



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL CASE NO.1 "A" OF 2020

REPUBLICPROSECUTOR

VERSUS

1. FLORENCE KOLA

2. CAROL KOLAACCUSED

3. EDWIN SIFUMA

J U D G M E N T

[1] The three accused, **Florence Kola, Carol Kola** and **Edwin Sifuma** are charged with murder, contrary to **S.203** read with **S.204** of the **Penal Code**. It was alleged that on the 11th day of August 2019 at Sango village, Naitiri sub location within Bungoma County, they murdered Martine Wawire.

[2] The facts giving rise to the prosecution case are that on or about the material date, **Wilfred Wawire (PW 1)** was sleeping in his house when he was awakened by his mother's telephone call notifying him that the deceased who was his brother was being killed at Sango market or trading area. He rushed to the scene and found a mob of people assaulting the deceased. He was able to see and recognize the three accused among the mob of people as the area was well lit. His brother, **Geoffrey Wawire (PW 3)**, arrived at the scene on his motor cycle accompanied by their mother, **Rispa Akutu Wawire (PW 2)**. They both saw the three accused among the mob of people surrounding and assaulting the deceased who lay on the ground.

[3] The two brothers (**PW 1** and **PW3**) rushed their injured brother to the hospital on a motor cycle but he died on arrival.

Geoffrey Weusya Wafula (PW 4) was attracted to the scene by screams and found that the deceased was beaten by a mob of people on suspicion of having stolen chicken. He saw several people known to him at the scene. These included the three accused.

[4] **Caleb Wabwire Sifuma (PW 5)**, was allegedly in the company of the deceased when they had gone to the home of the first accused (**Florence**) to do plastering works on her house after which they remained behind taking traditional liquor awaiting their pay from the first accused. Caleb (**PW 5**) was paid a sum of ksh.200/= cash but due to lack of more money, the deceased was handed over some chicken to take to the second accused (**Carol**) and bring back money. The second accused and the first accused are daughter and mother respectively.

[5] Caleb parted ways with the deceased at that point but later in the night he heard shouts and screams and on enquiring found the deceased being assaulted inside a maize plantation by the three accused who then moved him to the market area where he was further assaulted by a group of people. After the matter was reported to the police, **P.C Felix Oduor Ojowi (PW 6)** carried out necessary investigations and gathered that the deceased had allegedly been undertaking landscaping work at the homestead of the first accused and instead of being paid by cash money he was given a hen by the first accused who shortly thereafter raised alarm that the hen had been stolen. A group of villagers responded by attacking and assaulting the deceased after having stripped him off his clothes and frog matched him to the nearby Sango market.

[6] Statements recorded from witnesses by P.C Felix (**PW 6**) implicated the three accused and others thereby prompting their arrest and arraignment in court. Some of the suspects were arraigned at the Bungoma Law Courts while the three accused were arraigned in this court following their belated arrest. They all denied the charge and gave sworn statements in their defence.

[7] All the three accused implied and indicated that their respective arrest and arraignment in court was unjustified. Accused one indicated that she was asleep at home on the material night when she was awakened by unusual noises from her chicken pen. She raised alarm by screaming while venturing outside the house where she saw some people escaping from her compound. She proceeded to inspect the chicken pen and noted that some of her chicken had been stolen. She then called an assistant chief before reporting the incident to the police at Bakali police station as per O/B No.0212082019 for which she extracted a copy (**D.Ex 1**).

[8] After making the report, the first accused returned home only to later be informed that a suspect had been apprehended and lynched by villagers. Police officers then proceeded to her home where they took photographs and found a pair of slippers (**Flip flops**), a packet of cigarettes and a rope. They also arrested about seven villagers for lynching the suspected chicken thief. The said villagers were all her neighbours. She was arrested after one year of the offence.

[9] The first accused contended that Caleb (**PW 5**) did not speak the truth in court and that she never hired him and the deceased to renovate her house which was incapable of such renovations as it is made of mud. She further contended that she did not know how the deceased died or how he was attacked and assaulted by the villagers.

[10] The second accused indicated that she was at her home on the material night and only heard about the theft of her mother's chicken and the lynching of the deceased on the following day. Her house is about two kilometres from that of her mother (**first accused**). She contended that she was not at the scene of the lynching of the deceased on the material date and time. Her husband and other suspects were arrested after the offence but she was arrested one year thereafter even though she never left her homestead or area after the offence.

