



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL CASE NUMBER 15 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

EDWIN WAMWALWA SALIM.....1ST ACCUSED

IBRAHIM WANJALA HASSAN ALIAS TOM MUKANDA.....2ND ACCUSED

J U D G M E N T

The **1st Accused Edwin Wamalwa Salim, 2nd Accused Ibrahim Wanjala Hassan Alias Tom Mukanda** were charged with 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 night of 11th day of April, 2018 at Kambinivillage in Kimilili Sub County within Bungoma Country murdered Dennis Wekesa Nyongesa Wesusa.

The case for the prosecution is that on 11th April, 2018 at about 9 p.m. Janet Wanjala Wekesa was in her house with her husband the deceased. While there she heard people outside who demanded that the deceased Dennis Wekesa Nyongesa Wesuse go outside. She raised an alarm. Neighbours who included Juma and his wife and Nasimiyu came. The people told the neighbours that they wanted the deceased to come out and accompany them to AP camp to record a statement. Among the people who were making the demand was 2nd accused Tom who was the Chairman of bodaboda. The deceased came out and they went with 2nd accused and others. She remained behind and went to the clan elder and reported the matter. The next day she was informed deceased had died.

PW 2 Martin Nabuyola was at his home when he heard screams from deceased's home. He went there. He found **Edwin 1st accused and Tom 2nd accused** and other people outside holding the deceased. The accuseds were armed. He urged them to take him to clan elder but **2nd Accused** said they were taking him to the AP Camp at Ludaso. They then left. The next day he was informed deceased had died.

PW 7 Alex Wangala Wanyoni the village elder received a report at 8.40 p.m. that there was a person being attacked at the bridge. He called 2nd Accused Tom and asked him to go and assist the person. Later 2nd accused called him and informed him he had arrived there and found the person who had been attacked and were taking him to hospital. The next day he was informed that the person who was the deceased had died

PW 10 Cpl James Wanjao attached to Kimilili police station received information at 8 p.m. that a person had been beaten and left in a trench along Kambiri – AP Camp road. He visited the scene and found a person lying down with several injuries. They took him to Dreamland Hospital where he was pronounced dead on arrival. They took the body to the mortuary. Upon coming back to the station he found **2nd accused Tom** who was making a report that deceased had tried to rob him of his motorcycle and that he raised an alarm and people came and assaulted the deceased. Upon further investigation showed that 1st accused was also in the group that took deceased away from his home.

PW 9 Dr. Mwanambisi Caleb Mwata produced a postmortem Report on the body of the deceased as done by Dr. Wafula on 16th April, 2018. Dr. Wafula found that deceased had bruises on fore-head and right cheeks, lacerations on back of the head, bleeding on right side of kidney area, abrasions on back. Upon opening the body he found there was bleeding in the brain and rupture of 2nd right rib. He formed opinion that the cause of death was due to blunt injury on the head.

The accused upon being placed on their defence gave sworn evidence. **1st Accused Edwin Wamalwa Salim** testified that on 11th April,

2018, he went to work as a boda boda rider and left at 7 p.m. while riding his motor cycle Registration No. KMDF 400f, Home, he reached at the bridge when a person hit him on the head and the motorcycle overturned. He was then attacked by 2 people whom he did not know. He would see one was wearing a marvin. As a result of the injury he became unconscious. When he regained consciousness he found himself at the police station. He was later treated at Kimilili. On 12th April, 2018 he was informed deceased had died. He was arrested and charged with present offence.

2nd Accused Ibrahim Wanjala Hassan Alias Tom Muganda testified that he was a boda boda rider on 11th April, 2018 at 8 p.m. he was at his home when he was called by village Elder and informed that a boda boda rider had been attacked at the bridge. He went there and found a person lying down bleeding. He then took the injured to the AP camp but found it closed. They went to Kimilili Police Station who advised him to take the injured to hospital. On 12th April, 2018 he was called to the police station on allegation of killing the deceased. He testified that he knew the deceased who was a neighbor but had no grudge with him.

M/s Lunani for the accused filed her written submissions. Counsel submitted that the evidence of PW 1 as who took the deceased is unreliable as she told other witnesses that he was taken by unknown people and yet in court she said it is the accused. Counsel submitted that the defence by the accused is credible and that it is clear **2nd accused** did not go to the home of deceased and that he only took **1st accused** who had been attacked to hospital. Counsel submitted that the incident occurred at night, no witness saw accused kill the deceased, and, therefore, the murderers are unknown. Finally, counsel submitted that there are gaps and inconsistencies in the prosecution evidence and that the same should be resolved in favour of the accused person.

