



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL CASE NO. 6 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

TOM KUNANI WANJALA.....1ST ACCUSED

ALFRED SIMIYU SHIMAKA ALIAS MUKUYUNI.....2ND ACCUSED

JUDGMENT

The accused 1. Tom Kunani Wanjala and 2. Alfred Simiyu Shimaka alias Muiyuni are jointly charged with the offence of Murder contrary to section 203 as read with Section 204 of the Penal Code.

The particulars of the offence are that on the 15th day of Februarys 2018 in Mufunje village, Kibisi location of Bungoma North sub-county within Bungoma County murdered **SILAS WANGELE WANJALA**.

The prosecution case is that on 15.2.2018 **PW2 Edward Mukanda Musembi** went to the house of one Merab to drink changaa. He found Merab and 6 other people who included Alfred (accused 1) Amos Wanyonyi accused 2 and the deceased. They were also drinking changaa. The deceased bought him a mug of changaa which he drunk and deceased told him to leave. He left the deceased with accused.

PW4 Merab Simiyu was in her house selling changaa on the material date when accused 1, accused 2 and the deceased came and bought changaa which they drunk. They started quarrelling among themselves and she asked them to leave. The 3 of them then left. The next day she heard screams and on checking found it was deceased who was in a trench 50 meters from her house. She confirmed he was dead.

PW6 NO. 78788 PC John Kilecho received a report of murder at Mufunje village. He and party visited the scene. He found the body of the deceased with visible injuries on the back and hands. He received information that accused and deceased were drinking together and that accused 2 Alfred Simiyu had been seen with his clothes blood stained. He got accused wife who had led them to her parents home where they recovered a jacket and long trouser which had been recently washed. He took the clothes and soil sample from the scene which he forward to government analyst Kisumu. PW7 Richard Kimatei Langat, Government Analyst on 27.2.2018 received – blood sample of the deceased; a khaki blue shirt and blood stained soil sample. Upon examination and analysis, he found the blood stained shirt and soil sample had human blood. He subjected the same to DNA analysis. The shirt contained blood of a female person. He however confirmed that the sample of the blood on the soil matched that of the deceased.

PW5 Dr. Patrick Musila who performed the post moterm on body of the deceased testified that on examination he found the deceased had a dislocated right elbow joint and injury on the finger. On opening up the body he found that there was bilateral lung collapse at neck; friction burn over the neck with fractured airways blood clot under the neck, fracture of cervical spine on C2 and C3. From the examination he formed opinion that cause of death was due to fracture of cervical spine due to strangulation; because the injuries were going around the neck.

The accused gave sworn evidence in their defence. Accused 1 Tom Kunani Wanjala testified that on the material date he was distributing One Acre Fund fertilizer up to 6.0 p.m. He then went to a home where he drunk changaa for sh 30 and then went home. The next day he received information that a person had died. He went to the scene and found police taking the body away. Later the village elder came with deceased's father and took him to chief's camp where he was interrogated and later taken to police. He was then charged with the present offence.

Accused 2 Alfred Simiyu Shimaka testified hat on 15.2.2018 he went to the farm with his wife up to 11. am. He then went to repair the kitchen and took cattle to drink water. The next day he was informed deceased had died at the home of Merab. While a this home he was arrested. He confirmed he knows the deceased as he had sold land to his father. He informed court that he had a grudge with Merab over a changaa incident in 2017 and that he was not with deceased on the material day as he had seen him last 5 days earlier.

The accused are charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. Section 203

provides.

203.

Murder

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

The ingredients of the offence which the prosecution must prove are:

(a) The fact and cause of death.

(b) The unlawful act or omission causing the death.

(c) The existence of malice aforethought.

(d) Positive identification of the accused as the person who inflicted the injury or committed the unlawful act or omission that cause the death of the deceased.

In this case there is no dispute that the deceased died and the cause of death was stated by PW5 Dr. Patrick Musika to be due to strangulation. The fact and cause of death was therefore established. The post mortem report also showed that the unlawful act that caused the death was strangulation due to exerted trauma along the neck.

As there was no evidence of suicide, the strangulation was occasioned by a person. The issue is whether accused are the persons who inflicted the injuries that caused the death of deceased. The prosecution in their evidence did not call any witness who saw the accused 1 and 2 inflict injuries on the deceased.

The prosecution therefore relied on circumstantial evidence to connect the accused with the offence. The prosecution relied on two aspects of circumstantial evidence. (1) That the accused 2's clothes which were recovered from his wife's parent's house were blood stained and both accused were the last persons seen with the deceased alive.

On the first limb, on 16.2.2018 PW 3, Pius Wanjala Metiva, a village elder heard people screaming and went there. On arrival he found the deceased lying down dead. He informed the chief who called police who took away the body. On 19.2.2018 he received information that accused 2's wife was intending to take some clothes and throw them in the river. She was asked and led the village elder to her parents' home where the long trouser Exh.1, Jacket Exh.2 and shirt were recovered which were blood stained. Blood sample of deceased, the blood-stained clothes and soil sample which had blood stains were forwarded to Government Chemist Richard Kimatei Langat (PW7). PW7 on analyzing the specimen found that the blood sample on the soil matched that of the deceased. The blood stains sample on the clothes recovered belonged to an unknown female. The blood stains on the clothes therefore did not belong to the deceased or the accused persons.

The prosecution called PW2 Edward Mukanda Musembi who testified that he was with accused and deceased at the home of Merab, where deceased bought him changaa, he drunk and left them there while he went to his home. PW4 Merab Simiyu who was selling the changaa testified that both accused and deceased took changaa at her place when they started quarreling and left together. The following day she received information that deceased had died. This is the circumstantial evidence the prosecution relied on in respect to the accused. The accused's defense is that they were never with the deceased on the material day. This is not true in view of that evidence of PW2 Edward Mukalia and PW4 Merab Simiyu who was selling the charge testified that both accused and deceased took changaa at her place when they started quarrelling and left together. The following day she received information that deceased had died.

For a court to find an accused person guilty of an offence where the prosecution relies on circumstantial evidence, the prosecution must establish the inculpatory facts which taken cumulatively leads to the conclusion that the accused and no other committed the offence.

Sawe –vs- Republic 2003 EKLK the court of appeal stated.

“In order to justify on circumstantial evidence the inference of guilty, the inculpatory facts must be incompatible with the innocence of the accused and incapable of any other reasonable hypothesis than that of his guilt. There must be no co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of the inference from the facts to the exclusion of any other reasonable hypothesis of innocence remains with the prosecution. It is a burden which never shifts to the party accused.”

The prosecution evidence is that the accused left the home of PW4 Merab together with the deceased and the next day deceased was found dead on the road. That is the evidence the prosecution is relying on in this case. The evidence in my view does not meet the criteria in *Sawe – vs R-* (supra) on circumstantial evidence that would lead to inference of guilt of the accused. The fact that accused left the home of Merab together and no other does not meet the threshold for the court to infer guilt on the accused for the offence of murder.

After considering the whole evidence I find that the prosecution has not proved a charge of murder contrary to section 203 as read with Section 204 Penal code against accused 1 Tom Kunani Wanjala, 2. Alfred Simiyu Shimaka alias Mukuyuni beyond reasonable doubt and acquit them under Section 215 C.P.C Accused to be set at liberty unless otherwise lawfully detained.

DATED AND DELIVERED AT BUNGOMA THIS 9TH DAY OF MARCH, 2021.

S.N.RIECHI

JUDGE