[11] The third accused indicated that he was at a place called Nasianda watching football on T.V. He left the place at 11.00p.m headed home. On arrival at Sango market, he learnt that a theft suspect had been lynched. He was notified by his elder step brother Caleb (**PW 5**) that the deceased whom he referred to as his father was killed and that he (**third accused**) was required to make a statement. He declined to do so as he knew nothing about the offence. He therefore implied that his refusal to record a statement and an existing grudge between him and Caleb (**PW 5**) were the cause of his arrest and arraignment in court.

[12] From all the foregoing evidence it is without doubt that the deceased met his death after being assaulted and fatally injured by a group of villagers or mob of people on suspicion of having stolen chicken from the first accused. This was a typical case of what is referred as "**mob justice**" which in real sense is actually "**mob injustice**". Mob justice is nothing but a form of extra judicial punishment in which a person suspected of wrong doing is humiliated, beaten and in many cases, killed by a mob of people. Such act is criminal, pure and simple. Any person participating in it commits an offence and must invariably be held responsible for the consequences of his unlawful action.

[13] In this case, there was no dispute that the deceased was a victim of mob justice or injustice perpetrated by a group of villagers who decided to prosecute, judge and punish him for allegedly stealing chicken from one of their own. In the process, they set upon him with all manner of weapon or objects and occasioned him grievous bodily harm which resulted in his demise.

The post mortem report (**P. Ex 1**) established that the cause of death was severe head injury with massive external hemorrhage due to trauma. It also shows that the deceased's injuries were extensive and severe thereby implying that the attack against him was vicious as to leave no doubt that the assailants had a clear intention of snapping life out of the deceased.

[14] The cause of death was undoubtedly and undisputedly traceable to the injuries inflicted upon the deceased and indeed, the perpetrators of the injuries.

The prosecution having established without dispute that the deceased was murdered in a "**mob justice**" incident, the issue arising for determination in this case is whether the three accused or any one of them was positively identified as having been part of the mob of villagers who assaulted and fatally injured the deceased.

[15] This case therefore turns on the identification of the three accused as the offenders, hence criminally responsible for the death of the deceased.

Identification evidence must always be treated with caution. It must be free from error or mistake because a witness might be mistaken even if he is honest (see, **Joseph Onyinkwa Nyariki Vs Rep (2019)** eKLR).

[16] Further, consideration ought to be given to the prevailing circumstances at the material time and scene of the offence. In that regard, whether favourable conditions and adequate opportunity existed for the identification of the offenders especially if the offence occurred in the hours of darkness as in this case.

The learned defence counsel, **M/s Nanzushi**, submitted that the exact time of the offence was not revealed by the prosecution witness as they all gave different time within which the offence occurred. Learned counsel implied that the factor of time impacted negatively on the prosecution case.

[17] However, the learned prosecution counsel, **M/s Kihumba**, submitted that the evidence disclosed that the offence occurred between 11.00p.m to midnight. Be that as it may, the time factor does not touch on the root of the offence. It mattered not that the witness gave different time as this did not alter the fact that the offence occurred in the hours of darkness when conditions for identification may be unfavourable.

[18] Besides, discrepancies or contradictions in the prosecution evidence relating to time of the offence are readily curable under **S.382** of the **Criminal Procedure Code**.

It was herein evident that the accused and the witnesses who led evidence of identification against them i.e. Wilfred (**PW 1**), Rispa (**PW 2**), Geoffrey (**PW 3**), Weuswa Wafula (**PW 4**) and Caleb (**PW 5**), were known to each other prior to the material incident. They all indicated that they were neighbours and/or relatives.

[19] This meant that the identification of the accused was not based on identification of strangers rather it was more a case of recognition. Even so, in such cases caution must still be taken in order to overrule the possibility of mistaken identity. The learned defence counsel,

submitted that the charge was not proved against the accused beyond reasonable doubt thereby implying that the prosecution evidence of identification was insufficient, contradictory and unreliable. That, the belated arraignment of the accused in court was sinister if not suspect as they never did disappear from their area after the offence was committed.

[20] The prosecution submitted that the accused were placed at the scene of the offence by the prosecution witnesses, thereby implying that they were in the group of people who assaulted and caused the death of the deceased.

In situations where the death of the deceased is attributed to “**mob justice**” or “**mob injustice**”, it is difficult if not impossible to pinpoint which person in the mob administered the killer or fatal blow. In the circumstances, a common intention by the assailants to assault and kill the deceased or to take the law in their own hands may be lacking.

[21] However, a common intention may be drawn from the presence of the assailants at the scene of the offence, their action and even the omission of any of them to disassociate himself or herself from the assault.

S.21 of the **Penal Code** provides that:-

“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”

[22] It was undisputedly established that the deceased herein was murdered by a mob of people comprising of his village mates. Each of the villagers who took part in assaulting and killing the deceased was as guilty as the other for the murder.