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

To prove a charge of Murder the prosecution had a duty to prove the following elements of the assault.

- 1. The fact and cause of death of the deceased.**
- 2. That the accused caused the death of the deceased through an unlawful act or omission.**
- 3. That the accused had malice aforethought which is the intention to kill or cause grievous harm.**

All the above elements must be proved to the require standard in criminal cases of beyond reasonable doubt.

PW 9 Dr. Wanambisi Caleb produced a post-mortem form filled by **Dr. Wafula** who performed the postmortem on body of the deceased. He found that the deceased had bruises on the forehead, lacerations on back at head and chest and back. He found the 2nd right and left rib broken and bleeding into the brain. He formed opinion that cause of death was due to blunt injury on the head. This evidence, therefore, confirms both the fact of death and cause of death whether was due to injuries inflicted.

Did the **1st and 2nd accuseds** jointly or severally inflict the injuries that caused the death of the deceased? This revolves on the question of positive identification of the accuseds as having caused the death of the deceased.

PW 1 Janet Wanjala the wife of the deceased testified that she was in the house with deceased whet at 8 p.m. people came and asked deceased to come out. She screamed and neighbours came. The deceased went out. She said there were many people outside but recognized **2nd accused Tom** whom she knew as a boda boda. When they took the deceased, she went to the clan elder, **PW 6 Geoffrey Winyenyi** whom she informed that deceased had been abducted by unknown people and did not give any names to him. This witness, however, testified that she did not see **1st accused Edwin Wamalwa Salim**.

PW 2 Martin Nabunyola Juma, testified that upon hearing screams from deceased's home at 10 p.m. went there. On arrival he saw **1st accused Edwin and 2nd accused Tom** and other people. The **1st accused & 2nd accused** were holding the deceased while armed with arrows and pangas. He urged them to call clan elders but they declined saying they were taking him to the AP Camp. He said there were more than 20 people and there was sufficient light.

These are the only witnesses who gave evidence to having seen the accuseds take away the deceased on that material night. The prosecution case, therefore is that they took away the deceased when alive on pretext that they were taking him to the AP camp but later the body of deceased was found dumped near the AP Camp with bodily injuries. The prosecution case, therefore is that there is circumstantial evidence to show that it is accused who caused his death. Before the application of the circumstantial evidence doctrine, the prosecution must first establish that it is accused who took the deceased away.

This, therefore brings into focus the issue of identification. Identification is important in criminal law because in our system guilt is assigned to the person and punishment is to the person for the offence committed to achieve the objective of punishing the offenders. The court in establishing the accuracy of the identification by the witness should consider the following factors.

- a) **What were the nature and intensity of light conditions under which the witness was able to make the observation?**
- b) **What was the distance between the witness and the suspect?**
- c) **What were the position of the witness to the suspect? Were there any obstacles.**

- d) Was the witness able to observe and remember the appearance of special marks or features or clothing of suspect?
- e) What was the time for observation of the suspect or the event?
- f) Was it a short glance or a long time observation?
- g) What was the physical, mental or emotional state of the witness before, during and after observation? Was he anxious, fidgeted or calm and observant? Were there circumstances likely to affect the ability of the witness to observe and accurately remember the suspect?
- h) Did the witness have an opportunity to give a description of the suspect? If so to what extent did it match the suspect in court?
- i) Was there consistency in the description of the suspect to all the parties the witness reported to?

In **Paul Etole & Reuben Ombimi Vs R** – Criminal appeal No. 24 of 2000 the Court of Appeal stated as follows: -

The appeal of the 2nd appellant raises problems relating to evidence of visual identification. Such evidence can bring about miscarriage of justice. But such a miscarriage of justice occurring can be much reduced if whenever the case against an accused person depends wholly or substantially on the correctness of one or more identifications of the accused, the court should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally it should remind itself of any specific weakness which had appeared in the identification evidence. It is true that recognition may be more reliable than the identification of a stranger; but even when witness is purporting to recognise someone who he knows, the court should remind itself that mistakes in recognition of close relatives and friends are sometimes made.

All these matters go to the quality of the identification evidence. When the quality is good and remains good at the close of the accused's case the danger of mistaken identification is lessened, but the poorer the quality the greater the danger. In the present case, neither of the two courts below demonstrated any caution. This is a serious non-direction on their part. Nor did they examine the circumstances in which the identification was made. There was no enquiry as to the nature of the alleged moonlight or its brightness or whether it was a full moon or not or its intensity. It was essential that there should have been an enquiry as to the nature of the light available which assisted the witnesses in making recognition. What sort of light, its size and its position the vis-à-vis the accused would be relevant.

