



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA**

Criminal Case 12 of 2004

REPUBLIC.....PROSECUT

OR

VS

TREVOR MASIKA

MASIBO.....ACCUSED

JUDGMENT

Trevor Masika Masibo, the accused herein, is 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. It is alleged that on the 25th day of November 2003 at Sipala Village, Mihuu sub-location, Chetambe Location, Bungoma District within Western Province murdered Boniface Kudaka.

The prosecution's case against the accused is that Linah Okondo (P.W1) saw the accused challenge the deceased for a fight on the 25th day of November 2003 at Sipala Village in the deceased's homestead. P.W1 said she saw the accused swing a whip which had a nut tied to it and hitting the deceased when the deceased responded to the accused's deal. P.W1 said the accused fled the scene and sought refuge in a neighbour's compound. The deceased then resorted to destroying the accused's bicycle which had been left by the accused as he fled. P.W1 said the deceased fell down twice as he attempted to pursue the accused. The deceased was rushed to Lugulu Hospital where he was pronounced dead on arrival.

Evans Opiyo Odoke (P.W3) said he visited the house of Clement Kudaka in company of Boniface Kudaka (deceased) on 23.11.2003. P.W3 said the deceased told the accused not to go to his house to visit Judith Achieng (P.W6) his girlfriend at the gate of Clement Kudaka. P.W3 said the accused warned him and the deceased not to step in Lugulu for barring him from seeing his girlfriend. P.W3 said he heard the accused threaten the deceased with dire consequences on 24.11.2003 before P.W3 left for Kitale. P.W3 said he heard the accused say to the deceased that "*I have surrendered my life over you*" on 24.11.2003.

Dr John Ouma Juma (P.W5) produced the post mortem report prepared by Dr Kubasu. The cause of death is indicated to be severe brain injury due to blunt trauma.

Judith Achieng (P.W6) confirmed that indeed the accused visited the deceased's home on 25.11.2003. She said she left duo while talking outside the house and when he came out after about a few minutes he found the deceased lying down while the accused was standing. She said she rushed to the house to inform the deceased's wife of what she saw but when she came she found out that the accused had fled the scene. P.W6 denied being a girlfriend to the accused.

The accused gave an unsworn statement in his defence. He denied having killed the deceased. He however admitted having wrestled with the deceased upon which the deceased fell down and the bicycle he had fell on him. The accused said that he did not know how the deceased met his death.

There are the submissions by Mr. Omukunda advocate who urged this court not to lay much emphasis on the evidence of P.W1 because she gave fresh evidence which she did not record in her initial statement. It is said that she told the police that the accused removed something from his waist to hit the deceased yet in her evidence in chief she said she saw the accused use a whip tied with a nut to hit the deceased.

It is the submission of Mr. Omukunda advocate that the prosecution did not establish malice aforethought on the accused's part.

At the conclusion of the submission, I summed up the evidence to the assessors and directed them on the applicable legal principles. I sought for the assessors' opinion. They were unanimous that the accused is guilty of murder as charged. The assessors believed the evidence of P.W1 and further formed the opinion that there was rivalry between the accused and the deceased over P.W6. The assessors were of the view that the evidence of P.W6 was calculated to mislead this court to serve the interest of P.W6.

Having considered the evidence, the submissions and the assessor's opinion, I take the following position in this matter. The evidence tendered shows that the deceased died after the encounter he had with the accused. The evidence of P.W1 and P.W3 reveal that the accused and the deceased had a quarrel over Judith Achieng (P.W6). It appears the quarrel took a period of three days from the evidence of P.W3 i.e on the 23rd, 24th and 25th day of November 2003.

The deceased did not want the accused to visit Judith Achieng, a house help in the deceased's home. The accused did not want to let go. According to the evidence of P.W1, she saw the accused hit the deceased with a whip which had a nut tied at the end. When cross-examined, P.W1 conceded that she did not state that she saw the accused with a whip with a nut at the end. There is doubt whether such a weapon was used against the deceased. The accused in his defence has attempted to paint a picture that the deceased may have hurt himself in the process of pursuing the accused.

I have anxiously considered this matter and I am convinced that the deceased's conduct of preventing the accused from seeing P.W6 provoked the deceased to act the way he did. There is no evidence that the accused wanted to kill the deceased. The evidence shows that there was cumulative provocation and the last straw is when the deceased responded to the challenge by the accused to duel on 25.11.2003. In the end, I agree with the assessors that the accused killed the deceased. With respect, I disagree with their opinion that the accused is guilty for murder. The accused is acquitted for the offence of murder but he is convicted for manslaughter under section 207 of the Penal Code.

Dated and delivered this 14th day of September 2006.

J. K. SERGON

JUDGE

14.09.2006

Before: Sergon, J

CC: Nancy

Onchiri holding brief for Mr. Omukunda for the accused.

Mr. Onderi for the state.

COURT: Judgment read in open court.

ONDERI: The accused may be treated as a first offender.

ONCHIRI: I plead for leniency. He is now 21 years old. At the time of his arrest he was a student in form I. He has been in custody for a period of 3 years. He tells me he suffers from t. B. He is a first born. He lost his father at a tender age at 13 years. The family had hope in him. He is remorseful. We pray for a non-custodial sentence. The accused lost his mother while he was in custody.

COURT: I have considered the mitigation given by the accused's advocate. The accused is now an orphan. He committed the offence while he was at a teenage. He was barely in form 1. I think he must have learnt his lesson while he was in custody. I hereby discharge the accused unconditionally under section 35 (1) of the Penal code. He is set free forthwith.

Dated and delivered this 14th day of September, 2006.

J. K. SERGON

JUDGE