



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUSIA**

**CRIMINAL CASE NO. 19 OF 2018**

**REPUBLIC..... PROSECUTOR**

**VERSUS**

**1. JOHN MALENGO MANAIN**

**2. BWIRE MANAINA.....ACCUSED**

**JUDGMENT**

1. John Malengo Manaina and Bwire Manaina 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 night of 26<sup>th</sup> and 27<sup>th</sup> day of July 2018, at Siginga area, Bukoma sub location, Bunyala sub County within Busia County, jointly with another not before court, murdered Alphonse Ayiro Ogula.

3. The prosecution case was that the deceased left his home for a bar in Siginga. He was found by the road having been beaten. His bicycle was recovered in the house of accused two. A witness testified to have seen those who fatally beat the deceased. He named the two accused persons as having participated in the fatal beating.

4. John Malengo Manaina, the first accused pleaded an alibi while Evans Bwire Manaina, accused two denied any involvement in the offence.

5. The issues for determination are:

- a) Where was the deceased was killed; was it on the road or in a house;
- b) Whether the material prosecution witnesses were credible; and
- c) Whether the prosecution has proved its case against any or both accused persons.

6. The prosecution came up with two scenarios as to how the deceased met his death. The first was proffered by Wilberforce Masiga (PW2). He placed the scene of the incident at the Port Victoria-Siginga road. According to him, he was beaten by two men and a woman. He identified them as the first and the second accused and their mother, Majuma Manaina. The evidence of this witness is doubtful.

7. He initially testified that he saw the deceased from a distance of about 15 metres and that he (deceased) was alone. He however changed immediately and said that the deceased was in company of his assailants and that when he saw him, they were stepping on him. His explanation when asked why he had initially said the deceased was alone does not make any sense. He said that the deceased was alone for after he was beaten he was left alone.

8. The second version was testified to by Francisca Kadogo Odongo (PW4) the widow of the deceased herein. She said that after she was informed that her husband was beaten by two sons of Manaina and their mother, she accompanied the police officers who arrested the two sons. They found them lying on a mat and some blood in a basin. She testified that she was informed that he was beaten in the house. This witness has a credibility issue. She later testified that she did not accompany the police to the home of Manaina and that she did not see blood in a basin.

9. The Court of Appeal in the case of **Ndungu Kimanyi vs. Republic [1979] KLR 283, (Madan, Miller and Potter JJA)** 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 makes it unsafe to accept his evidence.**

These two material prosecution witnesses have held themselves out as untrustworthy. Their evidence is doubtful and full of contradictions. I accordingly dismiss it.

10. John Malengo Manaina, the first accused pleaded an alibi. In the case of **Kiarie vs. Republic [1984] KLR** the Court of Appeal 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 sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.**

The prosecution did not displace this defence with evidence.

11. Though Majuma Manaina the mother of the accused persons was said to have been one of the assailants, no explanation was offered as to why she was not arrested and charged. Though the failure to arrest a perpetrator cannot be the basis for an acquittal of the accused already charged, in the instant case, it however dents the credibility of the prosecution case.

12. Corporal Wycliffe Fundi (PW8) in his evidence said that the deceased was beaten by the three Manaina brothers after they disagreed over some political stand. This evidence exonerated the mother of the accused. It however introduced unsubstantiated hearsay.

13. 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 the offence of murder and set him free unless if otherwise lawfully held.

**DELIVERED and SIGNED at BUSIA this 9<sup>th</sup> Day of July, 2020**

**KIARIE WAWERU KIARIE**

**JUDGE**