



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CRIMINAL CASE NO. 23 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

GEORGE ODUORI EGESA.....1<sup>ST</sup> ACCUSED

PETER BARASA KESA.....2<sup>ND</sup> ACCUSED

HILLARY WANZALA KESA.....3<sup>RD</sup> ACCUSED

JUDGMENT

1. **George Oduori Egese, Peter Barasa Kesa and Hillary Wanzala Kesa** are charged with an offence of murder contrary to section 203 as read with section 204 of the Penal Code.
2. The particulars of the offence are that on the 31<sup>st</sup> day of August 2015, at **Masiebi** village in **Lwany** location of **Busia** County, jointly with others not before court murdered **Charles Oduori**.
3. The deceased and the accused persons were first cousins. Their fathers had a long standing land dispute which had turned the two and their families to enemies who were not seeing each other eye to eye. On the material day, the prosecution alleges that a meeting to resolve the land dispute had been called. The accused persons allegedly fatally attacked their cousin, the deceased herein.
4. All the accused in their defence conceded the existence of the land dispute but denied any involvement in the offence. Each one of them pleaded an alibi.
5. The issues for determination are:
  - a) Whether there was evidence that linked any of the accused person to the offence;
  - b) Whether the alibi defence by each accused person is tenable; and
  - c) Whether the offence of murder was proved against any of the accused person.
6. On 31<sup>st</sup> August 2015, there was a meeting to attempt to resolve a long standing land dispute between the families of Marko Kesa and John Kesa. The evidence of John Oduori Kesa (PW1) was that he was not aware of the meeting. He however acknowledged the existence of the land dispute. The evidence of Fredrick Obondo Khaseke (DW4) the area chief was that the meeting had been called.
7. When this matter was heard before Judge Tuiyott on 9<sup>th</sup> February 2016, Phaustine Adhiambo Oduori (then PW2) testified that John Oduori Kesa (PW1) informed her that he was not aware of the meeting when she enquired from him if he was.
8. Though John Oduori Kesa (PW1) had denied prior knowledge of the meeting, during cross examination he said the convener of the same was a village elder called Wilson Aido. He added that he knew the agenda of the meeting but did not attend for he feared for his life. We can therefore safely conclude that indeed there was a meeting which was called to attempt to resolve the existing dispute between the two families and that PW1 was aware of it in spite of his contention.
9. According to John Oduori Kesa (PW1), as he was passing by the venue of the meeting on his way to Matayos, he was attacked by three

people namely; Dan Kesa, Paul Kesa and Hilary Kesa. These three were trying to force him to attend the meeting. They kicked him and took away his bicycle. He fled the scene screaming. He ran into the compound of his neighbour, Peter. Behind him, he heard noises and screams from the scene but could not be able to know who was making noise. Shortly after about five minutes of the screams, he saw Phaustine Adhiambo (PW2) his daughter supporting the deceased to where he was. The two walked from the direction of the screams.

10. The evidence of this witness (PW1) during cross examination, was that his statement to the police indicated that he was attacked by five people. No explanation over the discrepancy was offered.

11. Before the consolidation of the two cases involving the accused persons, Phaustine Adhiambo Oduori testified as PW2 but after consolidation she was not called to testify. In her testimony she informed the court that her father (PW1) left for Matayos. After about five minutes of leaving, Valentine Oduor her nephew reported to them that her father (PW1) had been attacked. She left with the deceased hurriedly. On reaching near the home of Barasa, she saw Hilary Ekesa, George Oduor, Dan, Peter, Paul and Teresia and other people who included their neighbours gathered. Teresia was seated while the rest were squatting. Hilary Ekesa, George Oduor, Dan, Peter and Paul had wooden rods. She said that these people were inside some shrubs.

12. The five attacked them suddenly. Hilary hit the deceased with a rod and when he fell down, he (Hilary) cut the deceased with a machete on the left hand. George Oduor, Dan, Peter and Paul attacked the deceased viciously using the rods. One neighbour called Abu also attacked the deceased. She ran towards home screaming and returned to the scene with Boniface, Rose and her mother. On their way to the hospital, they met PW1 who was standing by the road. Boniface was carrying the deceased on his shoulder.

