



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA
Criminal Case 29 & 17 of 2006

(CONSOLIDATED WITH CR.17 OF 2006)

REPUBLIC.....PROSECUTOR

VRS

ELIZABETH K. WANJALA.....1ST ACCUSED

BONVENTURE W. MULATI.....2ND ACCUSED

SAMWEL W. MAKANDE.....3RD ACCUSED

RULING

The three accused persons Elizabeth Khisa Wanjala, Boniventure Wanjala Mulati and Samuel Wafula Mukanda were charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. They all denied that on 4th May, 2006, at Lukhuna Village, Kiminini Location, Bungoma District of the Western Province, with others not before the court, they murdered one Godfrey Waluse Fukwo.

The prosecution called a total of ten witnesses and rested its case whereupon both learned counsel appearing for the accused persons submitted that no case had been established to warrant all the accused persons to be placed on their defences. The learned counsel for the Republic however maintained that a prima facie case had been established and the accused should be called upon to defend themselves.

This case was partly heard by Lady Justice W. Karanja who recorded evidence from nine prosecution witnesses before she was transferred. Upon taking over the same under section 201 (2) of the Criminal Procedure Code, I informed all the accused persons of their right to recall any or all the witnesses who had already testified as required of me under section 200 (3) of the same code. All elected not to recall any witnesses. I thereafter proceeded to receive evidence from the tenth witness before the close of the prosecution case.

I have the submissions of all learned counsel for the accused on the one hand and the Republic on the other. I must note that I did not have the advantage to see, hear and observe the nine witnesses who gave evidence before my predecessor. However, the clarity with which the evidence was recorded by the learned Judge is sufficient to enable me address the salient issues herein.

In a criminal trial, the onus is on the prosecution to prove its case beyond reasonable doubt and a prima facie case is not made out if, at the close of the prosecution, the case is merely one which on full consideration might possibly be thought sufficient to sustain a conviction. The question whether there is a case to answer cannot depend only on whether there is "some evidence irrespective of its credibility or weight, sufficient to put the accused on his defence. A more scintilla of evidence can never be enough; nor can any amount of worthless discredited evidence " *[See RAMANLAL T. BHATT V R [1957] EA 332]*. It is also in this case wherein it is stated: "It may not be easy to define what is meant by

a “prima facie” case, but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.”

At the close of the prosecution case, the prosecution proved beyond doubt that the deceased Godfrey Waluse Fukwo died. He died of severe head injury, subdural haematoma, due to blunt trauma. A post mortem report by Dr. Munyendo was produced in evidence as exhibit 1 to confirm this.

It is the prosecution case that it was the accused persons with others not before the court who caused the death of the deceased. What is the evidence?

Of all the witnesses, it is only PW1 Fredrick Mutali Wanyama who appears to have been an eye witness. On the date of the alleged offence he was cycling to the market. The deceased was behind him also on a bicycle. PW1 saw the first and second accused, who are wife and husband respectively, emerge from the side of the road. PW1 and the deceased stopped and the deceased was told, apparently by Elizabeth and her husband, that they go back to the mother of Elizabeth, one Belita. Two other people who PW1 named as Peter and Wycliffe emerged, got hold of the deceased and started beating him. This is what he told the court.

“They were Peter and Wycliffe. They started beating the deceased using sticks. Accused 2 and 3 did not beat him. They first left as the deceased was being beaten.

They dropped him onto the ground. One Samuel emerged from the shamba. He joined the others and started beating the deceased. He then rushed to his house which was nearby. He came with a rungu but he met with the “Mukasa”- village elder as he came and so he did not hit him. One Peter went and brought a big stick and hit the deceased. The Mukasa stopped him and told them to take him to the police if he had wronged them. They stopped. I held the deceased and we moved slowly up to his home. On getting to his mother’s home he collapsed and died. He had injuries on his headThe accused persons ran away and did not intervene. I was just urging them to stop the fight.”

Cross-examined by Mr. Situma, the learned counsel for the first and second accused, this witness PW1 said:

“I was at the scene. Accused 1 and 2 did not beat the deceased at all. They just talked to the deceased. It was near their home so I did not ask them where they were going. They did not even touch him.”

In answer to questions by Mr. Makali, the learned counsel for the third accused, PW1 said;

“Deceased was being beaten by Wycliffe and Peter. The deceased was just asking them why they were beating him.

I saw the injury on the head. He was hit by Peter Accused 3 did not hit the deceased with a rungu.”

Under re-examination by the learned counsel for the Republic, this witness was emphatic that the deceased was beaten by two men, Wycliffe and Peter.

PW2 Cedric Andachi was attracted to the scene by screams and went there. He found a crowd of people among them Wycliffe, Peter and PW1. Accused three was also there but he did not see him with any weapon. The deceased was on the ground screaming *“Peter is killing me.”* The deceased rose and walked to his home with PW1. Later, PW2 saw accused one and two walking to the home of the brother of the first accused.

Cross examined, he said accused one and two were not at the scene by the time he got there but passed by later. There were about 100 people at the scene and he did not see accused three beat the deceased although he was at the scene.

A sister of the deceased one Emily Khanali (PW4) met her brother coming from the scene. When she asked him who had beaten him, he named *“Wycliffe Simba and others.”* Before she could hold him, he fell on her chest and died. Her brother, the deceased, had inherited one Belita who was the mother of the first accused, Elizabeth. She had never heard of any quarrel between them.

Belita Namalwa who had been inherited by the deceased also gave evidence as PW5. However, she did not witness the incident and only heard that it was the accused persons who beat her husband. She could not even name the persons who told her so.

Jenifer Wekesa Maboga the wife of the deceased also did not know who killed her husband except what the neighbours were saying, that it was Wycliffe, Peter and Samuel.

Police investigations which were partly conducted by Chief Inspector Fanice Amalemba (PW10) led to the arrest of the three accused persons. The officer conceded that some suspects namely Peter and Wycliffe Wafula are still at large. The officer also told the court that Peter and Samuel, according to investigations, had bought land from Belita but she (Belita) took a loan against the same land as security and that is what brought about the dispute.

From the foregoing evidence the witnesses have placed all the accused persons at the scene. They were among 100 or so people who had gathered there. The evidence of PW1, the eye witness did not incriminate any of the three accused persons. Yes, they may have been present and failed to intervene, but does that make them guilty of the offence?

The person who delivered the fatal blow is one Peter. He was seen by PW1. The deceased cried out that Peter was killing him. There is no evidence that he acted in concert with any of the three accused persons herein. The deceased also named Wycliffe Simba when asked by his sister as to who had beaten him. He did not name any of the three accused persons.

There is also no evidence that Peter and Wycliffe had any common intention with the three accused persons to attack, leave alone kill the deceased.

If the three accused were to elect to remain silent at this stage, would the court enter a conviction based on the evidence so far adduced? On the test and standards set out in the Bhatt Case, no conviction can be founded on that evidence.

The person(s) who committed this offence are known. They are at large. The three accused herein did not commit the offence charged. My evaluation of the evidence on record leads me to the finding that the three accused persons have no case to answer.

It follows that under section 306 (1) of the Criminal Procedure Code, Cap.75 Laws of Kenya the three accused persons are NOT GUILTY and are therefore acquitted.

They shall be released forthwith unless otherwise lawfully held.

Dated, Delivered and Signed at Bungoma this 27th day of January, 2009.

A. MBOGHOLI MSAGHA

JUDGE