



REPUBLIC.....PROSECUTOR

V E R S U S

CHRISPIN LUBUSE ELONDANGA.....1<sup>ST</sup> ACCUSED

JULIAS ELONDANGA KENYATTA.....2<sup>ND</sup> ACCUSED

JOSEPHAT AGOI.....3<sup>RD</sup> ACCUSED

## J U D G E M E N T

The three accused persons are charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that the accused persons:-

*“On the night of 21<sup>st</sup> /22<sup>nd</sup> day of October, 2005 at Shihunira village, Shisenjeri sub-location in Kakamega District within Western Province jointly murdered BONFACE SANDACHI LUBUTSE.”*

The prosecution called six witnesses. **PW1, DR. JASON AMUKONYI** testified that he performed a post mortem on the deceased on 27<sup>th</sup> October, 2005 at 4.30 p.m. at the Kakamega General Hospital. He formed the opinion that the cause of death was severe head injury due to fracture of base of the skull.

**PW2, FRANCIS SHIKONYELA ILONDANGA** testified that on the night of 21<sup>st</sup> and 22<sup>nd</sup> October, 2005 he was asleep at his home with his wife Truphena Karoli. He heard screams from someone. He went out of his house and recognized the screams as those of Boniface Lubutse, the deceased. PW2 went near to the deceased’s home. He had a torch and those who were assaulting the deceased had a torch. He hid himself near a

kiosk. The deceased was screaming while giving the names of his attackers. PW2's evidence is that he heard the deceased mentioning Shiholo, Lumumba, Kenyatta, Benard and Litali. He also saw those who were beating the deceased and these included the three accused persons. He did not talk to them as they were drunk and cruel.

**PW3, LYDIA ADOLWA LUBUTSE** is the wife of the 1<sup>st</sup> accused. The deceased was her son. Her testimony was that the 2<sup>nd</sup> and 3<sup>rd</sup> accused went to her homestead on 21<sup>st</sup> October, 2005 at 7.00 a.m. looking for the 1<sup>st</sup> accused who was not at home that morning but was in the neighbourhood. The 1<sup>st</sup> accused came home at about 9.00 p.m. and she gave him supper. She did not hear anything that night and did not know what happened to the deceased. On 22<sup>nd</sup> October, 2005 the deceased informed her that he was feeling pain and she took him to Eregi Mission Hospital. The deceased was walking on his own. PW3 went home and informed the 1<sup>st</sup> accused about the deceased's condition and that she had been advised to take him to Kakamega Hospital. The 1<sup>st</sup> accused told her that he would look for transport to take him to hospital.

On 23<sup>rd</sup> October, 2005 in the morning the deceased's wife went to hospital earlier than PW3 and when PW3 reached the hospital she met the deceased's wife crying saying that the deceased was dead. PW3's testimony is that the 1<sup>st</sup> accused was at home on the night of 22<sup>nd</sup> October, 2005 and that the deceased was troublesome and used to complain of headache, dizziness and chest-pain.

**PW4, SHEYLLA KHABAYI MIHESO** is the 1<sup>st</sup> accused's daughter in law. Her testimony is that on 21<sup>st</sup> October 2005 she was at home and did not see anything happening. She further stated that she was forced by PW2 to write a statement. Part of the evidence contained in her statement is that one of her younger sister in law by the name

Catherine told her on 22<sup>nd</sup> October, 2005 that the deceased was unwell and was taken to hospital.

**PW5, FELIX LIDONDE LUBUTSE** was the deceased's brother and 1<sup>st</sup> accused's son. His evidence does not touch on any of the accused persons. He denied that he was arrested by vigilantes together with the deceased.

**PW6, P.C. JULIUS LIJODI** investigated the case before he passed it over to P.C. David Makori. He received a report of the deceased's death from his wife, Maureen Sandachi Lubutse on 21<sup>st</sup> October, 2005 at about 10.00 a.m. He went to the Eregi Mission Hospital where he saw the deceased's body on the Hospital bed. He observed two bruises on his back and both legs.

The accused were placed on their defence. The 1<sup>st</sup> accused denied the offence and called four witnesses. He testified that he was not in good terms with his brother, PW2. On 22<sup>nd</sup> October, 2005 the deceased complained of chest pains and headache and he bought medicine for him at Mbale. He went to Chavakali town to look for transport to take the deceased to hospital on 23<sup>rd</sup> October, 2005 in the morning. While inside a taxi he saw police officers escorting the 2<sup>nd</sup> and 3<sup>rd</sup> accused while on foot. He came out of the taxi and he was arrested. He had hired the taxi to go and take the deceased to hospital.

