



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

Criminal Case 14 of 2001

REPUBLIC.....

PROSECUTOR

VS

BENSON KHWATENGE WANYONYI.....

ACCUSED

JUDGMENT

Benson Khwatenge Wanyonyi 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. The particulars of the offence are that on the 28th day of October 2000 at Mbakalo sub-location in Bungoma District of the Western Province, jointly with another not before court murdered Douglas Musumba.

The prosecution’s case against the accused is that on the 27th day of October 2000 the accused speared to death the deceased while he was in company of an accomplice called Abel Wambasi at Mbakalo Sub-location. An eye witness, Jane Nabwire (P.W3) said that at 2.00 p.m. on 27.10.2000 she heard John Okiring (P.W.5) scream at her father’s farm. She rushed to the scene upon which she saw the accused who was armed with two sticks standing besides P.W5 who was lying down while pleading for help. P.W3 said she and Douglas Musumba (deceased) assisted P.W5 by taking him to his house. As they were taking P.W5 to his house, P.W3 said she saw Benson Khwatenge, the accused, follow them while he was armed with a spear. P.W3 said the accused speared the deceased while he was in company of one Abel Wambasi who was in possession of 2 clubs. P.W.3 admitted on cross-examination that she said in her initial statement to the police that Abel Wambasi was the one who speared the deceased. The statement was produced by the defence as D.Ex.3. In that statement it is clear that P.W3 told the police that Abel Wambasi speared the deceased while Benson Khwatenge (Accused) attempted to remove the spear. John Okiring (P.W.5) said that on 27.10.2000 he met Benson Khwatenge and Abel Wambasi while he was on his way to a nearby river to take a bath. He said the duo beat him using whips upon which he fell into a ditch. He screamed for help. P.W3 and Douglas Musumba (deceased) answered his distress calls. P.W5 was carried by the deceased towards his house. P.W5 said that the accused and Abel Wambasi caught up with them. P.W5 claimed he saw the accused spear the deceased before fleeing the scene with Abel Wambasi. On cross-examination, P.W5, denied having told the police that it is Abel Wambasi who speared the deceased. P.W5’s statement to the police was produced in evidence as the defence Ex.5. In that statement it is indicated that P.W5 told the police that Abel Wambasi speared the deceased and that the accused attempted to remove the spear which was lodged in the deceased’s head. The evidence of Nicholas Omuse (P.W1) is very crucial in this case. P.W1 said he visited the scene of crime at 1.00 p.m. on 27.10. 2000 when he heard screams whereupon he saw P.W.3, P.W.5 and the deceased being closely

followed by the accused and one Abel Wambasi. P.W. 1 said he saw Abel Wambasi spear the deceased. When he was cross-examined P.W1 changed his story and said that he actually saw the accused was armed with a spear before spearing the deceased. He denied having told this court a totally different story from that he gave to the police. His statement was also produced as defence Exh.1. In that statement P.W1 did not mention the name of Benson Khwatenge. He did not also mention that Abel Wambasi was armed with a spear.

Patrick Musee Wafula (P.W4) said that at 3.00 p.m. on 27.10.2000 he saw the accused and Abel Wambasi pass by a foot path next to his house and came back within 10 minutes. P.W4, said he heard screams within a few minutes which noise prompted him to rush to the direction of the noise where he saw the accused spearing the deceased. P.W.4 said he saw the deceased attempt to remove the spear but fled when he saw him. He claimed he personally removed the spear from the deceased's head. P.W.4's statement to the police was produced in evidence as defence Exh.4. In that statement the witness did not mention the names of the accused nor that of the accused's accomplice Abel Wambasi. His statement does not also mention that he saw the accused spear the deceased.

As far as the prosecution's case is concerned the only eye witnesses were P.W.1, P.W3, P.W4 and P.W5. The post mortem examination was conducted by Dr. Meshack Liru ((P.W.7) who produced the post mortem report as an exhibit in evidence. P.W.7 formed the opinion that the cause of death was brain damage due to perforating injury caused by a very sharp object.

On behalf of the defence, there is sworn testimony by the accused himself that he was not at the scene of the offence at the material time. He said he was in Ndivisi being a farm labourer to one Sitati Khagame and that he last visited his home on 3.9.00 and that he only visited his home on 29.10.2000 when he learnt that his homestead had been razed down by arsonists. He denied ever participating in the killing of the deceased. He said he had no grudge nor reason to kill the deceased.

