



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL CASE NO. 41 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

PETER WAFULA WANYONYI1ST ACCUSED

EVANS WANJALA WAFULA.....2ND ACCUSED

J U D G M E N T

1. The accused herein were charged with the offence of **Murder contrary to Section 203 as read with Section 204 of the Penal Code**. The particulars of the offence was that **on the 28th day of July 2014 at Weonia – Mitoto village within Trans Nzoia County jointly with other not before court murdered Joseph Wandija**.
2. The accused denied the offence when taking plea. The prosecution called several witnesses to establish their case. At the close of the prosecution case the accused were placed in their defence and they gave unsworn evidence. Before analysing the evidence as presented, it shall be worthwhile to summarise the evidence of the witness.
3. **PW1 Metrine Kundu** testified that she was selling alcohol (Busaa) at her house that evening. Among her patrons were the deceased, the accused herein, as well as one Mr Nice and a lady called Sharon. At around 10.00 pm they stated leaving. The 2nd accused left with Sharon but came back shortly and called the deceased. The 1st accused who is the father to the 2nd accused had also left. She thereafter slept.
4. The following morning she heard people screaming and when she went to the scene, she found the deceased body lying down with injuries. The same was about 200 metres from his house.
5. **PW2 Andrew Wafula Barasa** testified that he was also taking alcohol that evening at the house of PW1. The deceased as well as the accused among others were present. He said that the accuseds were buying alcohol for the people. At 9.00 pm the 1st accused left and was followed by Mr Nice and Sharon as well as Evans. Evans came back and called the deceased and they left together although he had hesitated. He also left thereafter. The following morning he heard the incident and he went to the scene and saw the deceased body which had been dragged for a distance. It had injuries as well.
6. **PW3 Anthony Wafula** testified but he did not conclude his evidence and was stood down. He wasn't recalled.
7. **PW4 Dr Faustine Shutote** from the County Referral hospital testified on behalf of Dr Odhiambo who carried out the postmortem examination. He concluded that the cause of deceased death was a severe head injury.
8. **PW5 P.C. George Ogina** carried out the investigations. He stated that when he went to the scene he found PW1 house had been torched. He traced Accused 1 telephone to Malakisi where he was arrested. He said that he was told that the 1st accused had differences with the deceased since he had stolen his daughter. He also had differences with the 2nd accused since he had taken over some casual job meant for him. He recorded statements from the witnesses and preferred charges against the accused.
9. When placed on his defence, the 1st accused in his unsworn testimony stated that he was a mason and on that night he had gone to take alcohol at PW1's house. He had apparently come home to take his son who was a welder to work together. After taking alcohol he left at 9.00 pm while drunk. The following morning they left for Malakisi.
10. Accused 2 equally was taking alcohol in the house of PW1 that night. He left with his girlfriend at around 10.00 pm. She told him to call

the deceased and he left them talking. The following morning they left for Malakisi.

Analysis and Determination

11. I have carefully perused the evidence on board as well as the written submissions by the defence. Apparently the State never submitted.
12. What is clear is that there was no eye witness to the incident. All that the prosecution relied on was circumstantial evidence. Its trite Law that circumstantial evidence must infer the guilty of the accused person.
13. Save that the 2nd accused called the deceased outside and left with him, there was no evidence that the 1st accused had any engagement with the deceased. Even the 2nd accused seemed not to have had any engagement with the deceased.
14. As correctly submitted by the defence, there was no evidence from one Mr Nice and a lady called Sharon. All these people seemed to have left together. More importantly was Sharon who was the girlfriend to Accused 2. If so why was she not called to explain what happened when she was left with the deceased.
15. The evidence of PW5, the investigating officer was full of hearsay, a fact which he admitted during cross-examination. In my view he considered other extreme factors which were not necessary for instance that there was bad blood between the deceased and the two accused person. That never came from any of the witnesses.
16. In light of the above, I find the prosecution case too weak in the circumstances. The burning of the accused house by perhaps irate villagers were purely on suspicion and nothing else. It was not disputed that the accused were a Mason and welder respectively and their going to Malakisi was in the cause of their duties.
17. In the circumstances I shall disallow the prosecution case as it was not proved beyond any shadow of doubt and set the accused free under the provisions of Section 215 of the Criminal procedure Code unless lawfully held. The sureties are hereby discharged.

Orders accordingly.

Delivered, signed and dated at Kitale this 9th day of April, 2019.

H.K. CHEMITEI

JUDGE

9/4/19

In the presence of:

Mr Omoria for State

Wafula holding brief for Barongo for Accused

Accused 1 & 2 – present

Court Assistant – Kirong

Judgment read in open court.