



**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL CASE NO.44 OF 2007**

REPUBLIC ::::::::::::::::::::::::::::::: **RESPONDENT**

~VRS~

MORRIS KUNDU	::::::::::::::::::::::::::::: 1ST ACCUSED
GEORGE CHIBWA	::::::::::::::::::::::::::::: 2ND ACCUSED
GEORGE BARASA WAFULA	::::::::::::::::::::::::::::: 3RD ACCUSED
JUDITH NAFULA	::::::::::::::::::::::::::::: 4TH ACCUSED

JUDGMENT

The four (4) accused persons Morris Kundu, George Chibwa, George Barasa Wafula and Judith Nafula are jointly charged with the offence of murder contrary to section 203 as read with 204 of the Penal Code. It is alleged that on the night of 4th and 5th October 2007 at Boiki Village, Machakha Sub-location, Bungoma District, they murdered Joseph Wamalwa Sifunji. A plea of not guilty was entered for all the accused persons.

The facts of the case is that on 30/9/2007 there was a meeting at Boiki Village where one Machakha Ward Candidate Dickson Wangokho met his supporters including the deceased and the accused persons. He gave them Ksh.2,000/= for the campaign. The deceased gave Ksh.1,000/= to his wife (PW1) to share with the other women supporters. He kept the balance to himself. The 1st, 2nd and 3rd accused persons were not happy about the conduct of the deceased. Both the deceased and the accused persons frequented chang’aa and traditional liquor drinking places in neighbours’ homes. In the said forums, the 1st, 2nd and 3rd accused kept issuing death threats to the deceased that he would not live to spend the campaign money he took from the candidate. This happened between 30/09/2007 and 04/10/2007. On the 5/10/2007 the body of the deceased was found in the river near the house of 4th accused who was his woman friend. It had injuries on the head and face which were later confirmed to have caused his death. The members of public arrested the four (4) accused persons and handed them over to the police. They were subsequently charged with the offence.

PW1 who is the wife of the deceased told the court that the deceased was campaigning for one Wangokho a candidate for Namumbilo Ward in Bungoma District for the 2007 General Elections. The candidate had given the deceased Ksh.2,000/= to share among his political supporters. The 1st, 2nd and 3rd accused persons were unhappy because they were not given their share of the cash. On 30/9/2007 around 9.00 p.m, the 1st accused passed near the house of the deceased and shouted as he addressed the deceased. **“Hutakula hiyo pesa unaletewa na Wangokho umalize”**- (you will not live to fully use the cash Wangokho brought you). On the 04/10/2007, the deceased was drinking chang’aa with other customers at one Nandasaba’s house (PW15). He did not return home that day. His body was found in the river near the house of 4th accused who was deceased’s lover. On 09/10/2007, members of public arrested

the suspects of the murder who are the four (4) accused persons.

PW2 did not witness the incident. He only saw the deceased's body at the river on 05/10/2007. PW3 was drinking chang'aa in the house of his brother Andriano Wafula on the 04/10/2007 with other clients. The 1st, 2nd and 3rd accused were there too. The 2nd accused told PW3 that if he continued keeping the company of the deceased, he would follow the deceased to death. The 2nd accused further said that the deceased had used campaign money given by a candidate in exclusion of the other supporters. The 2nd accused warned the witness not to touch the campaign money at all or else he would die. PW3 reported the matter to the village elder and the Area Assistant Chief. He learnt the following morning that the deceased had been murdered and his body dumped in the river.

PW5 is a sister to the deceased. On 4/10/2010, she attended the burial of a close relative at Boiki Village. In the evening around 6.00 p.m she went to the house of PW15 to drink chang'aa. She found the deceased there. Since the chang'aa was finished, PW4 left home around 7.00 to 8.00 p.m leaving the deceased behind. She learnt in the morning of 05/10/2007 that her brother had been murdered.

PW4 the village elder testified that he had received the report from PW3 that the 2nd accused had threatened to kill him if he kept the company of the deceased. It was on 05/10/2010 around 6.00 a.m that the report was made.

PW6 visited the deceased in his home around 9.00 a.m. Around 11.00 a.m. the two went to the house of PW15 to drink chang'aa. PW6 then left for burial of deceased's mother in the neighbourhood and returned to the drinking den around 6.00 p.m. The deceased remained in the den drinking through out the day. He did not even attend his mother's burial.

PW7 a brother to the deceased is a resident of Boiki Village. He testified that on 30/09/2007 around 7.00 p.m he was in his house when he heard the 1st and 2nd accused shouting as they walked on the road about 400 metres away. They were saying that the man who denied them the campaign money will not live to consume the cash. On 05/10/2007, the deceased was found dead. The witness identified the body of the deceased to the doctor who performed the postmortem.

PW8 saw the 1st accused on 02/10/2007 around 6.00 p.m on the road next to her home. He was speaking loud saying that he would finish Joseph Joseph Wamalwa Sifunji (deceased) who had consumed campaign money given by Wangokho. The 1st accused saw PW8 and repeated the same words like he was addressing her. The two were about 30 meters apart.

