



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL CASE NO. 32 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

MILLY RASHID alias MAMA AMINA.....1ST ACCUSED

AUGUSTINE WASIKE WAFULA.....2ND ACCUSED

ELVIN OKIRING.....3RD ACCUSED

IBRAHIM NYONGESA alias BARASA.....4TH ACCUSED

J U D G M E N T

The accused **1. Milly Rashid alias Mama Amina.**

2. Augustine Wasike Wafula alias Kifaranga

3. Elvin Okiring

4. Ibrahim Nyongesa alias Barasa

were charged with offence of murder contrary to **Section 203** as read with **Section 204 Penal Code.**

1. MILLY RASHID alias MAMA AMINA 2. AGUSTINE WASIKE WAFULA alias KIFARANGA 3. ELVIN OKIRING 4. IBRAHIM NYONGESA alias BARASA: On the 15th October 2015 at Malakisi Rural village, Malakisi location in Bungoma West District, Bungoma County jointly with another not before Court murdered **RAMADHANI MAKOKHA NABARWA alias NYONGESA.**

The prosecution case is that on 16/10/2015, PW 3 Joyce Nasimiyu the mother of the deceased Ramathan Makokha Nabarwa alias Nyongesa left her home early and were to look for casual work. She then met accused 1 Milly Rashid who asked her (witness) if she has seen the deceased. Joyce replied that she had not and accused 1 urged her to go and check on him. She went to his house. Before she reached there she met her son Wanjala who informed her that deceased was dead. She went into his house where she found many people and police present. She entered the house and found deceased lying on bed with a cut on his neck but no blood on his clothes. The body was taken to Bungoma mortuary. She testified that at the scene the wife of deceased Wilbroda was present and that accused 1 is a neighbour who lives ½ mile away. She testified that accused 1 used to sell changaa but did not know if they had any romantic relationship with deceased. She also confirmed that accused 3 Augustine Wasike is now staying with accused 1 after inheriting her.

PW 5 No. 46474 P.C Benard Ongeru the Investigating Officer testified that on 16/10/2015 he was instructed by OCS to investigate a report of murder at Runee Malakisi area. He and colleague visited the scene. They entered the house of deceased. They found deceased lying down facing up. He observed that deceased had injuries on back of head and was bleeding from the nose. Upon investigations he received information that on 15/10/2016 the deceased was at the house of accused 1 drinking changaa. The deceased then had a quarrel with one Robert Tubeless on allegation that Robert had an affair with deceased's wife Wilbroda who was at the changaa den. There was a fight between Robert and deceased. The accused joined in the fight and accused 1 hit deceased with a stone on the back of the head. The deceased went home and next day he was found dead. On this information he arrested all the 4 accused but was unable to arrest Robert Tubeless.

PW 6 Wilbroda Nekesa gave evidence in Court under special circumstances. Since the time she recorded her statement to police she lost her

power of speech and on the application by the prosecution and there being no objection by Mr. Wamalwa for accused, her statement was adopted as her evidence in chief. In the statement she stated that she was the wife of deceased. On material day, she went with Tubeless to the home of accused 1 where they found Robert Tubeless, Elvis Okiring (accused 3) Ibrahim Nyongesa (accused 4) Augustine Wasike (accused 2). They started telling Robert that Wilbroda was his wife. The deceased and Robert Tubeless started fighting and accused 1 joined the fight and hit deceased with a stone on the back of the head.

Upon cross – examination by Wamalwa advocate for accused by way of written question, the witness stated that deceased was fighting with accused and not Robert Tubeless. She also confirmed that she was observing the happening by assistance of moonlight.

The accused gave sworn evidence. Accused 1 Milly Rashid alias Mama Amina testified that on 15/10/2015 the deceased went to her and wanted to buy a shirt. On 12/10/2015 she was at her home when police came and arrested her and accused 2 was at the home. She confirmed that accused 3 is her husband and that on 15/10/2015 nothing happened although she admitted she used to sell changaa.