The evidence of **PW 1 Janet Nekesa** is that she did not see **1st Accused Edwin** among the people. She, however, stated that she had seen **2nd accused Tom**, whom she knew well. She went and reported to **PW 6 Geoffrey Wanyonyi** that people had come to their home and abducted the deceased. On being cross-examined, **PW 6** testified that **PW 1 Janet** had told him that he had been abducted by unknown people. This was at around 9 p.m. a few minute after the deceased had been taken away.

PW 2 Martin Nabuyola testified that when he responded to the home at 10.15 p.m. he found many people outside and he was able to identify **1st accused Edwin** and **2nd accused Tom** holding the deceased. He said there was sufficient light to see that accused who were armed with arrows and rungu (clubs). He then went to report to John Mankeri the clan elder and went to sleep.

There is no doubt that these two witnesses knew the accused before. This was, therefore, a question of recognition of a person already known. In **Francis Kariuki Njiru & 7 others v Republic [2001] eKLR** court stated: -

“The law on identification is well settled, and this Court has from time to time said that the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error.”

In analyzing the evidence of identification and determining its probative value, the court will evaluate the circumstances of identification, including the lighting period of interaction, with witnesses, the witnesses state of mind and intelligence, capacity for observation and ability to recognize and remember the observation of the suspect and most importantly whether there are factors that can mitigate against accuracy of the observation.

In **Joseph Leboi Ole Toroke Vs Republic CR Appeal No. 204 of 1987** the Court of appeal urged that the court should all the time be alive to the following: -

“It is possible for a witness to believe quite genuinely that he had been attacked by someone he knows, yet be mistaken. So the error or mistake is still there whether it be a case of recognition or identification.”

In **Wamunga Vs Republic (1989) KLR 424** the Court of Appeal stated: -

“Where the only evidence against a defendant is evidence of identification or recognition, a trial Court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.”

It is common ground from the evidence of the witnesses that the incident occurred at night. **PW 1 Janet** said it was 8 p.m. and **PW 2** stated it was at 10.15 p.m. whatever the time, it is established that the people who came to abduct the deceased came at night. None of them entered the house. **PW 1** who was in the house testified that there were many people outside she said she saw only **2nd** accused out of the many people. She did not state as to the state of light which enabled her to recognize **2nd accused**. Further, when she went to report to **PW 5** who was the clan elder, she told him that he was abducted by unknown people. This was a person in authority to whom she had gone to report the crime but did not give the names of the accused. This in my view diminishes any reliability of this witness on identification of the accused.

The evidence of **PW 2 Martin Nabuyola** is that upon arrival at deceased's house he found many people outside and saw **1st accused** and **2nd accused** holding deceased saying they were taking him to the AP Camp. He stated there was light but did not testify as to the source of light. Its intensity and his position in respect of the accused to show that he would be able to recognize them. The court faced with this kind of evidence must take great care and caution to satisfy itself that the circumstances of identification were favourable to enable positive identification. In this case the alleged source of light is not known, the time spent within the abducting group is not indicated.

In **Republic Vs Turnbull & Others (1976) 3 ALL ER 540** Lord Widgely CJ had this to say as the issue of identification of an accused person

“First, wherever the case against an accused person depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of identification or identifications. In addition, he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken.”

The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way? Had the witness ever seen the accused before? How often, if only occasionally, had he any special reason for remembering the accused? How much time elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the descriptions of the accused given to the police by the witness when first seen by them as his actual appearance?”

*This court having carefully analysed and evaluated the evidence of identification by the witnesses. I find that the conditions favourable for positive identification free from error did not exist. Positive identification of an accused is central to a conviction for an offence. In this case, I am not satisfied that the evidence of identification is free from possibility of error. I, therefore, find that the prosecution has not proved the charge of Murder Contrary to Section 203 as read with Section 204 of the Penal Code beyond reasonable doubt and acquit them under Section 215 of the Criminal Procedure Code. I, therefore, order that the **1st Accused Edwin Wamalwa Salim** and **2nd Accused Ibrahim Wanjala Hassan Alias Tom Mukundi** be set at liberty unless otherwise lawfully detained.*

Read, signed and delivered at Bungoma this 7th day of May 2020.

S N RIECHI

JUDGE