



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL CASE NO. 19 OF 2019

REPUBLICPROSECUTOR

VERSUS

1. SILVESTER OBOLA

2. LUCAS OWINO

3. JOHN WANDERAACCUSED

JUDGMENT

1. Silvester Obola, Lucas Owino and John Wandera 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 10th day of June 2019, at Bwamani village in Mayenje location, Matayos sub County of Busia County, jointly with others not before court murdered Isaac Simiyu.
3. The prosecution case was that the deceased herein was taken to his father's home by a mob at night on allegations of stealing. He had been severely beaten. The mob that included the accused persons were armed. After they took him away, his father later learnt that he had been killed.
4. All the three accused denied any involvement in the offence and pleaded an alibi.
5. The issues for determination are:
 - a) Whether any of the accused participated in beating the deceased; and
 - b) Whether the offence of murder was established.
6. There were at least three scenes of the incident that led to the death of the deceased. The first scene is where the deceased was arrested allegedly stealing. Nothing much was said about this scene. The second scene was at his parents' home. His mother and father testified on what they witnessed.
7. John Omondi Mudiedie (PW1) testified that at 11.45 p.m. he was woken up by many people who were making noises outside. He heard Silvester Obola (accused1) asking him to go outside and see his son for the last time. However in his statement to the police, he recorded that he heard the voice of Isaac Obola. When he went outside, he found his son (the deceased herein) being held by many people. Among the people he found outside, he recognized the three accused persons. He said he was able to do so with the assistance of security lights from his house.
8. This witness testified that accused one was armed with a club, accused two with a machete and accused three with a round bar.
9. Jane Nabwire Omondi (PW2) did not testify about her husband being called outside to see his son for the last time. She contradicted her husband and said that Silvester Obola (accused1) had nothing, Lucas Owino (accused 2) had a machete while accused three had an iron bar.
10. At one stage in her evidence, she testified that she did not see any of the accused persons do anything to the deceased. However, she later changed and testified that the second accused cut the deceased on the head. She conceded that she did not record this in her statement.
11. The evidence of these two witnesses contradicts each other and that of Jane Nabwire Omondi (PW2) is self-contradictory. 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.

In the instant case, I am unable to find this couple (PW 1 & PW 2) as reliable and trustworthy witnesses.

12. The third scene was near the river between Mayenje and Bwamani. Charles Kenneth Wasike (PW4) testified that he recognized John (accused 3). The road at the scene was between bushes that were about one meter high. Though he testified that accused 3 had a club, his statement to the police did not state so. It generally gave a description of what the mob was armed with.

13. He (PW4) said he did not recognize the deceased but learnt it was Isaac after the people who were beating him stated so. This evidence raises a red flag as to whether he was able to recognize the third accused person as he contended. Other than stating that he recognized him, he did not say what led him to do so. It is not lost that he only gave one name; John. Was this a person he had known so well such that he could be able to recognize him in the prevailing circumstances? Unfortunately the prosecutor did not elicit evidence from him to confirm that his purported recognition was flawless. This purported recognition did not satisfy the prescription by Lord Widgery C.J. in the case of **R. vs. Turnbull and Others [1976] 3 All ER 549** where he stated:

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.

Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence. Recognition may be more reliable than identification of a stranger: but, even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relative and friends are sometimes made.

In the instant case, the condition of the night and the prevailing circumstances were not favourable for recognition.

14. It is also doubtful if there was any light as Charles Kenneth Wasike (PW4) testified to. Whereas he said that there was full moon and that there were no clouds, the evidence of Stephen Nyongesa Egesa (PW 5) was that the night was dark. This witness testified that he saw accused two and accused three at the scene but did not see any of them beating the deceased. He said he was able to recognize the two by help of the security light from his neighbour.

15. We are again confronted by an issue of ability to see well. The crowd and the deceased were between the source of light and this witness. The light was coming from his front. What is expected of him to see is a silhouette at this position. When he testified to have identified the two accused persons, unless he went and stood next to them, which he did not say he did, this could only be a miracle for him to purport to have recognized anyone. My finding is bolstered by his own evidence when he testified that he did not see what John was carrying if any. He further said that he did not see what accused two had for he was in the dark. The question is, how did he know the person in the dark was accused two?

16. It is abundantly clear that the deceased was killed by a mob and at night.

17. Each of the three accused persons pleaded an alibi defence. In the case of **Kiarie vs. Republic [1984] KLR** where 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.

In view of the material contradictions and insufficient evidence adduced by the prosecution, I find that the alibi defenses raised by the accused persons are plausible.

18. I therefore find that the prosecution has not proved the offence of murder against any of the accused persons. Each one is acquitted of the offence of murder contrary to section 204 of the Penal Code, and set free unless if otherwise lawfully held.

DELIVERED and SIGNED at BUSIA this 8th day of October, 2020

KIARIE WAWERU KIARIE

JUDGE