



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KERICHO

Criminal Case 8 of 2005

REPUBLIC PROSECUTOR

VERSUS

JOSEPH CHERUIYOT MELI 1ST ACCUSED

PAUL OTIENO WASUNA 2ND ACCUSED

JAMES ONSONGO ONYWOKI 3RD ACCUSED

DENNIS OGUTA OKEYO 4TH ACCUSED

RULING

The accused persons, Joseph Cheruiyot Meli, Paul Otieno Wasuna, James Onsongo Onywoki and Dennis Oguta Okeyo were charged with murder contrary to **Section 203 as read with Section 204 of the Penal Code**. The particulars of the offence were that on the 11th of March 2005, at Kericho Township within Kericho district, the accused persons jointly with others not before court murdered Chebusit Kipngeno Mutai. The accused persons pleaded not guilty to the charge when they were arraigned before this court.

The prosecution called a total of seven witnesses in its bid to establish its case on the charge of murder against the accused persons. After the close of the prosecution's case, this court reserved its ruling on whether the accused persons had a case to answer in view of the evidence that had been adduced by the prosecution witnesses.

The facts of this case according to the prosecution witnesses are as follows; on the 11th of March 2005, PW1 Kipkemoi Sitienei Paul, PW2 Wesley Kiplangat Kirui and the deceased, who were working as masons, decided to have a drink at the Kericho Guest House. They had just finished work for the day. The time was about 5.00pm. The deceased offered to buy PW1 and PW2 drinks at the said guest house. According to PW1 and PW2, they took about three bottles of beer each before they decided to go home. They took the beer at the bar situate on the ground floor of the guest house. At about 7.00pm, the deceased stood up from where they were sitting and went to the bar counter with a view of obtaining the bill so that he could settle the same.

PW1 and PW2 testified that before the deceased could reach the bar counter, he vomited. The 1st accused, who was a manager at the bar, was not amused. He asked the deceased to leave the bar. The

deceased apparently resisted the move by the 1st accused to forcefully remove him from the bar. According to the said two witnesses, the 1st accused then pushed the deceased towards the direction of the door while slapping and punching him. The deceased resisted and started fighting with the 1st accused. PW1 and later PW2 intervened in the fight with a view of separating the 1st accused and the deceased. Both PW1 and PW2 concede that they were slightly drunk when the fight took place. They both recalled that when the 1st accused and the deceased continued fighting, three people whom they said were dressed in black uniforms with red side strips, and whom they referred to as watchmen, intervened in the fight on the side of the 1st accused and started beating them using rungas.

PW2 and PW1 testified that they were beaten senseless by the 1st accused and the people who were dressed in uniforms of watchmen. It is apparent from the testimony of PW1 and PW2 that other people joined the fray and beat them up when they were pushed out of the bar into the verandah just outside the bar. Apart from the 1st accused, whom PW1 and PW2 recognized and were able to identify later when he was arrested (after the death of the deceased), PW1 and PW2 were not able to recognize or identify who the watchmen and the people who beat them up were. PW1 and PW2 were categorical that they could say if the 2nd, 3rd and 4th accused persons were the watchmen who assaulted them after the fight had taken place between the 1st accused and the deceased. PW7 PC John Koros, the investigating officer of this case testified that there were other two people who were alleged to have been involved in the assault of the deceased, PW1 and PW2. The said two people are still at large and had not been arrested by the time he testified before court.

PW3 PC George Barage Mzee testified that he was at the report office at the Kericho police station at about 9.00pm, when the 1st accused accompanied by other persons brought the deceased, PW1 and PW2 to the police station and made a report that the three had drunk beer at the guest house and had refused to settle the bill. He further reported that the three had broken glasses at the guest house. PW3 testified that the three suspects appeared to have been assaulted. PW2 was bleeding from an injury on his head. PW3 administered First Aid on him and placed him in a corridor near the report office so that he could observe him. He put the deceased and PW1 inside the cells.

PW3 recalled that the deceased was complaining that he had been injured although PW3 did not see any visible injuries on him. After a few minutes, PW3 was called by PW1 and informed that the deceased had collapsed in the cell and was no longer talking. PW3 informed the duty officer who immediately made arrangements to take the deceased to hospital for treatment. PW3 recalled that it was the 1st accused, accompanied by others who took the deceased and his two colleagues to the police station on allegation that they had failed to settle their bills and further that they had broken glasses at the guest house.

PW5 CPL Simon Riit testified that he was the duty officer at the Kericho police station on the 11th of March 2005 when he was informed by PW3 PC George Barage Mzee who was the police officer who was on duty at the report office that a suspect who had been detained at the police cells had collapsed. It was about 9.10pm. PW5 went to the police station and organized for the deceased and his two friends to be taken to hospital. At the time, the deceased was not talking but was groaning while holding his stomach. The deceased was taken to the Kericho District Hospital where he was admitted and attended to by the doctors. However, a few minutes after he was admitted, the deceased succumbed to his injuries and died. PW5 returned to the police station and immediately went to the guest house and managed to arrest the 1st and the 2nd accused. He took them to the police station.