PW9 said he sells chang'aa. On 30/09/2007 he was in his house selling the stuff with several clients. Around 8.00 p.m the deceased was there and the 1st accused. He heard the 1st accused threaten the deceased with death over the campaign money 1st accused said he was denied a share. The witness was present when the deceased was given cash Ksh.1,000/= by Mr. Wangokho. The three accused persons were present and were not happy when they were denied their share by the deceased. Several days later, the deceased was murdered.

PW10 did not see the deceased on the material day although she passed through the house of PW15 in the evening after the burial. PW11 saw the deceased at PW15's house and left him there. He had passed there for a drink after the funeral but found the chang'aa finished.

PW12 and PW14 are wife and husband. It was their testimony that the 3rd accused who was their friend borrowed a jacket from them on 04/10/2007 in the evening. He said he was feeling cold. He wore the jacket and left. The following day, the jacket was returned. The same was collected on 09/10/2007 by the Area Assistant Chief as an exhibit in this case. It is on the same day that the accused persons were arrested.

PW15 told the court that the deceased was drinking chang'aa in his house on 04/10/2007. PW15's wife was present at home while the witness was attending a burial during the day. He joined his wife and her chang'aa clients in the evening. The deceased was still in the home drinking chang'aa and left around 8.00 p.m.

PW16 the investigating officer received the death report of deceased from the Area Assistant Chief and a brother to deceased. The assistant chief handed over to PW16 the jacket 3rd accused had borrowed from PW14 as an exhibit. He arrested several people and later released most of them. He was left with only the four accused persons whom he charged with the offence.

PW13 was the doctor who performed the post mortem. He formed the opinion that the cause of death was cardio-respiratory failure due to the multiple head injuries.

The defence filed written submissions. The issue of over detention of the accused persons in custody was raised. On the evidence, Mr. Milimo argued that the accused were before the court due to mere

suspicion as gathered from the evidence of the witnesses. Circumstantial evidence on record is inadequate to implicate the accused persons.

It is evident that the deceased received some campaign money from the civic candidate Mr. Wangokho on 30/09/2010. This was witnessed by PW1 and PW4 who were in the meeting. The money was meant to be shared out to the candidate's supporters. This was never to be. PW1 said her husband kept half of the cash to himself while he gave her the other half to share out to the women supporters. PW1 and PW9 confirmed that the 1st, 2nd and 3rd accused were in the meeting. When the deceased failed to give them their share, they carried a grudge against him which is confirmed by the utterances which were made that evening by 1st accused and later by both 1st and 2nd accused. The accused persons were said to be friends to the deceased. It came out in the evidence that they regularly went to their drinking sprees together in the neighbourhoods of Boiki Village and Machakha Sub-location generally. The 4th accused was a woman friend of the deceased to the extent that the wife of deceased PW1 knew about their love affair. The 4th accused denied the relationship in her defence but this could not dislodge the evidence of several witnesses.

On 30/09/2007 the 1st and 2nd accused were heard uttering the words that the deceased would not live to use the campaign money he refused to share out to them. This was in the evening after the meeting where the candidate gave the cash. PW7 heard the utterances around 7.00 p.m as he was in his residence. The two accused were in their home compounds while PW7 was in his house in the neighbourhood. PW7 did not see the two accused persons but identified them by their voices which he was familiar with. The same evening around 8.00 p.m the two accused persons were drinking chang'aa in the house of PW9. The deceased was there and a number of other clients. 1st accused repeated the threats to finish the deceased on the campaign cash issue.

On 02/10/2007 PW8 was in his house around 6.00 p.m when he heard the 1st accused shouting and mentioning the deceased by name. He said that the deceased would die before he finished the campaign cash he (deceased) denied him. The 1st accused was about 30 metres from PW8.

On 4/10/2007 PW3 was drinking chang'aa in the house of one Andriano Wafula accompanied by the 1st, 2nd and 3rd accused among others. The 2nd accused threatened the witness (PW3) that if he continued keeping deceased's company, he would follow the deceased in death. PW3 did not take the threats kindly and he reported the same to the village elder (PW4) and the area assistant chief. By this time, little did PW3 know that the deceased was dead.

The accused persons gave sworn statements of defence. None of them talked about the 30/09/2007 when the campaign cash was given or even the evening of the 04/10/2010 when the deceased was killed. Generally each of them gave an account of how they were arrested and charged with the offence. They all denied committing the offence or being at the scene of crime in the night of 4th and 5th October 2007. They also denied any knowledge of any campaign cash given by the civic candidate.

