



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA Criminal Case 35 of 2007

REPUBLIC.....PROSECUTOR

V E R S U S

PHILIP SHIVAJI JOHNACCUSED

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 is that on the 28th day of March, 2000 at Senende village, Senende sub-location, Shamakhokho location, Vihiga District of the Western Province, the accused unlawfully murdered Bernard Jisuveyi Ashihuma.

The prosecution called five witnesses. PW1, Duncan Sungu was a brother to the deceased. He works in Nairobi as a Computer operator. He was notified about the assault on his brother on 30/3/2000 by his uncle. He went home and saw his brother in a critical condition. His brother died on 2nd April, 2000. PW2, Carvene Kachuku Ashiuma was also a brother to the deceased. He testified that on 28th March, 2000 at about 2.00 p.m. he met the accused while he was herding cattle. After passing him the accused started chasing him up to their house and saw the accused remove a panga and cut his brother who was at their home. He did not raise any alarm or scream but went and sought assistance from PW3, Samson Boit Wanyama and they took the victim to hospital.

PW4, Epaitus Mnene Khaligona identified deceased's body for postmortem at Kaimosi Hospital on 3rd April, 2000. PW5, Erastus Ashihuma was the deceased's father. He went home on 28/3/2000 at 5 p.m. and found his son lying outside the house bleeding on the head. He assisted in putting him on a bicycle and he was taken to hospital.

The accused was put on his defence and in his unsworn testimony he denied committing the offence. He testified that he works in Nandi where he resides. He knew the deceased as a neighbor and their home is about 200 metres from deceased home. He had no grudge with the deceased. Accused stated that he was at his place of work in Nandi on 28th March, 2000. He works as a Tea picker. He was arrested on 29th June, 2000 in Nandi.

From the prosecution evidence it is only PW2 whose evidence connects the accused with the commission of the offence. The witness testified that he was herding cattle on the material day when he met the accused who asked him whether their cattle were wild. He passed him but immediately saw him running towards his direction. He caught up with him and removed a panga and cut his brother. This was about 2.00 p.m. PW3, Samson Boit Wanyama testified that PW2 went to his home at 5.00 p.m. and asked him to assist in taking his brother to hospital. The deceased's father, PW5 also reached home at 5.00 p.m. and assisted in having his son taken to hospital. The evidence of PW2 does not explain what he did between 2.00 p.m. and 5.00 p.m. He testified that there were neighbours nearby but it's not explained what

happened immediately the deceased was attacked.

The deceased died after about five days. The prosecution did not produce a postmortem report indicating the cause of death. No police officer testified as to how the investigations were done. According to PW5, there is an Administration Camp about 2 km from his home. None of the witnesses was clear as to how the matter was reported to the police.

The motive for the committal of the offence is not established by the prosecution evidence. PW5 testified that the relationship between the accused's family and his family was not bad. Given the evidence on record, it is only the word of PW2 against that of the accused. I do find that the accused should be accorded the benefit of doubt. The evidence on record did not prove the case beyond reasonable doubt. I find the accused not guilty of the offence he is charged with and he shall be set at liberty unless otherwise lawfully held.

Delivered, Dated and Signed at Kakamega this 21st day of October, 2009

SAID J. CHITEMBWE
J U D G E