**DW2, JOSEPH ASILWA MANG'ONG'O** testified that the relationship between the 1<sup>st</sup> accused and **PW2** was not good. **DW3, HENRY MMBAYA ILONDANGA's** testimony is that **PW2** and the 1<sup>st</sup> accused had family feuds over land. He is a brother to both **PW2** and 1<sup>st</sup> accused. **DW4, ALFRED TOM MUNG'AU** testified that he is a neighbour to the 1<sup>st</sup> accused and that he did not hear noise from the 1<sup>st</sup> accused's homestead on the night of 21<sup>st</sup> October, 2005. His homestead is about 200 meters from

that of the 1<sup>st</sup> accused. He was at his home that night and woke up at 5.00 a.m.

On his part the second accused testified that he was at home on the night of 21<sup>st</sup> October, 2005 and he did not see accused one and three that night. His home is about three kilometers away from 1<sup>st</sup> accused's homestead.

The third accused denied committing the offence. His evidence is that on 21<sup>st</sup> October, 2005 he left home in the morning and went to his place of work at Vihiga when he was putting fisher board at Sabatia Hospital. He worked up to 6.30 p.m. and reached home at 7.00 p.m. He prepared food, ate with his children and slept. The following morning he left for his place of work at Sabatia Hospital and returned home. He was arrested in the evening of 23<sup>rd</sup> October, 2005.

**DW5, EUGINE MWASHI**, is the Chief of Eregi sub-location. He denied that the 1<sup>st</sup> accused is the Chairman of vigilante group in the location. He knew the deceased whom according to him was troublesome, drunkard and bhang smoker. He could disappear from home for three days and had domestic quarrels with his wife. DW5 knows the 2<sup>nd</sup> accused as a mason and the third accused is a mason, too.

Mrs. Muleshe for the 1<sup>st</sup> and 2<sup>nd</sup> accused submitted that the evidence of PW2 is contradicting that of PW1, 3, 4 and 5. PW3 denied that PW1 was involved in the murder of the deceased. Further, PW2 allegedly identified the attackers using a torch and it is not clear how he identified the voices.

Mr. Elung'ata for the 3<sup>rd</sup> accused stated that the evidence of PW2 is not credible and there is no direct evidence connecting the assault and the death.

From the prosecution evidence, it is only the evidence of **PW2, FRANCIS SHIKONYELA ILONDANGA**, that connect the accused to the commission of the

crime. He was with his wife when he went out at midnight after he heard screams from someone saying he is being beaten to death. He went to the deceased's home that was about 150 meters from his home and stood behind a kiosk.

During cross-examination by Mrs. Muleshe the witness stated that the beating was happening inside the house of the brother to the deceased by the name Lidonde. The investigating officer's evidence is that it was, Lidonde (PW5) who told him that he was sleeping in the same room as the deceased.

From the above evidence it is evident that the assault did not take place at an open field or outside the house. PW2's evidence is that he was using a torch. Since the beating could have been happening inside the house it is not clear how he was able to flash the attackers and identify their faces. It is also not clear how he could see the attackers and know that they had torches and hockey sticks or that they were drunk and cruel. PW2 did not go near the scene. He could not have kept on flashing the attackers without being noticed. The description of the house was not given as to whether someone could see inside the house while outside. PW2's testimony is that he went to the home of the Assistant Chief that night but did not find him. However, he did not return the following day neither did he go to check on the deceased.

Apart from PW2's evidence the evidence of PW3, 4 and 5 do not implicate the accused persons, the deceased was alive on 22<sup>nd</sup> October, 2005. Had PW2 notified the police that date, if indeed he witnessed the incident, then the deceased could have revealed the names of his attackers. The accused's respective defences raises doubt on the prosecution evidence. The first accused person was at home that night and slept with PW3. Other than PW2, no other witness saw the two other accused or alleged that they were involved.

In the end, I do find that this case has not been proved beyond reasonable doubt. It will be unsafe to rely on the evidence of PW2 to connect the accused. There is evidence on record that he has family disagreement related to land with the 1<sup>st</sup> accused. PW4 and PW5 when testifying stated that it was PW2 who was urging them to give statements to the police.

The accused are hereby accorded the benefit of doubt and are set free. The three accused persons shall be set at liberty unless otherwise lawfully held.

**SAID J. CHITEMBWE**

**J U D G E**

***Delivered, dated and counter signed at Kakamega this 11<sup>th</sup> day of March, 2010***

**J U D G E**