



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL CASE NO.23 OF 2017

REPUBLIC.....PROSECUTOR

VERSES

FRANK MOHAMED.....ACCUSED

JUDGEMENT

1. **The accused was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal code. The particulars of the charge were that on the 4th day of October 2017 at 22.30 hours at Tiwani estate within Transzoia west Sub County jointly with others not before court murdered Joseph Karua Chege.**

2. The accused denied the charge and the prosecution called a total of 6 witnesses to prove its case. The summary of the evidence is as hereunder.

3. **PW1 ELIAS MUCHIRI WAMUKI** testified that he runs a butchery business at Tiwani and the deceased was his employee and he knew the accused as they come from the same area. He said that the deceased wife called him at around 10.30 pm on 4th October 2017 and told him that the deceased had not arrived home. At 11pm she wrote a text message informing him that the deceased had been injured.

4. He went with his friend Chris and took him to Mt Elgon hospital where he was treated and released and told to return the following day. On the way he told them that he had been attacked by the accused whom he called **Ite** and one **Nelly**.

5. The following day they returned him to the hospital but were referred to the referral hospital at Eldoret hereinafter referred to as MTRH. They were informed later that he had died.

6. When cross examined he said that he knew the accused for a long time but he did not know Nelly.

7. **PW2 JACKLINE WEKESA SITOYA** also from Tiwani testified that she was an assistant chief central division Tiwani sub location and she received information from her secretary concerning the incident. When she went back to the office she organised for the arrest of Ann and Anita and had them taken to the police station. Anita told her that her husband was at the hospital. They went there and found the accused admitted with injuries on the head. The deceased had been taken to MTRH Eldoret.

8. The following day she was told that he had died. She found the accused handcuffed on the hospital bed. When cross examined she said that she had known the accused for over 5 years and had been involved in criminal activities including robberies in her area.

9. **PW3 SGT PETER KARIUKI** testified that he received a panga and a metal bar from one Sgt Njogu an AP officer which were allegedly handed over to him by pw2, assistant chief Tiwani sub location which had been used to assault the deceased. He surrendered the same to the investigation officer.

10. **PW4 KENNEDY WAWERU NJOGU** testified that he was a businessman and he knew the accused who was having a shop next to his since 2004. He said that pw1 called him around 7pm on 5th October 2017 and informed him that the deceased had died and he had mentioned some people namely Ite and Nelly. People then went and arrested the accused and the police arrived. He knew the accused to be deceased customer.

11. When cross examined he said that he did not see those who assaulted the deceased and that he died while being taken to MTRH.

12. **PW5 DR MACHERE BENSON** from MTRH performed post mortem on the deceased body and found that the deceased had many

injuries. He concluded the cause of death to be severe head injury due to forced trauma.

13. **PW6 PC MUSA MOHAMED** carried out the investigation when he received the information on 6th October 2017. He said that the deceased who was working in a butchery was attacked at around 10pm while he was going home after closing the business. He went home bleeding and he was taken to Mt Elgon hospital and returned home and the following day taken to Cherangany hospital who referred him to MTRH where he died.

14. He went on to state that the deceased knew his attackers and that he got the murder weapon from Sgt Kariuki, namely a panga and the metal rod which were recovered from the accused house. The same did not have any bloodstains. The villagers arrested and handed him to the police.

15. When cross examined he said that the incident occurred along the road between the deceased place of work and his house. He said that the deceased made a dying declaration in the presence of his relatives.

16. On re-examination he said that one Susan Wangare although she recorded her statement where she mentioned those who assaulted the deceased, she refused to come and testify. Those she mentioned included the accused and one Nelly. He said that there was no dying declaration.

17. When placed on his defence, the accused in his sworn evidence denied the charge. He said that he works as a " *manamba* "for the vehicles plying Lodwar route. He said that he was arrested on his way home at around 7pm after closing his business by two people who accused him of killing someone the previous day.

18. He said that he knew pw4 whom he had sold charcoal to but had no idea about a person who had been killed. He was injured by the mob and was saved by the arrival of police officers who were on patrol and taken to the Cherangany hospital and later Mt Elgon hospital.

19. He went to record statements at the police station but he was arrested and placed in the cell where he met three other ladies including his wife. After three days they were released. Pw4 owed him money.

20. When cross examined he said that he did not know the deceased nor pw1. He did not know Ite or Nelly. He said that pw4 owed him Kshs 1700 after selling him charcoal. He said that on 4th October 2017 he was in his house with his wife.

ANALYSIS AND DETERMINATION.

21. Having perused the proceedings herein, there is no doubt that there is no eye witness to the incident. The arrest of the accused was solely on the last dying words of the deceased that he had been assaulted by the accused and one Nelly.

22. The alleged '*dying declaration*' was correctly conceded by the investigating officer that it was not in a proper sense of the word. The same was not recorded by a competent officer as prescribed by law.

23. In the absence of a dying declaration, what is the strength of the charge against the accused.? It appears none from my perspective. There was no attempt to arrest Nelly or call the said Susan who was reluctant even to come and testify.

24. Even for argument sake the scene of the incident was not visited by the investigating officer. The alleged murder weapons were not subjected to any DNA analysis. The area assistant chief did not tell the court in her evidence that she recovered any exhibits. Pw3 said that they were brought to him by Sgt Kariuki, an AP officer who had been sent by the chief. There was no background on how they were recovered or at all.

25. The ladies who had been arrested as suspects including the accused's wife for some unknown reason were simply released without recording any statements or being called to testify.

26. In a nutshell, in the absence of a credible dying declaration, or an eye witness, the case against the accused is too weak to convict. Although the assistant chief said that the accused was a habitual offender, no evidence was proved. Even then in the absence of any proof suspicion alone is not enough. **See SAWE V. REP. (2003) 364.**

27. The accused is therefore acquitted under the provision of Section 215 of the Criminal Procedure Code unless otherwise held. The sureties are hereby discharged.

Delivered, Signed and Dated at Kitale this 11th day of December 2020.

H K CHEMITEI

JUDGE.