



REPUBLIC.....PROSECUTOR

VERSUS

ANTONY MUNYERI MAINA.....1ST ACCUSED

PETER ODUOR.....2ND ACCUSED

KELVIN OTIENO ONCHIENG.....3RD ACCUSED

FRANCIS NJURU KAMAU.....4TH ACCUSED

JUDGMENT

ANTONY MUNYERI MAINA, PETER ODUOR, KELVIN OTIENO ONCHIENG and FRANCIS NJURU KAMAU are jointly charged with murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. It is alleged that on 18th November 2006 at Lake View Estate in Nakuru District of Rift Valley Province they jointly murdered Charles Wambugu Ndungu (the deceased).

The prosecution case is that on 18th November 2006, a mob of about 50 people set upon the deceased and one Idd Ochieng, PW5 and seriously beat them alleging that they were thieves. When accused one was called, he identified Idd Ochieng as an electrician he knew who was not a chief. However, the mob including accused one beat the deceased inflicting him with serious injuries from which he died in hospital about three days later.

Of the six prosecution witnesses none mentioned accused 2, 3 or 4. Only James Njoroge, PW2 claimed to have seen accused 1 among the many people he saw beating the deceased. This is evidence of identification. "It is the law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely be the basis of a conviction." - Court of Appeal in Wamunga Vs Republic [1989] KLR 424 at p. 426.

In this case, PW2 claimed that the security lights at the scene enabled him to see accused 1 among the mob that was beating the deceased. The intensity of the security light was not stated. As was stated by

the Court of Appeal in **David Masinde Simiyu Vs Republic Crim. Appeal Nos. 33 & 34 of 2004 (Consolidated)** where the intensity of the light enabling a witness to identify an accused person is not stated, the witness's identification of an accused person cannot be said to be free from error.

This was also a case of the identification of accused 1 at about 2.00 a.m. by one witness, PW2. That witness did not say whether he identified any other person from the mob of about 50 people. The law is quite clear on the evidence of a single identifying witness especially when the conditions for a positive identification are not favourable. The court should be wary of basing a conviction on such evidence. In **Ogeto-Vs-Republic, [2004] 2 KLR 14**, the Court of Appeal stated:-

“It is trite law that a fact can be proved by the evidence of a single witness although there is need to test with greatest care the identification evidence of a single witness especially when it is shown that conditions favouring a correct identification were difficult- See *Marube & Another Vs Republic [1986] KLR 356*. Further the court has to bear in mind that it is possible for a witness to be honest but mistaken- *Kiarie Vs Republic, [1984] KLR 739*.”

Applying these principles to this case I find that the evidence of PW1 cannot be the basis of accused one's conviction. Consequently I hold that the prosecution has failed to prove the case against any of the accused persons and I accordingly acquit them. The accused persons shall be released forthwith unless otherwise lawfully held.

DATED and delivered at Nakuru this 9th day of December, 2009.

D. K. MARAGA

JUDGE.