Accused 2 Augustine Wasike Wafula alias Kevin Wanyama Wanyonyi testified that on 15/10/2015 he was at his furniture workshop and in the evening he went home. On 21/10/2015 he went to the home of accused 1 who informed him he wanted him to make a cupboard for her as she had timber. While there police came and arrested them on allegation of drinking changaa. He was taken to Sirisia Police Station and later charged with present offence. He denied that on 15/10/2015 he was at home of accused 1 drinking changaa.

Accused 3 Elvin Okiring Ekarot Emare testified that accused 1 is his 2nd wife. On 15/10/2015 he was with his 1st wife Elizabeth and nothing happened. On 21/10/2015 he participated in the burial of the deceased. Later police arrested him he found accused 2 in Sirisia Police Station cells. He was later charged with present offence.

Accused 4 Ibrahim Nyongesa Mukaah alias Barasa testified that on 15/10/2015 he went to his place of work and later returned home. On 25/10/2015 he met police officers who arrested him on allegation of making noise on the road. He denied that on the material day he was at home accused 1.

Mr Wamalwa Simiyu for the accused filed written submissions. He submitted that the death of the deceased is not disputed. He submitted that none of the prosecution witnesses saw the accused inflict any injury or unlawfully caused the death of deceased. He submits that the prosecutions have not established malice afterthought and that there is no even circumstantial evidence to connect the accused to the offence.

The accused are charged with the offence of murder contrary to section 203 as read with **Section 204 of the Penal Code**. It provides: -

Section 203: Any person who of malice afore thought causes death of another person by unlawful act or omission is guilty of murder.

The elements of the offence which must be proved by the prosecution in a charge of murder are: -

- a. The death of the deceased.**
- b. The unlawful cause of death.**
- c. That in causing death the accused persons committed it with malice aforethought.**
- d. That there is direct or circumstantial evidence placing the accused persons at the scene of the crime.**

On the issue of the death of the deceased, it is not contested that the deceased Ramadhan Makokha Nabware alias Nyongesa is dead. The same was confirmed by Dr. Ambongi PW 4 who produced the post mortem report prepared by Dr. Were Mbiri. Upon examination he found the deceased laceration, swelling on occipital region behind the neck. There was injury to the lung and heart. He formed opinion that the cause of death was due to cardio-pulmonary arrest following severe head injury. He then issued the death certificate. From the evidence of the post mortem the unlawful act that caused the death is the inflicting of injury to the head of the deceased by a blunt force likely of assault.

The other element which the prosecution must prove is whether it was accused persons who inflicted the injury on the deceased.

PW 1 Ezekiel Odeo was at his home when he heard screams from house of deceased. He went there and found deceased lying on bed and a crowd of people including police officers present. He did not find any of the accused at the scene.

PW 2 Bernard Wanjala Oskei was at the home where changaa was being sold. There sat outside. He then heard young men quarrelling. He left the home for fear of police. The next day he heard deceased had been killed. PW 3 Joyce Nasimiya the mother of the deceased met accused 1 who asked her about the deceased. She went to check when her other son Wanjala informed her deceased was dead.

PW 5 No 46474 P.C Bernard Ongeru the investigating officer testified he went to the scene where he found the deceased with injuries on the back of head and bleeding from the nose. He found he was already dead. He removed the body to the mortuary and commenced investigations. He received information that the deceased had been at the house of accused 1 drinking changaa, when he had a quarrel with one Robert Tubeless. The deceased had claimed that Robert appeared to have a love affair with deceased's wife Wilbroda Nekesa, who was also present. A fight started between deceased and Robert, and the other accused joined in the fight. He then arrested accused 1, 2, 3, 4 and caused them to be charged with present offence. He however did not find nor arrest Robert Tubeless, who was fighting with the deceased.

