



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA Criminal Case 5 of 2005**

**REPUBLIC.....PROSECUTOR**

**V E R S U S**

**BONVENTURE JUMA ODUORI.....ACCUSED**

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

The accused is 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 on the 11<sup>th</sup> day of March, 2005 at Eshikuyu village, Indangalasia Sub-location, Koyonzo Location in Butere/Mumias District within Western Province murdered JOHN ALANDO LUKHALE.

Nine witnesses testified for the prosecution. PW1, GABRIEL MUSUNGU testified that he was the village elder at that time. The accused reported to him on 10<sup>th</sup> March, 2005 at 7.30 a.m. that some people had been stealing vegetables from his shamba. On 11<sup>th</sup> March, 2005 at about 8.00 p.m. the accused went to his home and told him that he had found a thief at his shamba and that he had cut him using a panga. PW1 visited the scene and found the deceased's body at the accused's shamba. At the scene PW1 saw two pangas and a paper bag that had arrow roots which had been harvested from the accused's shamba.

PW2, DANIEL LUCHIRU BARASA was a senior village elder and was informed about the incident by PW1 who went to his home together with the accused. He testified that the accused told him his vegetables used to be stolen and that he had found the deceased and two

other people at his shamba and he had fought with them. PW2 visited the scene and discovered that the victim was his father-in-law. PW2 gave the two pangas and arrow roots to PW1 to take them to the police when reporting the incident.

PW3, DANIEL OUMA ALANDA and PW4, JAMES MUYAKA ALANDO are the deceased's sons. They were notified about the incident on the same day at about 8.30 p.m. They went to the scene and found their father already dead. They later reported the matter to Mumias Police Station.

PW5, PHOEBE MUMANGA and PW6, MARY KAGEHA MUKANDA heard screams at about 7.00 p.m. from someone saying "*Ni mimi Alando, msiniuwe.*" They went to the direction where the screams came from. It was dark. They found the deceased lying on the ground and the accused who was holding a panga. They identified the accused as the one holding the panga as he was a person known to them. PW5's testimony is that she did not see the accused cutting the deceased with a panga. By the time they reached near the scene the deceased had already been cut. However, PW6 testified that she saw the accused cutting the deceased with a panga.

PW7, PC. RICHARD SHIKAMI and P8, INSPECTOR CHARLES OUMA visited the scene that night and collected the body. Dr. Oreke who performed a postmortem on the deceased on 14<sup>th</sup> March, 2005 formed the opinion that the cause of death was cardio-pulmonary arrest due to head injury.

The accused in his defence testified that on 11<sup>th</sup> March, 2005 he was at his shamba at about 6.00 p.m. While spreading water to his vegetables he saw three people whom he didn't know. They had weapons and dared him not to stop them from getting what they wanted. One had a jembe while another one had a panga. Two were young while the third one was of middle age. The accused ran for his safety but one of them who was ahead of him managed to stop him while holding a panga. He fought with him and cut him with a panga.

The accused further testified that he suffered minor injuries and he went to report the incident to the village elder, PW1. On coming back to the scene with PW1 they found the victim had died. PW1 and the accused reported the matter to PW2 who also went to the scene. The accused went to Mumias Police Station to report. The following morning he was arrested.

From the prosecution evidence, it is evident that non of the witnesses saw the accused committing the offence. Although PW6 stated that she saw the accused cutting the deceased, PW5 who was with her did not see the accused cutting the deceased. The prosecution evidence further establishes that two pangas were found at the scene and were produced as exhibits by PW8. Although arrow roots were also recovered from the scene, they were not taken as exhibits by PW8, the Investigating Officer.

The accused complained to PW1, the village elder about theft of vegetables from his shamba. This was on 10<sup>th</sup> March, 2005. The theft had occurred two days before as per PW1's evidence. The accused's defence is that he was confronted by three people who were

armed. He fought with them and managed to cut one of them. This evidence is corroborated by that of PW2, the senior village elder who testified that the accused told him he had fought with three people and he had cut one of them. This was a few hours after the incident. I do find that the accused's defence is not an after thought.

Given the circumstances of the case, it is evident that the accused had no intention to kill the deceased. No one witnessed the fight between the deceased and the accused. Although the accused stated that he suffered injuries, there is no evidence that he sought medical treatment. The post mortem report shows that the deceased had two cuts on the head and left leg. The accused could have avoided the incident by running away. Although the accused's testimony is that the deceased had a panga and stopped him, he could have still managed to escape as it is his testimony that he snatched the panga from the deceased. The accused also did not testify as to what the other two accomplices of the deceased did to him. I do find the accused guilty of the offence of manslaughter contrary to *section 202* as read with *section 205* of the Penal Code. The prosecution did not establish that the accused had malice afterthought.

In the end, the accused is acquitted of the offence of murder contrary to *section 203* as read with *section 204* of the Penal Code. I do find him guilty of the lesser offence of manslaughter contrary to *section 202* as read with *section 205* of the Penal Code and he is convicted accordingly.

**SAID J. CHITEMBWE**

**J U D G E**

*Delivered, dated and countersigned at Kakamega by the Hon. Justice Isaac Lenaola this 10<sup>th</sup> day of March, 2010*

**ISAAC LENAOLA**

**J U D G E**