In **Rex Vs. Tabula Yenka s/o Kirya & others (1943) 10 EACA 51**, it was stated that:-

“To constitute a common intention to prosecute an unlawful purposeit is not necessary that there should have been any concerted agreement between the accused prior to the attack on the so called thief. Their common intention may be inferred from their presence, their action and the omissions of any of them to disassociate himself from the assault.”

[23] In this case, the deceased was assaulted and killed on suspicion of being a chicken thief. All those who took part in the unlawful transaction did not deem it fit to apprehend the suspect and hand him over to law enforcers, instead they decided to take the law in their hands. They were not permitted under any circumstances to do so and having done so, they came into direct conflict with the law. They must therefore be held criminally responsible for the consequences of their unlawful action.

[24] The accused contended that they were not in the mob of people who assaulted and killed the deceased even though the first accused was the person who sounded alarm that her chicken had been stolen. She never disputed the fact but indicated that she did not see the thief and that she made a report in respect thereof to the police.

Despite their denial, the accused were placed at the scene by the prosecution witnesses i.e. **PW 1, 2, 3, 4 and 5**.

[25] These witnesses saw the accused at the scene and recognized them. They indicated that the scene was well lit with flash lights, solar lamps and motor cycle headlamps thereby making it possible to recognize the accused as being part of the mob of people which assaulted and fatally injured the deceased. They also indicated that the incident took a considerable period of time which gave them adequate opportunity to identify the accused and others as the assailants.

[26] Wilfred (**PW 1**) stated that he saw the first accused holding stones, the second accused holding two hens and the third accused holding a stick. Rispa (**PW 2**) saw the first accused carrying a stick and a stone and the second accused carrying two hens. In cross examination she said that on her arrival at the scene she witnessed the first accused hitting the deceased with a stick and heard the second accused saying that they needed evidence that the deceased was a thief.

[27] Geoffrey (**PW 3**) said that he arrived at the scene and saw the first accused holding a stick and stone and used the stick to hit the deceased who was already seriously injured and his leg severed.

Weusya Wafula (**PW 4**) confirmed having seen the three accused at the scene. He said in cross examination that he did not see the first accused carrying anything but the second accused was carrying a stick and metal rod.

[28] Caleb (**PW 5**) indicated that he initially found the deceased being assaulted inside a maize plantation by the three accused before they moved him to the market area where he was set upon by a mob of people. He implied that the three accused were the masterminds of the entire criminal transaction against the deceased. That, they actually “**delivered him to the slaughter house**” (**market**) to finish off the job started by them with the assistance of likeminded villagers.

[29] Caleb (**PW 5**) also indicated that the second accused was carrying chicken and a piece of wood while the first accused assaulted the deceased using a piece of Y10 metal rod. Most importantly be (**PW 5**) indicated that prior to the incident during the day the deceased and himself had been in the homestead of the first accused who hired them to carry out some works in her house. That, he was later in the evening paid for the job done but not the deceased who was given hens to take to the second accused and get his money. It was at that juncture that they parted ways only for him to hear shouts and screams in the night. He enquired and it was then that he found the deceased being assaulted by the accused in a maize plantation.

[30] Although the evidence of all the foregoing prosecution witness was laced with insignificant discrepancies and contradictions, it was cogent and reasonably credible as to prove that the accused were actually at the scene on the material date and time of the offence and that they actually participated in assaulting and causing the death of the deceased. They provoked the entire episode and led a horde of villagers in assaulting and killing the deceased. The witness aforementioned positively identified indeed recognized them with the help of light from flash lights, solar lamps and motor cycle head lamps which provided favourable conditions for positive identification and rendered the possibility of mistaken identify quite remote.

[31] The duration of time that the incident lasted provided adequate opportunity for the witness to positively identify the accused whose alibi defence was effectively discredited and disproved by the entire prosecution evidence which also showed that the report made by the first accused to the police was done after the fact and as a means to cover up her role in igniting the unlawful transaction against the deceased and actually participating in it.

[32] Indeed, the prosecution evidence against the first accused and her co-accuseds proved and established that they were positively identified as being part of the mob of people who assaulted and killed the deceased in what is known as “**mob justice**” instead of “**mob injustice**”.

In sum, the prosecution case against the accused was proved against them beyond reasonable doubt. Accordingly, the three accused are hereby found guilty as charged and convicted.

J.R. KARANJAH

J U D G E

[DELIVERED & SIGNED THIS 15TH DAY OF DECEMBER 2021]