



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL CASE NO. 8 OF 2014

REPUBLIC.....STATE

VERSUS

JUSTIN OGALO NYANUMBA.....1ST ACCUSED

EMMANUEL WAFULA NYONGESA.....2ND ACCUSED

KEN WEKESA.....3RD ACCUSED

JUDGEMENT

JUSTUS OGERO NYANUMBA, EMMANUEL WAFULA NYONGESA and KEN WEKESA are charged with the 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 25th day of January, 2014 at Kapsoya Estate in Uasin Gishu county, the accused persons jointly murdered Joseph Wanyama.

The prosecution case is that Simon Kawai Mugala, the PW-1 in this case, was from 2/12/2013 working as a mason at a construction site of a Mzee called Nyambane. He worked there till Friday and on Saturday he did not go for work. He heard that the police wanted him. He went to the site where he was working at Kapsoya. He found Justus, Emmanuel and Ken, the accused persons herein. They told him that certain things had been stolen from the site. They started beating him. He protested. Nyambane arrived and they checked the store. They noted a wheelbarrow and nails were missing. They continued beating him. PW-1 told them the wheelbarrow was with Wanyama, the deceased. Nyambane called Wanyama who said the wheelbarrow was available. However when he arrived he did not have it. PW-1 was untied and Wanyama was tied up. They started beating him up. Ken is the one who tied him up. They had sticks of which they used to beat the two suspects.

PW-4, a wife to the deceased, stated on 20/1/2014 she had left the house. When she returned she found a young man tied on a tree being beaten. Those who were beating him asked her whether she had seen a wheelbarrow. She said she had not and they called the deceased. When he arrived they started beating him. They left with him while beating him. She followed them behind screaming. At some point she was chased away. Those beating him were a big crowd. Of them she knew only one, Justus Ogero. She had not known him before then. The incident took part at about 4.00 p.m.

PW-7, who on 8/1/2014 was stationed at Kapsoya police post, was called at 7.45 p.m by Emmanuel Wafula the second accused person. He reported that they had two suspects arrested within Kapsoya Estate having been suspected of stealing construction materials within Kapsoya Estate. PW-7 called the OCS, the PW-8 in this case, who is also the Investigating officer and told him of the report.

At about 9.40 p.m, on 25/1/2014, PW-1 and the deceased were taken to Kapsoya police post by members of the public. Among those who took them were James Ongare and Gedion Orange. The deceased had head injuries and PW-1 was complaining of pain on both hands. Deceased head injuries were bleeding. PW-6 placed the suspects in cells and informed PW-8 about it. He requested for a vehicle to take the suspects to the hospital. A vehicle had not been availed by midnight. The suspects condition had worsened. PW-6 reminded the OCS of the need for a vehicle. It was availed and he took the two to Moi Teaching and Referral Hospital. On arrival Joseph Wanyama was pronounced dead. PW-1 was however treated and returned to the cells.

On 26/1/2014 Pw-8 summoned the accused persons. They went to the station and he recorded their statements. He as well recorded the statement of PW-1 and PW-4. The two made him conclude that the three suspects were responsible for the death of the deceased. He arrested the suspects and had them charged with the offence.

On 4/2/2014 PW-8 accompanied the parents of the deceased and PW-5 who is the second wife to the deceased, to Moi Teaching and Referral Hospital mortuary for body identification and post mortem. The body was identified by the parents and the said wife. PW-2 conducted the

post mortem and was of the opinion that the cause of death to the deceased was severe tissue injury due to blunt force trauma. He thus filled the post mortem form of which he produced as an exhibit.

At the close of the prosecution case this court found that the accused persons had a case to answer and accordingly placed them on their defence. Each accused gave sworn testimony and called no witness.

The first accused stated that on 25/1/2014 he was working for Gedion Orege as a caretaker at his construction site in Kapsoya. The construction site was neighbouring another for Nyambane. Some construction materials went missing from the store. The 3rd accused person was working at the construction site of Nyambane and could at times borrow items from the first accused. The first accused asked him whether he knew where the items missing from the store were. The 3rd accused alleged that Simon Kavai had put some items at a certain place and they could check there. The first accused called his employer and told him about it. He was to get there and try to identify the items. The items were taken to a certain club. They went there and the employer identified a consumer unit and circuit breaker as his. The pub owner said the items were taken there by Simon Kavai (PW-1). The employer told first accused to call him when he gets Simon Kavai. The first accused got him in the evening at a place where he was working. The first accused spoke to him and they went to the site of Mr. Orege. When they entered the first accused closed the gate and went to call Mr. Orege. Simon Kavai was drunk and was screaming that the gate be opened for him to get out. Those passing by got closer to find out what was happening. The first accused told them and they questioned PW-1. Meanwhile Mr. Orege arrived. Mr. Orege said they should go back to the club to ascertain that he is the one who took the items there. They were about 50 persons as they went back there. The club owner ascertain he was the one. The crowd got irritated and attacked him. PW-1 told them not to kill him as he'll tell the truth. He said he had stolen the items and had sold some. He said he was with Wanyama (the deceased). He was asked where Wanyama was and said he was at Kapsoya. They went to look for Wanyama. PW-1 was tied with a rope and led them to Wanyama's house. Wanyama was not there but his wife was. She was questioned and said Wanyama took some items but could not tell where they were placed. Meanwhile Wanyama appeared. He was questioned and said he'll take them where the items were. On the way he made a phone call and spoke in his mother tongue. When he was through he stood and said those present could do whatever they wished as he'll not go. The crowd attacked him and Mr. Orege sought some assistance from people to avail the police. The first accused tried to stop the crowd from beating him. They headed towards Kapsoya police post. They got there and registered their complaint. The following day they were informed that Wanyama died. The first accused could not tell whether 2nd and 3rd accused were among those who attacked the deceased. On his part he did not attack the deceased.

