



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA**

**AT BUNGOMA**

**CRIMINAL CASE NO. 11 OF 2015**

**REPUBLIC.....PROSECUTOR**

**VERSUS.**

**1. ELIJAH NDALILA WAFULA.....1<sup>ST</sup> ACCUSED**

**2. ROSEMARY NANYAMA WAFULA.....2<sup>ND</sup> ACCUSED**

**3. PATRICK WANDAWA WANDABWA.....3<sup>RD</sup> ACCUSED**

**J U D G M E N T**

The Accused **1. ELIJAH NDALILA WAFULA 2. ROSEMARY NANYAMA WAFULA 3. PATRICK WANDAWA WANDABWA** are charged with offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code. Particulars of the offence were; on the 1<sup>st</sup> day of June 2015 at Namboko village in Bungoma North District within Bungoma County jointly murdered **GILBERT NYONGESA WANYONYI**.

The case for the Prosecution is that on 1.6.2015 at 5.30p.m. Leonard Masika Ndege was on his way at stage Matope when he met the 3 accused person. He saw Accused 3 (Patrick Wandabwa) was holding the deceased from behind, and Accused 2 (Rosemary Nanyama Wafula) who was also present was armed with a piece of wood. Accused 1 (Elijah Ndalila Wafula) was hitting the deceased with fists while Accused 2 hit him with the piece of wood. There were other people there. The deceased was saying they were killing him for no reason. He left the accused still with the deceased. The next day he received information that deceased had died.

**Pw2 Irene Nanjala** was on walking when she saw a boda boda person being beaten by 2 men and one woman. She saw the woman with a piece of wood hitting the deceased, who was bleeding. The people she saw beating the deceased are the accused.

**Pw3 Norman Nyongesa Wanjala** the son of the deceased went home at around 8-9p.m. and found deceased lying down with injuries. The deceased told him that he had been assaulted by Elijah (Accused 1) Rosemary (Accused 2) and Wandabwa (Accused 3). He left him and went to sleep. The next day when he went to wake up deceased, he found he was dead. He informed relatives and matter was reported to police.

**Pw6 Night Nelima Wamalwa** met the deceased on the road lying down. She saw he had injuries. He told her they had fought with Accused 1 Elijah at the home of Accused 2 – Rosemary.

The accused were called upon to make their defence. Accused 1 (Elijah) in his sworn evidence testified that on 1.6.2015 he went to the home of Accused 2 (Rosemary) to drink changaa. He found the deceased there in the house. He drank and left before 4p.m. to go to his place of work at Naitiri Hospital where he was a watchman. The next day he was informed that deceased had died. Accused's wife informed him that people were suspecting him for death and that police were looking for him. He went to the police station where he was arrested. On being cross-examined by Mr. Oimbo for State, he confirmed he was at home of Accused 2 Rosemary, and that deceased and Accused 3 wanted to fight but **he intervened**.

**Accused 2 Rosemary Nanyama** was in her house a sleep when she was informed that people were fighting. She went out but found the people had left. She did not see Accused 1 and Accused 3 assault the deceased.

**Accused 3 Patrick Wandawa Wandabwa** testified that on material day he went to the home of Accused 2 Rosemary where he found people drinking changaa. He did not drink. He then went home. The next day he was informed deceased had died. In cross-examination he stated he met Accused 1 present and deceased came in when he was leaving.

Mr. Wattanga for accused filed certain submissions. He submits that the accused admits to have gone to drink changaa at home of Accused 2 Rosemary but the Prosecution was unable to prove the charges of Murder. He submits that if the accused indeed beat the deceased, it should be a case of Manslaughter and not Murder.