I did not believe the defence of the accused persons which was dislodged by the evidence of the prosecution witnesses. On 30/09/2007, the 1st, 2nd and 3rd accused persons were seen by PW1 and PW9 in the meeting where the civic candidate gave money for his supporters to the deceased. On the material evenings of 30/09/2007, 2/10/2007 and 4/10/2007 the 1st, 2nd and 3rd accused were seen in the chang'aa drinking den by PW3 and PW9. The deceased was present on 30/9/2007 in PW9's house when the 1st accused threatened him.

The 3rd accused was in the campaign meeting on 30/09/2007. He was also regularly in the company of the 1st and 2nd as they went to drink. No witness said that the 3rd accused issued any threats to the deceased that he would die. The 3rd accused is said to have borrowed the coat of PW14 to wear in the evening of 04/10/2007 because he was feeling cold. He returned it the following morning.

PW16 the investing officer said he did not see any blood stains on the coat when it was handed over to him. The coat was never produced in evidence. No evidence was adduced as to where the 3rd accused went as he wore the coat on the material evening. The 4th accused was a woman friend to the deceased. The deceased visited her and went drinking with her regularly. On 30/09/2007, the 4th accused was not in the campaign meeting. Neither was she in the company of the other accused persons in their drinking places on the material dates. There was no evidence to show that the deceased went to her house on the material evening. The fact that the body of the deceased was found in the river about 50 – 100 metres from her house does not connect her with the offence. There was no witness who saw her with the

deceased on the material day (04/10/2007).

The 1st and 2nd accused were in the campaign meeting on 30/09/2007 as PW1 and PW4 told the court. The deceased denied them their share of the campaign cash. The two witnesses confirmed that the two accused were not happy about the conduct of the deceased. It was on the material evening around 9.00 p.m that the 1st accused in a drunken state passed near the house of the deceased and shouted the death threats. Around 7.00 p.m the same day PW7 had heard the 1st and 2nd accused shout similar words. As they drank chang'aa in the house of PW9 the 1st accused uttered the same words. At that time, he addressed the deceased who was present. Two days later, the 1st accused in a drunken state uttered the threats in the face of PW8. He even went nearer his house from the road and addressed him about 30 metres away. He called the deceased "**Joseph Sifunji,**" which was his real name. It was around 6.00 p.m at daylight and PW8 knew the 1st accused well since he was his neighbour.

On 04/10/2007 in the house of PW9, the 1st accused repeated the threats at around 8.00 p.m. PW9 took the initiative to talk to the 1st accused and the deceased with a view of making peace between them since it was almost going physical. Each of them left the home and went their way. The deceased was not seen alive again. His body was discovered the following morning in the river.

The evidence against the 1st and 2nd accused is circumstantial. There is no witness who saw them strike the deceased dead. The facts which come out of the evidence is that the two accused were unhappy that the deceased denied them as a share of the campaign money given by the ward civic candidate in a meeting which the three of them attended. There is evidence that death threats to the deceased either directly or indirectly started the same evening after the meeting. Five witnesses PW1, PW3, PW7, PW8 and PW9 heard these threats. Except PW1 and PW7 who heard the voices of the two accused persons, the other three witnesses saw the accused persons and heard the words uttered. PW1 and PW7 knew the accused persons well and were familiar with their voices. The death threats continued for about one week and finally, the deceased was found dead. The deceased had multiple cuts and a blunt injury on the head. He also had bruises on the back. The deceased died of the head injuries as confirmed by PW13, the doctor. The 1st accused and deceased left PW9's house after 8.00 p.m after PW9 separated them. In his defence the 1st accused did not explain where he went after that or how far he may have walked with the deceased from the home. The 1st accused denied seeing the deceased on the material evening. This was not consistent with the evidence of PW9 whom this court found a truthful witness. There is evidence that the 1st and 2nd accused both threatened the deceased with death. The deceased met his death in the night of 4th and 5th October 2007. The series of facts all together point the guilty to the 1st and 2nd accused more than any other person in the murder of the deceased. An inference can be drawn that the two accused persons were responsible for the act which caused the death of the deceased. I find no other co-existing circumstances pointing guilt at any other person. I reject the defence's argument that the charge was based on mere suspicion. It is my finding that the prosecution have proved the actus reus on part of the two accused and hold them responsible accordingly.

I find no evidence to connect the 3rd and the 4th accused with the death of the deceased. I therefore acquit them of the charge accordingly.

The two accused took about one week from the 30/09/2007 when the first threat was issued. Several threats followed until the night of the 4th and 5th October 2007 when the deceased died. The time taken and the threats issued on diverse dates are evidence of well planned act which was finally executed. This forms cogent evidence of malice aforethought. I find that the prosecution have proved that the two accused persons had the intention to kill the deceased. I accordingly convict them of murder as charged.

The 1st and 2nd accused persons are hereby sentenced to death.

F. N. MUCHEMI
JUDGE

Dated, delivered and signed at Bungoma this 26th day of October, 2010 in the presence of the four accused persons,, their counsel Mr. Watanga for Mr. Milimo and Mrs. Leting the State Counsel.

F. N. MUCHEMI
JUDGE