There was detailed submissions and criticism of the evidence by counsel for the defence and counsel for the prosecution. Mrs Mumalasi, counsel for the defence was of the view that prosecution's case was not proved beyond reasonable doubt. The learned counsel was also of the view that P.W.1, P.W2, P.W3, P.W4 and P.W5 were persons who were related to the deceased and that they were not credible witnesses in that they gave contradictory evidence which were at variance with that given to the police initially. Learned counsel further urged this court to hold that the alibi defence raised by the accused was not displaced. It was also pointed out that the prosecution intentionally withheld the evidence of the investigating officer because his evidence was detrimental to the prosecution's case.

The learned advocate further pointed out that the evidence was in respect of an offence committed on 27.10.00 whereas the information is in respect of an offence which took place on 28.10.2000. It is further the submission of the defence counsel that common intention was not proved in that there is no relevance between the fight between the accused and P.W.5.

Mr. Onderi, the Learned Principal State Counsel submitted at length on behalf of the prosecution. He was of the view that the prosecution's case was established beyond reasonable doubt via the evidence of P.W.1 through to P.W.5. He was of the view that there was common intention between the accused and his accomplice Abel Wambasi. It is the prosecution's view that the evidence tendered were credible and that the alibi raised by the defence was displaced. The learned Principal State Counsel was of the view that the defect in respect of dates contained in the information and the evidence tendered was curable under section 382 of the Criminal Procedure Code.

At the conclusion of the evidence, I summed up the evidence to the assessors and directed them on the applicable legal principles after which I sought for their opinions. The assessors were unanimous that the accused person was guilty as charged. They expressed the view that the accused was placed at the scene of crime and that he was seen participating in the killing of the deceased by P.W1, P.W2, P.w3, P.W4 and P.W5. The assessors believed the evidence of P.W1, P.W2, P.w3, P.W4 and P.W5. They disbelieved the alibi defence raised by the accused.

Having considered the evidence, the submissions and the assessor's opinion I have formed the following opinion of the matter: The evidence discloses that the deceased, Douglas Musumba died as a result of fatal injuries he sustained on the 27th day of October 2000. I observed the demeanor of the accused as he testified and I am satisfied that his alibi is a make up story for his own benefit. I agree with the assessors that his alibi defence was displaced by the evidence of P.W1, P.w2, P.w3, P.W4 and P.W5. These witnesses gave direct evidence. The issue which must be determined is whether their evidence is credible and whether the evidence of a common intention was established. It is not in dispute that P.W1, P.w2, P.W3, P.W4 and P.W5 are people who are related to the deceased. That does not in itself make their evidence incredible. Their evidence should be treated like that of any other independent witnesses. These witnesses recorded their statement with the police almost immediately after the murder. In their statements they all save for P.W4 mentioned that the deceased was assaulted with a spear by one Abel Wambasi. However when they testified on oath, they all changed their story and stated that the accused was the one who actually speared the deceased. The learned Principal State counsel sought to solve this contradiction by urging this court to find that there was a common intention between the accused and Abel Wambasi to kill the deceased. In essence this court was urged to make a finding that it mattered not who speared the deceased.

Why did these witnesses change their story? In such a case a court of law is entitled to infer that the witnesses were not credible if there is no satisfactory explanation. None of the witnesses sought to explain why they changed their story from what they recorded with the police officer who investigated the case. This issue was settled by the Court of Appeal in the case of Choge =vs= Republic (1985) KLR 1, in which the Court of appeal held interlia:

That evidence contained in an unsworn statement cannot be treated as equivalent to sworn testimony. If a witness had formerly said or written the contrary of that which he testified, unless a satisfactory reason is given for his having done so, his evidence should not have much weight except to show that he is not a credible witness.

In the end, I find the evidence of P.W.1, P.W2, P.W3, P.W4 and P.W5 to be incredible hence cannot be relied upon to sustain a conviction.

Even if I were for a while to treat the evidence of these witnesses to be credible then the same did not prove that there was a common intention. I have assessed the evidence tendered and I find that a common intention has not been established between the accused and the run-away Abel Wambasi. In the absence of such a nexus then I find the accused not guilty. He will obviously be given benefit of doubt.

For the above two reasons, I respectfully disagree with the assessors that the accused is guilty of murder.

In the final analysis, I find the accused not guilty. He is acquitted of murder. He should be set free from custody forthwith unless held lawfully.

Dated and delivered this 13th day of September 2006.

J. K. SERGON

JUDGE

In open court in the presence of Mrs Mumalasi for the accused and Mr. Onderi for the state.