

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Criminal Case 31 of 2001

REPUBLICPROSECUTOR

VERSUS

JEREMIAH SABAYA alias DONIDO.....ACCUSED

J U D G M E N T

The accused herein, Jeremiah Sabaya alias Donido is before this court on information of the Attorney General, duly charged with offence of murder contrary to Section 203 as read with section 204 of Penal Code. The particulars of the offence are that on the nights of 5th and 6th December 2000 at an unknown time at Boghoni village in Taita/Taveta District within the Coast Province, he jointly with Syengo Mutokaa alias Wangu murdered Emmanuel Sarino. The prosecution tendered the evidence of 10 witnesses to support its case. The accused gave an unsworn statement in his defence. He also summoned the evidence of a police officer who produced a copy of the Occurrence Book (O.B.) of 12th November 2000 to 14th January 2001 and the cell register of the same period.

The prosecution's eye witnesses are said to be Raymond Kauya (P.W..1) and Sawunini Scaver (P.W.3). The duo had been sent to visit a kiosk within Boghoni village to purchase some onions. It was on the 5th day of December 2000, at about 7.00 p.m. P.W.1 and P.W.2 came back from the shops. On the way they heard screams. They looked at the direction where the screams emanated from and they each claimed they saw the accused cut Emmanuel Sarino, the deceased, on the head as his two accomplices namely: Lawrence and Wangu held the deceased. P.W.1 and P.W.2 said they witnessed that with the assistance of moonlight P.W.1 said he saw the accused cut the deceased on the road next to his farm. He had known the accused for 1 year. It is the evidence of P.W.1 that the accused wore a black shirt. P.W.1 said he explained to his parents what he saw but he was warned not to tell anybody. On his part P.W.3 said he had known the accused for 3 years. He was a neighbour. He also claimed he was told to keep quiet by P.W.1's parents. Both P.W.1 and P.W.3 claimed they visited the scene of crime the morning of 6/12/2000. Both P.W.1 and P.W.3 recorded their police statements on 27.1.2001 more than four weeks after the incident. Regina Zakaria (P.W.2) told this court that the deceased had visited her kiosk where he took lunch at 1.00 p.m. on 5.12.2000. P.W.2 was surprised to find him dead besides the road in the morning of 6/12/2000. Lucy Munyao (P.W.4) told this court that on 5.12.2000, Jeremiah Sabaya alias Donido, the accused herein had borrowed a panga from her. The next day she received news of the deceased's death. It was dark on 5/12/08. In his statement of 3/7/2001, Robert Kiteme (P.W.5) said he saw the accused on 5/12/2000 pass by at around 7.30 p.m. He had known him for over 2 years. P.W.5 said he saw the accused due to the bright moonlight. Tabu Sawunini (P.W.6) confirmed having sent P.W.1 and P.W.3 to purchase onions from a kiosk on 5/12/00. She also confirmed that she was told by those children of what they saw while coming back home. She said she told them to keep quiet. She (P.W.6) recorded her statement on 27.1.2001. P.W.6 admitted having been arrested as a suspect where she was held in police custody for two week before being released and made a prosecution witness. Dr. Shem Patta (P.W.7) produced the post mortem report which indicated that the deceased died as a result of cardio-respiratory arrest due to severed aesophagus at the level of larynx. P.C. Khalif Abubakar (P.W.8) and P.C. Johnson Murimi (P.W.9) were the investigating officers. They visited the scene and formed the opinion that there was no evidence of a struggle at the scene hence the deceased could have been killed elsewhere and dropped at the scene. According to P.W.8, the names of the suspects were not given to the police but the police came to learn of the same through their informers.

The accused on his part gave an unsworn statement in his defence. He insisted that he is called Soi Siara Sigilai. He pointed out that it took the witness about 49 days to implicate him with the offence. This information came from informers. He said he was only implicated by witnesses after being kept in police custody for over 50 days. P.C. Frederick Kioko (D.W.2) was summoned to produce the O.B. and cell registers for the period between 5th December 2000 and 14.01.2001.

At the end of the evidence, Mr. Muthama, learned Counsel for the accused and Mr. Monda learned Senior State Counsel made submissions in support of their respective positions. It is the submission of Mr. Muthama that the evidence of P.W.1 and P.W.3 are full of contradiction. It is the learned advocate's view that their evidence needed corroboration hence unreliable as of now. Mr. Monda is of the firm view that the prosecution proved its case to the required standard of beyond reasonable doubt. It is his submission that there was a bright moonlight. The evidence of P.W.1 and P.W.3 did not require corroboration. This court was urged to taken into account the accused's conduct of

fleeing his home after the incident to be that of a guilty person.

I have considered the evidence and the submissions. The law is quite clear that two ingredients must be established in order for one to prove the offence of murder namely: actus reus and Mensrea. According to the evidence of P.W. 1 and P.W.3, the accused was seen cut the deceased. It is not in dispute that the deceased died as a result of a severed aoesophagus. Whoever inflicted the injuries, must have intended to cause death or grievous harm. The question which must be answered is who committed the act? I have already stated that the prosecution relied on the eye witness accounts of P.W.1 and P.W.3. The duo said they saw the accused and two accomplices with the aid of moonlight. They said they saw him at about 7.00 p.m. on 5/12/2000. The information filed by the Attorney General does not specify the time yet those witnesses specified the exact time. P.W.4 and P.W.6, said though there was moonlight it was dark. I have agonized over this issue and I am doubtful whether P.W.1 and P.W.3 actually saw the accused. They claimed they saw the accused but were told not to reveal the incident to anybody by P.W.4. In fact they only recorded their statements on 23rd January 2001. This was done after P.W.4, the mother to P.W.1 had been arrested and kept in police custody. P.W. 7 said the names of the suspects were not given to the police by the eye witnesses. The police managed to get the accused's name through an informer. If indeed, P.W. 1 and P.W. 3, had seen the accused, why didn't they record their statements? Why wait until P.W.4 is arrested? I have entertained some doubt which I think should be given in favour of the accused. First, I am not convinced that the moonlight was sufficient to enable P.W.1 and P.W.3 identify the accused. Two, the evidence of P.W. 8 indicated that there was no struggle at the scene of crime hence the deceased could have been murdered elsewhere and his body dumped at the scene. Three, that the witnesses did not name the suspects yet they claimed they knew them. I am satisfied that the element of actus reus was not established beyond reasonable doubt.

The second element which must be established is mensrea. It is that the accused must have malice aforethought. Under section 206 of the penal code, Malice aforethought can be inferred if one of the circumstances enumerated therein are proved. One of the circumstances is an intention to cause the death of or do grievous harm to any person. In this case it would appear the throat of the deceased was slit and severed. The person who inflicted the injuries intended to cause death or grievous harm on the deceased. I am convinced malice aforethought manifests itself from the nature of injuries which led to the deceased's death. What emerges from the evidence is that there is strong suspicion that the accused committed the offence. It is unfortunate because suspicion however strong, will not substitute proof beyond reasonable doubt. It is possible somebody else committed the offence. That doubt was not cleared by the evidence. It is also possible that the witnesses particularly P.W.1 and P.W. 3 mistook the accused with somebody else. Where doubt is entertained by any court, the same will be given in favour of the accused.

In the end and for the above reasons I find Jeremiah Sabaya alias Donido not guilty. I acquit him. He should be released from custody forthwith unless otherwise lawfully detained in such custody.

Dated and delivered at Mombasa this 27th day of October 2008.

J. K. SERGON

J U D G E

In open court in the presence of Mr. Ondari, Assistant Director of Public Prosecutions and the Accused in person.

N/A for Mr. Muthama.