



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI**  
**CRIMINAL CASE NO 39 OF 2003**

**REPUBLIC..... PROSECUTOR**

**VERSUS**

**SAITOTI NDALAMIA**

**SIMON NDUKA**

**JACKSON TARETO .....ACCUSED**

**JUDGMENT**

The accused persons Saitoti Ndalamia, Simon Ndukai, and Jackson Tareto were charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the charge state that on the 14<sup>th</sup> April 2001 at Huruma estate Nairobi murdered Wambua Ngila.

The prosecution case is that on the 14th April 2001 at about 5 am the 3 accused persons attacked the deceased with Maasai *rungus* and hit him repeatedly inflicting injuries which caused his death. To prove its case the prosecution called 10 witnesses. PW 1 Annah Njoki in her evidence told the Court that on the 14th April 2001 at about 5 am while she was in her house she heard screams from her neighbour's plot. She went there to find out what was happening. She found the three accused persons beating the deceased using Maasai clubs. The deceased who knew her asked her to persuade the accused persons to stop beating him. She tried to persuade them to stop beating the deceased but they could not listen and they threatened to beat her too if she insisted. She had known the accused as watchmen who guard plots at that area. She knew accused 1 Saitoti by name and accused 2 Ndukai and accused 3 Tareto by appearance. She was able to see them through security lights and she stood there for some time as the accused continued to beat the deceased. PW3 James Mutua Matata in his evidence told the Court that on 14th April 2001 at about 5 am while he was in his house he heard screams from outside. He went to find out what was happening. He found the deceased being beaten by 3 men who used Maasai clubs. He was able to see them well through security lights. He stood there while the accused continued beating the deceased.

He knew the three men as watchmen who guarded the plots at that area and he also knew PW1 Annah Njoki whom he found at the scene. He tried to persuade the accused to stop beating the deceased but they became very hard to him. When he went away the deceased had been badly beaten and he learned later that the deceased had died. PW4 Mary Machirima in her evidence told the Court that on the material date 14th April 2001 at about 5 am while she was in her house she heard some screams from outside. This was within the compound where she resides. She got out and went to see what was happening. She found the watchman who guards that plot whom she knows well by name as Saitoti and two other watchmen from the neighbouring plots beating the deceased. She had known the other two watchmen by appearance. She

was able to see them well through security lights and she identified them as accused 1, accused 2 and accused 3. PW 5 Fredina Kasyoka in her evidence told the Court that on 14th April

2001 at about 5 am while she was in her house she heard screams from outside. She got up and went to see what was happening. She saw the accused beating the deceased. She had known the accused persons as watchmen who guard the plot at the area. Accused 1 whom she knows by name as Saitoti guards her plot while accused 2 and accused 3 whom she knows only by appearance guard the adjacent plots. She was able to see them well through security lights. PW 7 Rose Ngila in her evidence told the Court that she is a business woman at Machakos town. She had come to Nairobi on 13th April 2001 to see the deceased who was her son. On the 14th April 2001 at about 5 am the deceased left the house and went to the market at Gikomba to buy green maize which he used to roast and sell.

After sometime at about 6 am she heard screams from the gate and she recognised the voice as that of her son the deceased. She went to check and found the deceased lying on the ground and he could not walk. She observed him and she saw he had injuries on the head and legs. She inquired from the deceased who was able to talk though he could not walk for what had happened. The deceased told her that he had been assaulted by Maasai watchmen within Huruma estate and he gave her the name of accused 1 Saitoti as one of those masais who had beaten him.

She sought the assistance of PW8 Elizabeth who assisted her and they hired a taxi and rushed the deceased to Kenyatta National Hospital but he died while undergoing treatment. She later went to the City Mortuary where she identified the body of the deceased to the doctor who performed the post mortem. The post mortem of the body of the deceased was performed by Dr Kirasi Olumbe. The body was identified to him by his relative PW6 Margaret and PW7 Rose. The doctor formed opinion that the cause of death was due to head injury due to blunt object. He filled and signed the post mortem report. Dr Olumbe has since left the country and the post mortem report was produced in evidence by Dr Paul Maundu who had worked with Dr Olumbe and he knew his writing and signature well and confirmed that the said post mortem report bore the handwriting and signature of Dr Olumbe.

The case was investigated by PW9 No 217932 IP William Ekasi who arrested and charged the accused persons. The accused were pointed to him by PW1 Annah Njoki. From the evidence so far adduced there are four prosecution witnesses PW1, PW3, PW4 and PW5 who have all testified that they saw and recognised the three accused persons as the ones who attacked the deceased with Maasai clubs and inflicted injuries which caused the death of the deceased.

What I have to decide is whether this evidence is reliable and free from possibility of error so as to find a secure basis for the conviction of the accused persons. Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize the danger.

In the case of *Cleophas Otieno Wamunga vs R* – Criminal Appeal No 20 of 1989 (KSM) (unreported) the Court of Appeal said:

“whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant in reliance of the correctness of the identification.”

The way to approach the evidence of visual identification was well stated by Lord Widgery CJ in the well known case of *R vs Turnbull* [1956] 3 All ER 549 at page 552 where he said:

“recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.” In the present case the deceased was assaulted within a fenced plot and there were security lights. When the deceased screamed for help, the tenants of the plot came out and they saw the three accused persons beating the deceased using Maasai

clubs. Among those who came out were PW1, PW3, PW4 and PW5. They saw the three accused persons beating the deceased using Maasai clubs. They were able to see them through security lights. Accused 1 Saitoti was guarding the same plot where the deceased was being beaten while accused 2 and 3 were guarding the adjacent plots.

These witnesses had known the accused before PW1 Njoki said she witnessed the accused beat the deceased repeatedly and mercilessly as he screamed for help. She tried to persuade them to stop beating the deceased but they could not listen. PW3 James also tried to persuade the accused to stop beating the deceased but to no avail. The accused persons were positively identified as the conditions were favourable for a correct identification. Section 203 of the Penal Code defines murder as follows:

“Any person who of malice aforethought causes the death of another person by any unlawful act or omission is guilty of murder.

And section 206 defines malice aforethought as follows:

Malice aforethought shall be deemed to be established by evidence proving any of the following circumstances:

(a) .....

(b) knowledge that the act or omission causing the death or grievous harm will probably cause the death or grievous harm to some person whether that person is the one actually killed or not, although such knowledge is accompanied by the indifference whether death or grievous harm is caused or not by a wish that it may not be caused.”

The accused persons beat the deceased violently and persistently and when they were persuaded to stop beating the deceased they could not listen.

They continued beating the deceased inflicting injuries on him which injuries caused him death. This is sufficient prove of malice aforethought.

I am satisfied from the evidence adduced before me that the prosecution has proved its case beyond reasonable doubt and I make a finding that the accused persons are guilty of murder and I convict them accordingly. All the three assessor returned a unanimous verdict of guilty. I sentence the accused persons to death as per law provided. Right to appeal within 14 days.

Dated and delivered at Mombasa this 31<sup>st</sup> day of October, 2003

**J.L. OSIEMO**

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**JUDGE**