUCHEMI
JUDGE

Judgment dated and delivered on the 23rd day of May, 2011 in the presence of the accused, State Counsel and Mr. Onchiri for defence.

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F. N. MUCHEMI
JUDGE