The second accused in his defence stated that on 25/1/2014 he was called by Nyambane to go to his construction site and try to identify some recovered items, allegedly stolen from therein by an arrested suspect, Simon Kavai. He went there and found nobody. However he heard noises from a neighbouring site of Orege. He checked therein and there was a crowd of people. He noted Simon Kavai had been arrested. He was their casual labourer. He was led to where the items were allegedly recovered from. They went to the club of Brian who said he knew Simon Kavai as he used to take items there, at times for beer. The crowd wanted to beat Simon Kavai and Brian told them not to do it in the club. When he was led outside they attacked him. Simon Kavai said he was with Wanyama. He led the crowd to Wanyama's house. Wanyama was not present but his wife was. She was asked about the items and said were taken there. Wanyama then appeared. He denied that he had stolen items. He was threatened and said he took them to one, Lenga. He was tied together with Simon Kavai and led towards Lenga's house at Munyaka. On the way he said he should call Lenga to find out whether he was there. They spoke in unfamiliar language. Wanyama said he won't lead the crowd there. The crowd got annoyed and attacked him. They used stones and sticks in the attack. The second accused tried to prevent them. He called PW-7 an officer at Kapsoya police post. The officer said he was off duty and could not help. The suspects were attacked seriously. The second accused called PW-7 again and asked for contacts of an officer who could help. He was given the number of PW-8 and called him. PW-8 said they had no vehicle and asked the second accused to do his best and get them to the police post. They made effort and reached the police post. The suspects were held and placed in cells. Complainants phone numbers were taken. The following day PW-8 called second accused and said one of the suspects died. He was called at the police post and when he arrived he was arrested and charged.

The 3rd accused stated that he is a mason. On 25/1/2014 he was working at the site of Nyambane. The first accused went and asked him whether he was aware of some missing items which Simon Kavai was stealing. 3rd accused said there was a time he was at a bar in Kapsoya and saw Simon Kavai taking items there. First accused asked whether 3rd accused could take him there. He agreed and they went there. They found the bar owner who produced the items taken there and showed them to the first accused person. The first accused went to call Mr. Orege and returned with him. People present alleged their items had been stolen and attacked Simon Kavai. He was asked for his partner in theft and said Wanyama. They went looking for him but did not get him. They got his wife. The wife was questioned and said the husband carried away nails and a wheelbarrow in the morning. Wanyama arrived. He was asked about the items and denied. He was told what his wife had said. He agreed and led the crowd towards where he took the wheelbarrow. On the way he made a call and spoke in his mother tongue. He then said that he won't go. The crowd got annoyed and attacked him. He was beaten along the road. The second accused called the police at Kapsoya. The officer he called was not on duty and there was no vehicle at the station. They were urged to take the suspects to the station. At Munyaka another crowd joined in and attacked the two suspects.

In the evening they got to the police post. They were in a big crowd. They were urged to return the following morning to record statements. When they did so were told one died. He did not attack the deceased.

This court must now establish as to whether the offence against the accused persons is proved by the prosecutions beyond reasonable doubt.

Section 203 of the Penal Code defines Murder as follows:-

“Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of Murder.”

It therefore follows that the ingredients for the offence of murder are:-

1. Malice aforethought,

2. An unlawful act or omission on the part of the accused.

Malice aforethought is defined under *Section 206* and is:-

- i. Intention to cause the death of or to do grievous harm to any person.
- ii. Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person.
- iii. Intention to commit a felony.
- iv. Intention by the act or omission to facilitate the flight or escape from custody of any person.....”

In this case the prosecution called two eye witnesses, PW-1 and PW-4. However the evidence of these two witnesses is contradictory in material particulars. PW-1 alleged they were beaten with sticks by the three suspects. However PW-4 stated there was a big crowd that was beating the two and of them she only knew Justus Ogero. She however said she had not known him before then.

All the accused persons gave sworn statements in their defence. They alleged the deceased and PW-1 were suspects in a theft case where some items stolen from construction sites were recovered. Upon arresting the two suspects they were subjected to mob injustice. The three accused were against it and the second accused even sought police assistance by calling PW-7 who was off duty then. He even called PW-8 the OCS then, Kapsoya police station but they had no vehicle. PW-7 ascertained the claim in his evidence. The evidence by the accused was not challenged at all by the prosecution and is detailed and consistent. There are no basis on which it can be doubted. Other possible eye witnesses in the case, like Orege and Nyambane, the site owners, were not called as witnesses. The police as it appears, went for those who reported the theft case and took PW-1 and the deceased to the police post. Weighing the prosecution case against the defence, the prosecution case only raises suspicion that the accused may have been involved in attacking the deceased. Such is not established as of fact and suspicion no matter how strong cannot form basis for a conviction. The onus is always upon the prosecution to establish the offence beyond reasonable doubt and where reasonable doubts subsists, the same should be resolved in favour of the accused (see *Criminal Appeal no. 199 of 2014, of Kevin Kiswiri Kyongi -vs- Republic [2018] eKLR.*) Having observed the foregoing I do find that the prosecution have not established the offence of murder against the accused persons beyond reasonable doubt.

The existing doubts are resolved in their favour and are accordingly acquitted of the offence. They are set free unless otherwise lawfully held.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 11th day of November, 2020.

In the presence of:-

All the accused persons

Mr. Miiyinda for the accused person

Ms Limo for state

Ms Gladys - Court assistant