



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL CASE NO. 30 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

1. KENNEDY MATIBO ALIAS FRANCIS KANOTI

2. FLAVIAN CLAY OGESA

3. BONIFACE OKUMU ODUOR

4. JULIUS ONYANGO ODUORI.....ACCUSED

JUDGMENT

1. Kennedy Matibo Alias Francis Kanoti, Flavian Clay Ogesa, Boniface Okumu Oduor and Julius Onyango Oduori 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 5th day of December 2017, at Sumba Island, Bunyala sub County within Busia County, jointly with others not before court, murdered Michael Taabu Muchanji.

3. The prosecution case is that the deceased was out with a colleague fishing. The first accused and others in a boat alleged that they were stealing their fishing nets and thoroughly beat them. When they were removed to the mainland, other people joined in beating them. The deceased succumbed to the injuries.

4. In his defence the first accused contended that when it was reported to him that some thieves had been arrested, he called the patrol unit chairman and relayed the information. The Two suspects were taken to the mainland. He denied any involvement in beating any of them.

5. Flavian Clay Egesa (he may have been called Ogesa erroneously), the second accused, denied any involvement in the offence and so did Boniface Okumu Oduor and Julius Onyango Oduori.

6. The issues for determination are:

- a) Whether any of the accused was involved in the offence; and
- b) Whether the offence of murder was established.

7. The identity of the first accused is in issue. In the charge he was referred to as Kennedy Matibo Alias Francis Kanoti. At the time of his defence, he contended that his name is Kennedy Kanoti Okumu and displayed his Kenyan National identity card No. 26488904. There would have been no issue on the name had the prosecution adduced evidence to show that he was locally known by the name he was charged under. The prosecution did not attempt to explain through evidence why they charged him as Kennedy Matibo Alias Francis Kanoti. Benedict Opetu (PW4) referred to the first accused as Kennedy Kanoti. This was what the first accused contended to be his identity. I will revert to this issue later.

8. Douglas Kiridu Abwori (PW2) testified that the deceased informed him that Ken hit their boat and a fight broke out. The deceased however, did not describe Ken.

9. The evidence of Stephen Okumu Ochola (PW1) who was in company of the deceased, was that the "Kennedy" who beat him and the deceased was the first accused.

10. The unfortunate incident took place at about 4 a.m. According to Stephen Okumu Ochola (PW1), there was an altercation before the boat of their attackers turned. It had many people whom he said he did not count. On reaching where they were, it hit their boat and damaged it. This is when Kennedy took a piece of timber and started to beat the deceased. Prior to this night he had not seen Kennedy. After the incident he later saw him in court.

11. In the celebrated case of **R. vs. Turnbull and others [1976] 3 All ER 549**, Lord Widgery CJ said the following:

First, whenever the case against an accused 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 the 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. Provided this is done in clear terms the judge need not use any particular form of words.

Secondly, 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 the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such descriptions, the prosecution should supply them.

In the instant case, the circumstances were not favourable for a positive identification. No evidence was elicited as to the intensity of the moonlight and how long he was able to observe Kennedy and later identify him. He further did not tell the court what peculiar observation he made so as to identify him. Though they were later transported to the mainland, he did not adduce any evidence as to whether he was later in a position to see the person he called Kennedy and identify him later. The purported identification of the first accused by this witness does not pass the test of a positive identification. He may have identified him in court for he heard him being called Kennedy. His evidence amounts to dock identification which has no probative value. In the case of **Oluoch vs. Republic 1985 KLR 549** the court of Appeal held:

A dock identification of an accused person by a witness where there had been no identification parade conducted earlier, and at which the witness is present, is almost worthless.

12. In spite of the lack of evidence of identification by Stephen Okumu Ochola (PW1), the evidence of Benedict Opetu Lumala (PW4) is that Kennedy Kanoti (accused 1) called him and informed him that they had been attacked in the lake. This evidence therefore places the first accused in the lake and displaces his contention that he did not go to the lake that night. The only question is whether he participated in the attack.

13. The prosecution, apart from placing the first accused at the lake had a burden to prove beyond reasonable doubt that the first accused participated in beating the deceased. This is a peculiar case where common intention cannot be inferred by simply being in the same boat with the other offenders. This onus was not discharged.

14. Benedict Opetu Lumala (PW4) in his evidence said that Julius Okumu (accused 4) was in charge of the boats that went for the rescue mission while accused 2 used to fish with accused one. He further testified that members of the beach removed the two suspects and beat them. This therefore does not necessarily imply that these accused persons were part of the people who beat and caused the death of the deceased. No evidence was adduced to implicate the accused persons.

15. There is no doubt that the deceased was a victim of mob injustice. However, no sufficient evidence was adduced other than that of suspicion. It is trite law that suspicion however strong cannot be a basis for conviction. The Court of Appeal in the case of **Sawe vs. Republic [2003] KLR 354**, the Court of Appeal held as follows:

Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.

16. 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 9th Day of July, 2020

KIARIE WAWERU KIARIE

JUDGE