PW7 was assigned to investigate the case on the 12th of March 2005. He interrogated the 2nd accused who disclosed the names of the 3rd and 4th accused persons. PW7 went to the residences of the 3rd and 4th accused persons and arrested them. After investigations, he made the decision to charge the accused persons with the offence of murder. PW7 however conceded that an independent witness (the bar maid) who witnessed the accused persons assault the deceased, PW1 and PW2, had since died and therefore was not available to offer her testimony. He testified that the said bar maid had been arrested together with the 1st and 2nd accused persons but was released when PW7 confirmed, on investigation, that she was not

involved in the scuffle that led to the assault and subsequent death of the deceased.

PW4 Dr. Athanasius Kasera Ochieng testified that Dr. Makokha, his colleague at the Kericho District Hospital performed a post mortem on the body of the deceased. On external examination, she saw that the deceased was bleeding from his left nostril. There was bleeding in the right eye. Around the eye also, it was swollen. There was a bruise on the right shoulder and right arm. There was dust on the right upper arm. No fractures were noted but there were signs that the deceased had sustained internal hemorrhage in his head. There was fresh blood on the trachea. There was a bruise on the right mandible joint to the skull. There was a fracture at the base of the skull. She established the cause of death of the deceased to be a blunt head injury which caused a skull fracture. He produced the post mortem report as prosecution's exhibit No.1. Dr. Ochieng saw all the accused persons and determined that they were mentally fit to stand trial. The P3 forms were produced as *Prosecution's exhibit No.2,3,4 and 5* respectively.

The onus of establishing the guilt of an accused person in a criminal case is always on the prosecution. This burden of proof has to be discharged to the required standard of proof beyond reasonable doubt. In this case, the prosecution was mandated in law to establish that it was the accused persons who had killed the deceased with malice aforethought. Did the evidence adduced by the prosecution establish the guilt of the accused persons to the extent that this court would be required to put the accused persons to their defence? All the prosecution witnesses who witnessed the beating of the deceased only mentioned and identified the 1st accused. PW1 and PW2 testified that the 1st accused fought with the deceased after the deceased had vomited and refused to leave the bar as the 1st accused had asked him to. When PW1 and PW2 intervened with a view of separating the 1st accused and the deceased, other people, some of who were said to be watchmen, joined in the fight and started assaulting the deceased, PW1 and PW2.

PW1 and PW2 recalled that the 1st accused and the other people participated in beating them senseless, both inside the bar and outside the bar at the verandah. The only person that PW1 and PW2 could identify as the one who participated in their beating was the 1st accused. PW1 and PW2 however testified that at the time of the assault, the 1st accused was not armed. The other people who participated in assaulting the deceased, PW1 and PW2 used rungas. PW1 and PW2 were not however able to identify any other person at the time they were being assaulted. They testified in court that they could not say that it was the 2nd, 3rd, and 4th accused persons who had assaulted them. PW5 and PW7 arrested the 2nd, 3rd and 4th accused persons on the basis that they were the watchmen on duty on the night in question.

Does this evidence establish a case against the accused persons to the standard that this court would be obliged in law to put the accused persons to their defence? In respect of the 1st accused, I have no doubt in my mind that the prosecution has established a prima facie case to enable this court put him on his defence. Several prosecution witnesses adduced evidence which placed the 1st accused at the scene where the deceased was assaulted and fatally injured. I have no doubt that the injuries which the deceased suffered when he was beaten at the guest house were the injuries which led to his death. The 1st accused is therefore put on his defence.

As regard the 2nd, 3rd and 4th accused persons, no evidence has been offered by the prosecution to connect the said accused persons with the death of the deceased. No witness testified that the said accused persons were identified as having participated in the beating of the deceased at the guest house. Both PW5 and PW7 conceded that the 2nd, 3rd and 4th accused persons were arrested because they were on duty as watchmen on the evening in question when the deceased was fatally assaulted. PW7 however acknowledged that other people, including two suspects who are still at large, participated in the beating of the deceased, PW1 and PW2. The prosecution did not adduce any evidence of eye witness account which connected the 2nd, 3rd and 4th accused persons with the beating of the deceased. They did not adduce any circumstantial evidence that could place the said three accused persons at the scene of the offence. The evidence offered by the prosecution as regard the said accused persons is that of mere suspicion. The police assumed that just because the 2nd, 3rd and 4th accused persons were on duty when

the deceased was assaulted, then by necessary implication, they were the watchmen who were referred to by PW1 and PW2.

Unfortunately, this court cannot convict the 2nd, 3rd and 4th accused persons based on the evidence of mere suspicion and supposition. As was held by the Court of Appeal in the case of **Sawe vs. Republic [2003] KLR 364** at page 375;

“We have evaluated the evidence as we are entitled to at great length and there is really nothing left to connect the appellant with the death of the deceased except mere suspicion. The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt. As this court made clear in the case of Mary Wanjiku Gichira vs. Republic (Criminal Appeal No. 17 of 1998)(unreported), suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence.”

Similarly, in this case, other than mere suspicion, the prosecution did not adduce any evidence to support the charge of murder against the 2nd, 3rd and 4th accused persons. I do therefore enter a finding of not guilty against the said accused persons as provided by **section 306 (1)** of the **Criminal Procedure Code**. The 2nd, 3rd and 4th accused persons are therefore acquitted of the charge of murder. They are ordered set at liberty and released from prison unless otherwise lawfully held.

The 1st accused however, is put on his defence in accordance with **section 306 (2)** of the **Criminal Procedure Code**.

DATED at KERICHO this 1st day of November 2006.

L. KIMARU

JUDGE