



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL CASE NO. 17 OF 2017

REPUBLIC.....PROSECUTOR

VERSES

ANTONY VITINYU MANGO.....ACCUSED

JUDGMENT

1. The accused herein was charged with the offence of **Murder contrary to Section 203 as read with Section 204 of the Penal Code**. The particulars of the charge were that on the **16th day of March 2016 at Wekhoya village Maili Saba area within Trans-Nzoia County murdered YONAH WANJALA WASWA**.

2. The accused denied the offence and the prosecution called several witnesses to prove its case whose evidence is hereby summarised as hereunder.

3. **PW1 DR FAUSTIN SHITOTE** from Kitale County Referral hospital produced the post mortem report on behalf of her colleague **Dr. Obala** who carried out the said exercise on 21st March, 2016 and found the cause of death to be cardiopulmonary arrest secondary to penetrating heart and chest injuries.

4. **PW2 SAMWEL NYONGESA JUMA** testified that the deceased was his cousin and that on 16/3/2016 they went to Sabwani for a funeral vigil together with the deceased and others. They carried out a fund raiser and thereafter they left for another funeral ceremony not far from where they were.

5. He said that the accused then came and said that he had killed someone and suddenly he heard the deceased scream. He was behind and he saw the accused although he said that there was no source of light. The accused then took off and although they gave chase they were unable to apprehend him. The deceased was taken to the hospital and they reported the matter to the village elder.

6. They also went to the home of the accused and his father became violent and chased them while armed with a panga.

7. **PW3 JACOB WANJALA** said that the deceased was his eldest brother and he did not know the accused. He was also at the funeral ceremony and he heard some scuffle as well as screams while outside. He saw the deceased bleeding from the ribs and they took him to the hospital. He did not get to know who stabbed the deceased.

8. **PW4 ROSA NAFULA WAFULA** a village elder was woken up that night and informed of the incident. They went to the deceased home but they did not get him and the police commenced the search. She said that she did not witness the incident although she went to the scene where she saw blood on the ground.

9. **PW5 PAUL WANJALA LUMARA** said that he was the father to the deceased and that on the material day he had joint others for a funeral ceremony. At around 12.00 a.m. Jacob his other son came home and informed him of the sad news. He went to the scene and later to the police station where the incident had been reported.

10. **PW6 PATRICK GACHANI** said that he knew both the accused and the deceased and that on the material day he was at the funeral ceremony with the deceased. They had sat behind the house and after a short while someone jumped over the fence and was saying that he would kill someone. He met the deceased whom he stabbed and took off. They gave chase but were unable to apprehend him. They came back and took the deceased to the hospital.

11. They went to the village elder who showed them the home of the accused but when they reached there the accused father who was armed with a panga chased them away. He said that he attended the post mortem exercise. He said that he saw the accused jump the fence though

he did not recognise him.

12. **PW7 APC JOSEPH KIBUTI** arrested the accused on 22/7/2017 after receiving an arrest order from Kitale police station.

13. **PW8 P.C LINET OMWAMBA** from Kitale police station took over the investigation from **PC ESTHER NOLALI** who had been transferred and who recorded statements from the witnesses and preferred charges against the accused.

14. When placed on his defence, the accused gave sworn evidence and did not call any witness. He said that on 16th March 2016 he went to work in a flower farm in Nairobi and after a while he was called by his father and told that they were looking for him over an incident that had occurred at home. He came back after two years when he was arrested and charged with the offence which he denied. He denied having met the deceased person neither did he attend the funeral.

ANALYSIS AND DETERMINATION.

15. The court has read the proceedings as well submissions on record from the learned state counsel and despite granting the chance to the defence counsel there was no submissions from his side.

16. The provisions of Section 203 of the Penal Code clearly spells out the ingredients which ought to be met before the offence of murder is established. These include the cause of death; that the deceased met his death due to the unlawful acts by the accused or omission for that matter; and that the said unlawful acts or omission was committed with malice aforethought.

17. The death of the deceased was well explained by pw1 who showed that he died as a result of the stab wounds on the chest cavity and which reached the heart. The stabbing was well explained by the prosecution witnesses as the cause of the deceased injuries.

18. Who stabbed the deceased? The incident as admitted by the witnesses occurred during the night at a funeral vigil. It was alleged that it was the accused who jumped through the fence and was heard saying that he was going to kill someone. Thereafter the deceased was heard screaming and upon being checked he was found bleeding.

19. This is a case which basically inches on identification of the assailant. There seemed not to have been a clear evidence by any of the prosecution witness that they saw the assailant. PW2 for instance said that;

“It was dark. We bypassed each other. There was no source of light. There was no moonlight. He had a white shirt.”

20. He then went on to state that he knew the accused as he heard his voice as he had met him for the first time earlier at the fund raiser.

21. PW6 who was at the scene said that they saw someone jump over the fence and was saying that he would kill someone. He thereafter stabbed the deceased. On cross-examination however he said that they did not know who stabbed the deceased.

22. Other than the two witnesses the rest came after the fact. PW2 was clear that he could not see the assailant except the white shirt and his voice. Obviously there could have been other people who had white shirts that night noting that being a funeral vigil there must have been other people. If there was no other source of light, then one could conclude that he was not able to identify the assailant.

23. The other issue raised by the said witness, PW2, was the scene of the incident. His evidence suggest that it occurred on a road as they by passed each other with the accused. The rest of the witnesses speak of being behind the house. From the proceedings there was contradictions on his evidence at the dock and the statements he made at the police station which the prosecution sought to rely on.

24. In the absence of any identification parade, although given the circumstances there may have been no need for any, it becomes hard for this court to conclude whether it was the accused who was the assailant. Although it was said that they gave chase, he was not arrested by the members of the public that night.

25. They went all the way to the accused father's home who was found to have been violent and was wielding a panga. The accused, despite this incident of his father was not at home. There was no reason why his father was violent that night and chased his son's pursuers away.

26. This issue of identity of the assailant was critical given the decision in the now famous case of **R VS. TURNBILL & OTHERS (1976) ALL ER 549** where the court warned among other pronouncement that there could be a case of mistaken identity for the failure of the witnesses to identify a person because of poor visibility for lack of sufficient lighting.

27. The main suspicion which I find may have connected the accused with the offence is the fact that he went away for two years and he was not apprehended. There was no evidence that he was sought and he disappeared for all that time.

28. There was no sufficient evidence also that the accused was at the scene during and before the incident. PW2 said that he saw him during the fund raiser but it appears that he said so in passing and he even went further to state that that was the first time he had encountered the accused.

29. In the absence of direct and or circumstantial evidence to link the accused with the offence, this court finds it difficult to conclude that the accused stabbed the deceased. Moreover, the murder weapon was not traced. There was no sufficient lighting for any of the witnesses to identify the accused.

30. In the premises, the accused is hereby acquitted under the provisions of Section 215 of the Criminal Procedure Code unless lawfully held.

Dated, signed and delivered in open court at Kitale this 17th day of February, 2020.

H. K. CHEMITEI

JUDGE

17/2/2020

In the presence of:-

Mr. Omooria for the Respondent

Appellant present

Court Assistant – kirong

Judgement read in open court