



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

Criminal Case 1 of 2001

REPUBLIC.....PROSECUTOR

VERSUS

JOHN ODUOR BUNDIARA.....1ST ACCUSED

JAMES BARASA.....2ND ACCUSED

JUDGMENT

John Oduor Bundiara and James Barasa are before this Court duly charged with the offence of murder contrary to section 203 as read together with section 204 of the Penal Code. The particulars of the offence are that on the nights of 23rd and 24th November 1999 at Sikarara Sub Location in Busia District within Western Province jointly murdered Clecensia Makokha Onyango.

The prosecution tendered the evidence of seven witnesses in support of its case against the accused persons. Basically it is said that on the 23rd day of November 1999 John Oduori Bundira and James Barasa the accused persons, Clecensia Makokha Onyango (deceased) and others were taking alcohol in form of chang'aa in the house of Samuel Mukara (P.W.6). The illicit drink had been brewed for commercial purposes by Hilda Awino (P.W.2), the wife of Samuel Mukara (P.W.6). The evidence of Hilda Owino (P.w.2), John Ouma Opiyo (P.W.3), Patrick Nerima (P.W4) and that of Samuel Mukara (P.W.6) concur that the deceased left the home of P.W.6 at about 8.00 p.m and that she was closely followed by the two accused persons leaving them behind. P.W.2 said she saw the 2 accused persons immediately follow the deceased without uttering a word. P.W.4 said he saw the accused persons leave without a metal bar.

In the morning of 24.11.99 the deceased's body was found lying dead about 80 metres from the house of Samuel Mukara (P.W.6). The accused persons were suspected to have killed the deceased because they were the last people to be seen with the deceased when she was alive. A post mortem report prepared by Doctor Kayayua was produced by Doctor Sylvester Maingi (P.W.7). The pathologist formed the opinion that the deceased died as a result of intra cranial haemorrhage and indecent assault.

On their part each of the accused persons denied the charge while giving their sworn testimonies. The first accused John Oduor Bundiara (D.W.1) admitted that he was in the house of Samuel Mukara (P.W.6) taking chang'aa. He claimed that he left that home at about 7.30 p.m. leaving behind the deceased and others still drinking. He said he was shocked to learn of the deceased's death.

James Barasa (D.W.2), the 2nd accused, said that he was taking chang'aa in the house of Samuel Mukara (P.W.6) up to 9.30 p.m when he left for his home. He said he had no grudge against the deceased hence he could not have committed the heinous act.

Learned Counsel for the accused persons and the Learned Principal State counsel submitted at length in

support of their positions. Mr. Ipapu, the learned advocate for the accused persons urged this court not to put much weight on the evidence tendered by the key prosecution witnesses because he was of the view that they were drunk and their judgment may have been impaired by the influence of alcohol. Mr. Ipapu further pointed out that there was no nexus between the accused persons and the deceased's death.

Finally, Mr. Ipapu argued that there was no malice aforethought on the part of the accused persons.

The learned Principal State Counsel urged this Court to believe the evidence tendered by the prosecution witnesses. He argued that the accused persons had the opportunity to commit the offence they are now facing. He also argued that malice aforethought was established by the nature of injuries the deceased sustained. I summed up the case to the assessors and requested them to give their oral opinion on the matter. The assessors were all unanimous that the accused persons were guilty of murder.

I have considered the evidence tendered and the able submissions presented by the learned counsel for the prosecution and on the part of the accused persons. I have also taken into account the opinions of the assessors.

There is no dispute that the accused persons and the deceased were in the house of Samuel Mukara (P.W6) taking chang'aa brewed by Hilda Awino (P.W2). I believe the evidence of P.W.2, P.W3, P.W4 and P.W6 to the effect that the deceased left the house of P.W6 at about 8.00 p.m on 23.11.1999 and was closely followed by the two accused persons. It is also not denied that the deceased passed away that night as a result of excessive bleeding into the brain due to head injury and of course due to indecent assault.

The question which is left for this court to determine is who murdered the deceased? According to the prosecution, it is argued that the circumstances incriminated the accused persons as the only culprits to the standard of beyond reasonable doubt. In this case the prosecution's case solely rely on circumstantial evidence. Where the prosecution's case relies on circumstantial evidence the law is well settled. First, the circumstances from which the inference of guilty is sought to be drawn must be established by cogent and credible evidence. Secondly, those circumstances should point to the guilt of the accused persons and finally that when the said circumstances are taken cumulatively they should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused persons and no one else. The circumstances in this case are that the accused persons were the last people seen follow the deceased immediately she left the house of Samuel Mukara (P.W6) at about 8.00 p.m on 23.11.1999 and that the deceased was found lying dead in the morning of 24.11.99. Can these circumstances which are said to incriminate the accused persons incapable of any other explanation except the guilt of the accused persons? Are they wholly inconsistent with their innocence? In order to answer this question I will pose the following questions: How many footpaths were heading to and out of the house of Samuel Mukara (P.W6)? Did the accused persons and he deceased go in the same footpath? The evidence tendered did not displace or answer these questions. How did the deceased meet her death? The evidence tendered show that the deceased died as a result of intra-cranial haemorrhage. Is there a possibility that she might have been injured when she fell down in the cover of darkness and while under the influence of liquor?

Again these possibilities were not displaced by the evidence tendered. What was used to murder the deceased? There is evidence that a metal bar was found at the scene where the deceased's body was found lying. That metal bar was not produced in evidence. There was no evidence that the same was taken for dusting to establish who handled the metal bar that fateful night. Again there is doubt lingering in my mind.

It is also stated in the post mortem report that the deceased died as a result of indecent assault. No evidence was laid to show that the accused persons were taken for medical check up so as to connect them with the offence of indecent assault.

The sum total of my findings in this matter is that there is doubt as to whether the accused persons committed the offence they are facing and this is the point of departure between me and the assessors. I

hold the view that the evidence tendered is no more than strong suspicion. The law is well settled that where there is doubt, that doubt will always be given to the benefit of the accused persons. In the end, I find the accused persons not guilty. Consequently, they are acquitted and ordered set free forthwith from custody unless lawfully held. The assessors serving in this case are hereby discharged and shall not be summoned to serve in another case until twelve (12) months have expired from the date of this judgment. They should however be paid today's allowances.

Dated and delivered this 3rd day of November 2005.

J. K. SERGON

JUDGE

Read in the presence of:

Mr. Ipapu for the accused persons and Mr. Onderi for the state.