

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT BUNGOMA

Criminal Case 11 of 2002

REPUBLIC.....PROSECUTOR

VS

BENSON WAMALWA WAFULA

EDWAR HAWAYA MANYONGE.....ACCUSED

JUDGMENT

The accused person herein, Benson Wamalwa and one Edward Hawaya Manyonge are before this court on information of the Attorney General duly charged with the offence of murder contrary to section 203 as read with section 204 of the Penal code. The particulars are that on the 10th day of January 2002 at Chebukwabi Village in Bungoma District within Western province jointly with others not before court murdered Jesteria Wanjala.

The prosecution's case against the accused is supported by the evidence of six (6) witnesses. On the 11th day of January 2002, the deceased was at home with Maurice Wekesa (P.W1). At about 9.00 p.m, the deceased went out of the house to answer a call of nature at an external pit latrine within the homestead leaving P.W1 inside the house. P.W1 said shortly he heard Ben Juma, a son to the deceased scream for help because the deceased had been attacked. P.W1 said he immediately rushed out of the house and with the assistance of moonlight he managed to see a green hat on the ground similar to the one worn by Benson Wamalwa (Accused) during the day. He also saw the deceased lying down outside the toilet with a visible wound on the head. P.W1 said he organized for a motor vehicle to take the deceased for treatment at Kimilili Sub district Hospital. P.W1 claimed the accused fled their homestead after the incident. He also said that the accused's father, Jotham Wafula settled the deceased's hospital bill and further made overtures to settle the dispute out of court. P.W1 said he spoke to the deceased after he was discharged from hospital. He claimed the deceased told him that he was assaulted with a panga by Benson Wamalwa as his father, Alfred Juma held him. Consolata Naliaka (P.W2) said she was informed by her daughter called Sylvia that the deceased had been attacked upon which she rushed to the scene where she found one Ben Juma crying and accusing Benson Wamalwa of assaulting the deceased. P.W2 claimed that she knew Benson Wamalwa had a quarrel with the deceased over a dispute over rice. Joseph Wenami (P.W3) gave evidence which seemed to contradict part of the evidence of P.W1 in that he told this court that the deceased was unable to talk even after he was discharged from hospital after receiving medical treatment. P.W1 had claimed that he had spoken to the deceased after he was discharged and that is when the deceased mentioned the name of the accused as his assailant. Dr. Stephen Ngigi (P.W4) did the autopsy. He produced the post mortem report which showed that the deceased passed away on 24.3.2002. P.W4 formed the opinion that the deceased died as a result of hypovolemic shock due to internal bleeding as a result of head injury.

In short, the prosecution's case is that the accused was seen at the scene of crime on the fateful night by the deceased's son Ben Juma attacking the deceased. It is also the prosecution's case that there was sufficient moonlight which enabled him to see. Ben Juma did not testify hence this piece of evidence is hearsay hence worthless. The other aspect which connected the accused with this offence is the recovery of a hat which was alleged to have been worn by the accused during the day. It is claimed that the deceased made a death declaration to P.W1 incriminating the accused to the culprit.

On behalf of the defence there is sworn testimony by the accused himself. The accused, Benson Wamalwa claimed that he was not at home when the incident took place hence he had no opportunity to commit the offence. He claimed he had been given an assignment by his employee to transport some women to Kitale where they spent the night of 11th January 2002 and came back at 4.00 p.m on 12.1.2002. In short, he raised the defence of alibi. The accused stated that he had a grudge with Maurice Wekesa (P.W1) which arose due to the fact that he fell a tree which accidentally damaged P.W1's bananas. He denied ownership of the hat which was allegedly found at the scene of crime. In short, the accused's defence is that of alibi and that the key witness, P.W1 had a grudge against him.

Counsels on both sides gave detailed submissions. It is the submission of Mr. Barasa advocate for the accused that the evidence tendered by the prosecution were full of contradictions. The evidence of P.W1 and P.W2 were mentioned as the testimonies with material contradictions in respect of the date when the deceased is alleged to have died. It is also pointed out that there is doubt as to who amongst P.W1 and P.W2 arrived at the scene of crime first. None of them mentioned the name of the other in the statement to the police. It is also submitted that the prosecution withheld the crucial evidence of one Ben Juma hence rendering some of the evidence as hearsay. The hat which was allegedly found at the scene of crime was not produced in evidence. The conditions were not favourable for a positive identification of the accused on the fateful night. The contention of the defence that malice aforethought was not established.

At the end of the submissions, I summed up the evidence to the assessors after which I sought for their opinions. The assessors were unanimous that the accused is not guilty. They were of the opinion that there were contradictory evidence in the testimonies of P.W1, P.W2, P.W3 and P.W5.

I have considered the evidence, the submissions and the assessors' opinion and I have come to the following in this case. The evidence P.W1 is dependent on is the evidence of one Ben Juma who was not called to testify. It is the evidence of P.W1 that Ben Juma mentioned the name of the accused as the deceased's assailant. Of course this piece of evidence amounts to nothing but hearsay in the eyes of the law. In this respect, I agree with the assessors that it was important to summon the evidence of Ben Juma. There was no explanation from the prosecution as to why such evidence was withheld. May be it was prejudicial to its case and of course favourable to the defence.

The prosecution sought to rely on the dying declaration allegedly made by the deceased. In this regard, it is in the evidence of P.W1 that the deceased mentioned the name of the accused as his assailant in his dying declaration. The evidence of P.W1 is contradicted by the evidence of P.W2 who said that the deceased did not talk at all after he was assaulted. There is therefore doubt whether or not the accused made a dying declaration. The law is quite clear that where some doubt is entertained, then that doubt should go to the benefit of the accused. In the end, I am in agreement with the assessors that the accused is not guilty of the offence of murder. He is hereby acquitted of murder. He should be set free forthwith unless lawfully held in custody.

Dated and delivered this 14th day of September 2006.

J. K. SERGON

JUDGE

In open court in the presence of Mr. Barasa holding brief for Mr. Makokha for the accused and in the presence of Mr. Onderi for state.