The accused were charged with the offence of Murder Contrary to Section 203 as read together with Section 204 which provides;

203: *Any person who of malice afore thought causes death of another person by unlawful act or omission is guilty of murder.*

204: *Any person convicted of murder shall be sentenced to death.*

The elements of the offence of Murder are;

- 1) *The killing or fact of death of the deceased;*
- 2) *existence of malice aforethought or mens rea and*
- 3) *the unlawful act or omission on the part of the accused the actus reus.*
- 4) *That it is the accused who inflicted the injury.*

**Pw8. Dr. Phaustine Shitote** produced a Post Mortem report prepared by Dr. Odhiambo who performed the Post Mortem on body of the deceased. He observed that the deceased had bruises on both fore arms, right ribs cage, swollen mouth, bruises under nose and left side of eye, fracture of 10<sup>th</sup> and 11<sup>th</sup> right rib, right lung had collapsed and injury to diaphragm and liver. He formed opinion that cause of death was due to severe head and chest injuries leading to internal bleeding. This witness therefore confirmed the fact of death and cause of death.

The second issue is whether it is the accused who inflicted the injuries. Pw1 Leonard Masika testified that while on the road he saw people assaulting the deceased. He identified them as Accused 3 Patrick Wandabwa holding the deceased, Accused 2 was holding a piece of wood. He then saw Accused 2 Elijah Ndalila was beating the deceased with fists. On cross-examination by Wattanga the witness stated that he knew accused by appearance and names but in his statement to police he did not mention his names.

**Pw2 Irene Nanjala** was also on the road when he saw 2 men and one woman beating the deceased. The woman (Accused 2) was armed with a piece of wood and hit the deceased while the men were assaulting him with fists. Upon cross-examination she maintained that she saw Accused 1 hit deceased with fists until deceased fell down and Accused 3 hit him on the back.

**Pw3 Norman Nyongesa** the son of the deceased stated how he found deceased with injuries and the deceased informed him that he had been assaulted by Elijah (Accused 1) Rosemary (Accused 2) and Wandabwa (Accused 3). The deceased then died that night. Pw6 Night Nelima Wamalwa met the deceased who was lying down and told him he had taken changaa at home of Accused 2 Rosemary. He told her he had sustained injuries from a fall and he had also met Accused 1 at the home of Accused 2. On cross-examination she stated deceased had told him there was a quarrel and fight at Accused 2's (Rosemary) home with Elijah (Accused 1).

The accused denied involvement in the assault. Accused 1 admits in his evidence that he met the deceased on the home of Accused 2 Rosemary. He testified that he even gave deceased Kshs.30/= to go and drink elsewhere on cross-examination he admits that Deceased, Accused 1 and Accused 3 were all at the home of Accused 2 Rosemary. He confirmed that there was a near fight between deceased and Accused 3 Wandabwa, but he intervened and separated them.

Accused 2 Rosemary in her testimony stated that she did not see Accused 1 and Accused 3 assault the deceased but in cross-examination she confirmed that Accused 1 and Accused 3, deceased and 2 others were at her home drinking changaa. From the evidence, it is not in dispute that the deceased, Accused 1 and Accused 3 were at the home of Accused 2 Rosemary drinking changaa. It is therefore clear that all the accused were with deceased on the material day. There is also evidence by Accused 1 that there was a fight between deceased and Accused 3. Howe then did the deceased sustain the injuries. Pw1 testified that he saw all the 3 accused with deceased each assaulting him. **Pw2 Irene Nanjala** testified that she saw the accused beating the deceased. All this occurred at 5 p.m. during the day and there would be no question of inability to recognize at the persons who were assaulting the deceased. I am satisfied that the Accused 1, 2, 3 were positively identified as the people who inflicted injuries on the deceased from which he died, later that night.

From the evidence on record, the Accused 1 and Accused 2 and deceased had gone to the home of Accused 3 to drink changaa. **Pw3 Norman** the son of the deceased testified that when he observed the deceased he appeared drunk. **Pw6 Night Nelima** also testified that the deceased appeared drunk. From this evidence it is clear that the incident occurred when both the accused and deceased were drunk. In view of this, I find that the accused committed the offence after a drinking spree with the deceased.

I therefore find the **Accused 1 Elijah Ndalila, Accused 2 Rosemary Nanyama Wafula and Accused 3 Patrick Wandawa Wandabwa** guilty of the lesser offence of Manslaughter Contrary to Section 202 as read with Section 205 of the Penal Code and convict each one of them accordingly.

**Dated, Signed and Delivered at BUNGOMA this 29<sup>th</sup> day of May, 2020.**

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**S.N.RIECHI**

**JUDGE**