



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAPENGURIA

CRIMINAL DIVISION

CRIMINAL (MURDER) CASE NUMBER 6 OF 2019

BETWEEN

REPUBLIC PROSECUTION

AND

JOSEPH LUMOYI1ST ACCUSED

JAMES NGOLIAPUS.....2ND ACCUSED

NAUSURAN MUSA..... 3RD ACCUSED

ISAAC LUTULYA 4TH ACCUSED

CORAM: JUSTICE BWONWONG'A

RULING

1. The issue before me is whether the accused persons have a case to answer or not following the closure of the prosecution case in terms of section 306(1) of the Criminal Procedure code (Cap 75) Laws of Kenya.
2. The accused persons are charged with the murder of one John Luputuk, which is alleged to have occurred on 5th May 2019 at Utuku Village within Pokot North sub county, within West Pokot county.
3. They all pleaded not guilty. The prosecution called 6 witnesses in support of the charge. The prosecution called Sheba Takaramoi (PW1) who was aged 15 years. After undergoing a *voire dire* examination, she was allowed to give evidence after being affirmed. It was her evidence that on the 5th of May 2019, she was at Amakuriat Centre where she had gone to iron her school uniform. While there, she was informed her father, now the deceased, had been beaten and was being carried on a motorbike. She then followed the motorbike into the forest, where she heard many people making noise. She met the second accused at that place, who also was riding a motorbike. The second accused told him to hurry up so that she could get to his father before he (the father) died.
4. Upon arrival where his father was, she found that he was hanging from a tree and could not talk. She then heard people saying “*shika huyu mtoto*”. She thought they want to kill her. As a result, she ran away with one Tilomuk following her in hot pursuit. Tilomuk eventually caught her up and took her back to where her deceased father was. He then told her to speak to his father just in case he had a last word to tell her. In response she told Tilomuk that she could not talk to a dead person. She then started crying and walked away.
5. Tilomuk, who was not arrested told her they were to remain at the scene until her father was dead. As at that time, it was about 7.00pm. Apart from Tilomuk, PW1 saw the 1st, 2nd 3rd and the 4th accused persons, whom she identified in court. She knew all of them by appearance. Subsequently, following the arrest of the accused persons, she was called to police identification parades which were conducted by No. 235724, Inspector Gucha Onyango (PW4), who was stationed at Kacheliba Police Station. PW4 conducted the following police identification parades in respect of the following: 1st he conducted a police identification parade in respect of Isaac Lutulya, the 4th accused. PW1 was unable to identify the 4th accused at that parade. PW4 then produced the police identification parade as Pexhibit 1(a).
6. PW4 conducted the 2nd parade for Joseph Lumoyi, the 1st accused. Again PW1 was unable to identify the 1st accused. PW4 then produced the identification parade in respect of Joseph Lumoyi as Pexhibit 1(b). Furthermore, PW4 conducted a parade for Nausuran Musa, the 3rd accused. Similarly, PW1 was unable to identify the 3rd accused. He then produced the identification parade in respect of Nausuran Musa, as P.exhibit 1(c).

7. PW1 continued to testify that all the four accused persons were boda boda riders and that she never had a grudge against them. PW1 also testified that she had been told that her father was a witch and that he had bewitched a child of the family of the 2nd accused. She also testified that she led the police to where the body of his father was recovered in the forest. She did not report on that day because it was at night.

8. The body of the deceased was taken to Kapenguria Referral Hospital Mortuary, where it was identified by Constantine Korir who was the son of the deceased. Constantine Korir (PW2) identified the body of his deceased father to Dr. Vincent Omondi Omollo (PW3), who performed a post mortem examination and his findings were as follows:-

- a. There were multiple linear bruises on the chest and lateral side.
- b. On the upper back, there were blood bruises
- c. There were also bruises on the eyes and on the upper part of the neck.

These were the external appearance of the body.

9. In respect of the internal appearance of the body, the doctor found the upper part of the voice box was crushed and swelling around the region. PW3 concluded that the cause of death was asphyxia due to strangulation. He then signed his report and produced it as exhibit Pexh.1.

10. The prosecution also called No. 232812 CI Aloys Imboya (PW5), who was the investigating officer. His evidence was that the body of the deceased was recovered and based on the evidence of PW1 he charged all the accused with the offence of murder. The prosecution applied for an adjournment to call a crucial witness by the name Ezra, which was granted to them. In the end they were unable to secure the attendance of Ezra.

11. On 9th December 2020, the prosecution informed me that they have not been able to trace Ezra who was their last witness. As a result, he closed the prosecution case.

12. Mr. Sitati for the prosecution and Mr. Kraido for all the accused persons informed the court that they were not going to make any submissions in respect of no case to answer. Instead they left the matter to the court to decide.

The applicable law are: -

13. As I have already pointed out, the issue is whether the prosecution have made out a case so as to require them to be put on their defence. A *prima facie* case according to *Bhatt versus Regina 1957 EA 332 at page 335 paragraphs (a) and (b)* is made out when a “reasonable tribunal properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.”

14. Furthermore, in the case of the *Republic V. Wachira EA 262 at page 263 paragraph D*, the court stated that:

“A court is only entitled to acquit at that stage (at the close of the prosecution case) if there is no evidence of the material ingredient of the offence or if the prosecution has been so discredited and the evidence of their witnesses so incredible and untrustworthy that no reasonable tribunal, properly directing itself could safely convict.”

15. In the instant case, the key witness was Sheba Takaramoi (PW1). It was her evidence that she saw all the four accused persons at the scene of murder in respect of her deceased father. The time was 7pm. She was unable to identify any of the four accused persons in parades that were conducted by IP Gucha Onyango PW4. The inability to recognize any of the four accused persons whom, she had known by appearance casts doubt on her evidence of recognition of the accused persons. There is no other evidence that connects the four accused persons with the murder of the deceased.

16. I find on the totality of the evidence, that the evidence of PW1 was discredited to the extent that it cannot be relied upon by this court. It is incredible and is not worth of belief.

17. Furthermore, there is no other evidence that connects the accused with the murder of the deceased. I find as persuasive the case of *Republic v. Wachira*, (supra) and *Bhatt v. Regina* (supra) that on the evidence adduced before me, it does not warrant all the four accused persons being put on their defence.

18. In the premises, I find that the accused persons have no case to answer and they are therefore acquitted of the murder charge in terms of section 306(1) of the Criminal Procedure Code.

Ruling signed, dated and delivered at Kapenguria in open court this 2nd day of February, 2021

J. M. BWONWONG’A

JUDGE

In the Presence of

Mr. Kraido for Accused

Mr. Makori for the State

Mr. Juma Court Assistant

J.M. BWONWONG'A

JUDGE

2/2/2021

Coram - J.M. Bwonwong'a - Judge

Rep - Mr. Makori

1st accused – present in person

2nd accused – present in person

3rd accused - present in person

4th accused – present in person

Mr. Kraido for all accused.

C/A - Juma

Interpretation - English/Kiswahili

Order- Judgment delivered in open court.

J.M. BWONWONG'A

JUDGE

2/2/2021