13. Two issues arise from the evidence of John Oduori Kesa (PW1) and that of his daughter PW2. According to PW1, while at the compound of his neighbour Peter, his daughter Phaustine Adhiambo went to where he was while holding the deceased by the shoulder and assisting him to walk. However, Phaustine Adhiambo testified that the deceased was carried by Boniface on his shoulders. She also said PW1 was standing by the road side. These two witnesses raise a credibility issue. The Court of Appeal in the case of **Ndungu Kimanyi vs. Republic (1979) KLR 282** held:

**The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.**

In the instant case, I am unable to make a finding that these two witnesses can be relied upon to tell the truth.

14. The second issue that is manifested is the failure to recall Phaustine Adhiambo Oduori the initial PW2 after the consolidation of Criminal Cases 23 of 2015 and Criminal case No. 6 of 2016. This failure would mean that Hilary Wanzala Kesa who was charged in Criminal case No. 6 of 2016 did not have the advantage of challenging her evidence and would be prejudiced by the same.

15. Apparently, the prosecution deliberately decided to omit calling her without telling the court of the intention. The court cannot ignore evidence which had tended to be in favour of an accused person and which was adduced in judicial proceeding.

16. The other evidence of a purported eye witness was that of Rose Anyango (PW2 in the subsequent proceedings). In her evidence, she contradicted her father (PW1) who said he ran to a neighbour's home. She testified that her nephew ran home and reported that PW1 was being attacked and he (PW1) shortly ran home shouting. She also contradicted the earlier evidence of her sister Phaustine Adhiambo. According to Adhiambo's evidence, it was Boniface who tied the deceased with his (deceased's tee shirt) on the bleeding hand but according to Rose (PW2) it was her who did it.

17. If these purported eye witnesses can contradict each other on non-contested issues, one cannot believe their testimony on the contested issues.

18. The accused persons pleaded alibis. The Court of Appeal in the case **Kiarie vs. Republic (1984)KLR 739** held:

**An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.**

19. George Oduori Egesa (accused 1) contended that on 31<sup>st</sup> August 2015 he was suffering from malaria and went to seek medical attention at Matayos Health Centre. He produced his treatment book. His treatment book (Dexh.1) indicate that on 30<sup>th</sup> August 2015 he sought treatment and was asked to report back for review on the following day. The record shows that he did and was seen at 9:20 a.m. His outpatient number was indicated to be 2000 of 2015.

20. There was nothing to show that this evidence was not authentic. The incident that gave rise to this case occurred at about 10 a.m. His defence is therefore plausible.

21. Peter Barasa Kesa (accused 2) testified that at the time of the incident he was a student and on the material day he had gone to Busia for shopping in preparation to return to school. He said he left home and returned at 12 noon. His defence in view of the doubtful evidence of the purported eye witnesses is plausible.

22. The third accused, Hilary Wanzala Kesa (DW3) testified that at the time of the incident he was a teacher at Nasewa Primary school. He produced a logbook where he had signed his attendance on 31<sup>st</sup> August 2015. This alibi is plausible.

23. The investigating officer failed in his duty to record the evidence of independent witnesses but solely decided to rely on the family of the deceased. Given the history over the land dispute pitting the two families, it would have been prudent to call independent witnesses.

24. Fredrick Obondo Khaseke (DW4) though an independent witness, was not present at the scene at the time of the incident.

25. Colleta Awino (DW5) testified that the deceased attacked her mother and a crowd charged and attacked him. This witness is not an independent witness; she is a sister of the accused persons. She therefore manages to introduce another version of how the deceased met his death.

26. From the foregoing analysis of the evidence on record, I find that the prosecution has failed to prove its case against any of the accused persons. I accordingly acquit each one of them of the offence of murder. Each is set at liberty unless if otherwise lawfully held.

**DELIVERED** and **SIGNED** at **BUSIA** this 12<sup>th</sup> day of February, 2020

**KIARIE WAWERU KIARIE**

**JUDGE**