



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL CASE NO.E005 OF 2020

REPUBLICPROSECUTOR

VERSUS

ISAAC DAVID MASIKAACCUSED

J U D G M E N T

[1] Isaac David Masika, is accused of murdering **Job Godfrey Masika (deceased)** contrary to s.203 read with s.204 of the **Penal Code**.

It was alleged that on the night of 30th November 2020 and 1st December 2020, at Emakina village – Nambale - Busia County, the accused and others not before court jointly murdered the deceased.

[2] The prosecution case arose from the facts that on the material date in the afternoon hours the deceased met his cousin, **Nashon Lawrence Adusala (PW 1)** and they proceeded to the local market centre where they entered a “**changaa**” (**illicit liquor**) den and took their drink up to 6.00p.m. Thereafter, they began their journey back home and arrived at the deceased’s home where they found the deceased’s brother, the accused.

[3] The accused picked a quarrel with the deceased and threatened he would one day kill him. **Nashon (PW 1)** proceeded to his home and left the duo quarreling. In the process, he spotted a group of people entering the deceased’s homestead. The group then advanced towards his home. He became scared and hid in a nearby plantation. The group left after banging the door. Thereafter, he entered his house and slept. He later on the following day heard that the deceased had been assaulted and seriously injured and succumbed to his injuries while undergoing treatment in hospital.

[4] It was at 11.00p.m on the material date that **Violet Athieno Kuboko (PW 2)** heard the voice of a person outside her house pleading for forgiveness. She recognized the voice to be that of the deceased her relative and neighbour. She also heard two other voices which she also recognized as being those of the accused and one Wycliff Omere. She heard them saying “**you have disturbed us for long, today we shall finish you.**” **Violet (PW 2)** did not at any moment venture outside her house where she spent the night but on the following day she saw the accused and his mother in the company of police officers. She then heard screams and shouts to the effect that the deceased had been killed.

[5] **Leonard Masika (PW 3)** was at his home on the material date and did not witness any unusual events but on the 1st December 2020, he was called on phone and confirmed that he was not with the deceased, his cousin. Thereafter, he went looking for the deceased but did not find him in his house although he noticed some blood stains in the house. About twenty metres away in a small sized farm he noticed more blood stains on freshly dug soil. The farm belonged to **Violet (PW 2)**. **Leonard (PW 3)** having failed to find the deceased returned home and found a crowd of people gathered. He then learnt that the dead body of the deceased had been removed to the mortuary by the police.

[6] **Beatrice Masika (PW 4)**, mother of the deceased as well as the accused confirmed having been at home with her two sons on the material date at about 1.00p.m. In the process, the deceased made several trips of bringing in and taking out of the home some maize. In one of the trips, he failed to return home and the mother (**PW 4**) went looking for him in his house. She did not find him immediately but noticed some blood stains in the house. It was then that she bumped into the dead body of the deceased lying on the house floor.

[7] **Beatrice (PW 4)** called the accused to the scene and both noted that the deceased had been assaulted and injured with sharp objects. They reported the matter to the police. **Dr. Oketch Georgeroy (PW 5)**, carried out the post mortem on the body of the deceased and compiled the necessary report (**P. Ex 1**) indicating that the deceased died from severe head injury secondary to a penetrating injury caused by a sharp object.

[8] **Cpl. Deoniso Njeru (PW 6)** carried out the necessary investigations after the accused had been arrested on suspicion of killing the deceased. The police officer gathered that the two had met and quarreled in the presence of **Nashon (PW 1)** who allegedly fled from the scene. He (**PW 6**) arranged for the scene of crime to be photographed and produced the photos (**P.Ex 2**). He later preferred the present charge against the accused.

[9] The accused's defence was a denial. He stated that he was a university student at Jaramogi Odinga University college Nambale campus and that on the material date he was at home from 5.00p.m in the company of his mother, his wife and siblings save for the deceased who was not present in the house as confirmed by the wife of the accused, Stella Negali (**DW 1**). They had dinner or supper at about 7.00p.m after which he later proceeded to his nearby house for the night. It was on the following morning when he was attracted by shouts and screams of his mother. His enquiries led him to the house of his deceased brother where he saw blood stains leading to the bedroom where they found the body of the deceased.

[10] The accused screamed for help and took his mother to the police to report the matter. The police arrived at the scene and commenced investigations. They removed the body of the deceased to the mortuary and on the following day he returned to the police station to record a statement. He was then arrested by officers attached to Directorate of Criminal Investigations (**DCI**) after being implicated by Nashon (**PW 1**) who had also been arrested and was a good friend of the deceased. However, Nashon was released by the police and he (**accused**) was instead charged with the present offence.