PW 6 Wilbroda Nekesa testified under peculiar circumstances. She recorded her witness statement with the police. Since her recording of

the statement she lost ability to speak properly but was able to hear and respond in writing. On application before the prosecution and there being no objection from Mr Wamalwa for the accused, her statement to police was adopted as evidence in chief.

In her evidence she stated that she was married to the deceased. On 15/10/2015 at 5:30 pm she was in her house when Robert Tubeless told her that she was required at the home of accused 1. She went with him. At the home of accused 1 she found the deceased, Robert Tubeless, Elvin Okiring (accused 3) Reuben Odeo (PW 1) Ibrahim Nyongesa (accused 4) and Augustine Wasike (accused 2). They were all taking changaa. They were outside the house. The deceased then told Robert Tubeless that the witness (Wilbroda) was his woman and he will hand her over to him free of charge. The deceased and Robert Tubeless started fighting and the people who were there attempted to separate them but would not manage. The accused then emerged with a brick and hit the deceased on back of head. The other accused together with Tubeless started assaulting the deceased, with sticks and stones. She went away. The next day she learnt that deceased had died.

On being cross – examined by Mr Wamalwa for accused, she testified she denied that Robert Tubeless was her lover. She testified that the incident occurred at 9 pm and there was moonlight. She also stated that after the fighting started she went and hid behind a tree which was behind the house where she observed what was happening.

The prosecution in this case relied on the eye – witness testimony of PW 6 Wilbroda to establish that it is accused who jointly inflicted injuries on the deceased. She is the only witness who was present. The evidence on identification therefore is from this witness. Before examining the evidence of the witness on identification, the Court notes that the incident occurred at night and the accused and the witness are persons known to each other. A Court can convict on the single witness evidence on identification. However great care and caution should be taken to ascertain whether the conditions for identification were favourable for positive identification and free from error. These conditions would include but not limited to: -

- a. Whether the witness was known to the accused previously and for how long.**
- b. What were the lighting conditions in which the witness made the observation?**
- c. What was the distance between the accused and the witness?**
- d. Did the witness have unobstructed view of the accused?**
- e. If unknown previously to the accused what was the duration of observation;**
- f. What was the state of the witness, was he apprehensive, in panic mood, emotionally distressed or physically threatened?**

All these circumstances have a bearing on the quality of observation and therefore the quality of evidence of identification.

In this case PW 6 Wilbroda testified that the incident occurred at night. She was present when deceased told Robert that he can give her to him for free. They started fighting. As she thought she was the cause of the fight she ran away from scene of fight. Her evidence is that she observed the fight and saw deceased fighting with Robert Tubeless. The others then joined in the fight with accused 1 hitting deceased using a stone. What is clear from her evidence is that the fight was between the deceased and Robert Tubeless. The others joined to separate them. She however does not state where Tubeless who was alleged to be her lover hit the deceased. Robert Tubeless was never and has not been arrested.

I have considered the whole evidence. I find that the conditions for positive identification where each of the accused assaulted the deceased were not favourable. Wilbroda asserted that she hid behind a tree from where she observed the assault. This greatly compromised her ability to positively identify that it is accused and not Robert who inflicted the injuries on the deceased. I find the prosecution's evidence against the accused unreliable as a basis to prove the charge against the accused. I therefore find the prosecution has not proved the offence of murder contrary to **Section 203 of the penal code** against all the 4 accused persons. I find the accused

- 1. Milly Rashid alias Mama Amina**
- 2. Augustine Wasike Wafula alias Kifaranga**
- 3. Elvin Okiring**
- 4. Ibrahim Nyongesa alias Barasa**

not guilty of the offence of murder and acquit them under **Section 215 C.P.C.** Accused to be set at liberty unless otherwise lawfully detained.

DATED AT BUNGOMA THIS 10TH DAY OF MARCH 2021.

S. N. RIECHI.

J U D G E