[11] The accused contended that he did not strangle the deceased as alleged by Nashon and that he was never in the company of Nashon on the material date. We further contended that Violet (**PW 2**) lied in court after failing to get a cow from the accused's family which she demanded in order to change her statement against him. He also contended that he did not kill his brother and could not tell what happened to him.

[12] All the foregoing facts confirm and establish that the deceased was violently assaulted and killed by a group of unknown villagers on suspicion of being a habitual village offender. This was implied clearly by Leonard (**PW 3**) and Robert Namwaya Balongo (**DW 2**), a local village elder or "**liguru**". The manner in which the killing occurred by infliction of severe head injury upon the deceased with sharp objects was a strong pointer to the assailants intention to kill.

The severity of the injury and the usage of dangerous objects or weapons was sufficient evidence in establishing malice aforethought.

[13] The issue for determination was therefore the alleged criminal culpability of the accused as one of those people who attacked the deceased and occasioned him fatal injuries.

In that regard, the prosecution in order to discharge its burden of proof was required to provide sufficient and credible direct or indirect evidence to prove beyond reasonable doubt that the accused was among the offender assailants especially in the face of his vehement denial of his alleged involvement in the assault and fatal injury of his deceased brother.

[14] Apparently, the key prosecution witnesses included Nashon (**PW 1**) and Violet (**PW 2**) but none of them provided cogent and credible evidence against the accused. Nashon testified that he was with the deceased when they met the accused. That, the two brothers quarreled and in the process, the accused threatened to kill the deceased. He (**PW 1**) indicated that he left the two quarrelling and went away. Few minutes thereafter, he saw a group of rowdy people entering the home of the deceased before they came to his home and then returned to the home of the deceased after which he heard screams coming from that homestead.

[15] There was no indication from Nashon (**PW 1**) that the group of people joined the accused while he was allegedly quarreling with the deceased or whether the accused joined them when they entered the home of the deceased. Indeed, there was no indication that the accused was part and parcel of that group of people which it would appear were involved in assaulting and fatally injuring the deceased. Nashon (**PW 1**) confirmed that he did not see the accused assaulting the deceased. He also confirmed that he could not identify any of the people in the offending group.

[16] Violet (**PW 2**) also failed to provide any evidence linking the accused with the murder of the deceased. Her evidence that she heard people talking outside her house on the material date at 11.00p.m did not link the accused with the death of the deceased even though she said that it could have been them that she heard talking outside her house as she was familiar with their voices. She said that she heard the accused and a person known as Wycliff Omeke saying that "**you have disturbed us for long, today we shall finish you.**" She thus implied that the two were talking and uttering the same words at the same time. This was clearly not possible. It pointed to her unreliability in implicating the accused.

[17] The evidence by Nashon (**PW 1**) and Violet (**PW 2**) was clearly not sufficient and reliable in proving that the accused either alone or in the company of others assaulted the deceased and caused his death. The evidence was based on suspicion and conjecture that because the accused and the deceased did not get along well, then it must have been the accused who killed the deceased while in the company of others. Nashon (**PW 1**) was actually arrested as a potential suspect but was released and treated as a prosecution witness merely because he was a good friend of the deceased and could have been in the company of the deceased when he was attacked and fatally injured by a group of villagers for criminal activities in the village. It was clear that the witness (**PW 1**) escaped the wrath of the villagers and abandoned the deceased. He was said to be the deceased's "**comrade in arms**" and could have been lucky because the villagers did not reach him.

[18] Whether or not the deceased and his friend (**PW 1**) were habitual criminals in their village, none of the villagers was allowed to take the law into their own hands. They broke the law and committed the offence of murder when they purported to punish the deceased by assaulting him so severely that he succumbed to his injuries. Unfortunately, none of those villagers was arrested to face the full force of the law. Instead, a wrong person identified as the accused herein was without any good reason and justification linked with the murderous group of villagers and charged with the present offence, only because his name was mentioned by Nashon (**PW 1**) and Violet (**PW 2**) who were clearly portrayed herein as dishonest and unreliable witnesses.

[19] In sum, the accused's alleged criminal culpability as one of those villagers who attacked the deceased and caused his death was not proved by the prosecution.

Consequently, the accused is hereby found **NOT GUILTY** as charged and is acquitted accordingly.

J.R. KARANJAH

J U D G E

[DELIVERED & SIGNED THIS 18TH DAY OF NOVEMBER 2021]