



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT LODWAR

HIGH COUR CRIMINAL CASE NO. 1 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

SYLIVESTER EKIDOR.....1ST ACCUSED

MOSES EMASE.....2ND ACCUSED

JUDGEMENT

1. The accused **SYLIVESTER EKIDOR** and **MOSES EMASE NAKALI** were charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**, the particulars of which were that on the 19th day of December 2017, at Loberot Village, in Turkana Central sub-county within Turkana County murdered **ELAAR LOMORU**.
2. They pleaded not guilty to the said charges and to prove its case against them the prosecution called a total of four (4) witnesses and when put on their defences the 1st accused gave sworn statement of defence and called no witnesses while the 2nd accused gave unsworn statement of defence.
3. On behalf of the prosecution **PW1 EKAARAN LOMORU POTOKOL** testified that on 18/12/2017 while sleeping at home together with a visitor who had visited them at night she heard a shout of "kill kill". She raised alarm and when she went out saw many people – both male and female killing somebody using knives. It was her evidence that she did not know what the deceased had done. In the morning she was interviewed by the police and stated that she did not know the reason for his killing. She confirmed that she did not know any of the killers who were about ten (10) in number.
4. **PW2 E.N.** a minor at the time testified that while asleep she was woken by noise from her mother and noticed that his uncle **TITUS ELAR** was fighting with people she knew as **NKIDORA, KANAYA** and **ESOKOR** together with other people she did not know. It was her evidence that her uncle was being stabbed on the stomach causing his intestines to come out before they placed a big log of wood on him. The body was left at the scene and was later collected in the morning by the police. She was able to see by the aid of moonlight and she knew the accused persons. She corroborated the evidence of **PW1** her grandmother.
5. **PW3 DR. DENIS MWENDA** performed post-mortem examination on the body of the deceased who had stabbed wound on the left side of the head, bleeding from nose and mouth, stabbed wound on the stomach among other injuries and formed an opinion that the cause of death was cardiac forformade and left hemothorax secondary to penetrating chest injury.
6. **PW4 PC ELVIS OBUTE** the Investigating Officer in the matter visited the scene where the body of the deceased was found lying on the ground within the homestead with a stabbed wound on the stomach. He was informed by the villagers that one of the accused persons had been arrested and they re-arrested the 1st accused person who happened to had been beaten. He then recorded statements from the witnesses having recovered weapons at the scene. It was his evidence that the 2nd accused was arrested on 7/08/2018 following a police raid and was later on identified by members of the public. In cross-examination he confirmed that the 1st accused was identified by the mother of the deceased. He stated that there was no identification parade conducted upon the arrest of the accused persons since the villagers knew them.
7. When put on his defence the 1st accused stated that he was a *bodaboda* operator. He had taken a customer to Kalokol and came back at 7.00 p.m. when he took the bike to the owner before going back to his house where he was with one **Jam es Losoro** a herds boy for supper at 8.00 p.m. before retiring to sleep. Since his child was sick, the wife suggested that they wait until morning before taking her to the hospital. At 2.00 a.m. the child started to cry forcing him to seek assistance from his neighbour who stayed with them until 6.00 a.m. At 7.00 a.m. he went and got a motor cycle and on the road a customer requested that he take him to town, which he did. On his way back home he saw a group of people whom he asked what had happened only for them to turn against him before being handed over to the police.
8. In cross-examination he denied knowing the deceased and stated that he was away at Nabulon when the same died. He insisted that he was with his wife and the herdsman at home and slept until 2.00 a.m. when the child became very sick. It was his evidence that he did not

know any of the prosecution witnesses.

9. DW2 BEN IYINA the herdsman testified that he did not know why the accused was arrested having been with him at 7.00 a.m. before going to sleep until 7.00 p.m. when his child fell sick. He asked him to get a motor cycle to take the child to hospital and as the accused was going to get the motor cycle he proceeded to graze the goats. When he came back in the evening he found people beating the accused and when he stopped them, they turned against the 1st accused. It was his evidence that the 1st accused did not leave home that night. In cross-examination he confirmed that the goats he was herding belonged to the 1st accused.

10. DW3 MOSES EMASE NAKALI the 2nd accused gave unsworn statement of defence and stated that on 19th December 2017 he was at home until 8.00 a.m. when he went for pool game. He stated that on 18th of December 2017 he also went for pool game upto 1.00 a.m. when the police motor vehicle went to the area causing people to run away. He was arrested together with the people and taken to the police station and was locked in. He was interrogated by the police who told him that someone had given out his name. The OCS asked the investigating officer to get the person who had given out his name for purposes of identifying him. All the people he was with at the cell were released leaving him alone. The OCS then informed him that he had a case to answer.

SUBMISSIONS

11. On behalf of the State it was submitted that both **PW1** and **PW2** saw the two accused persons stab the deceased and that each witnesses corroborated the other. It was submitted that the accused was properly identified by the prosecution witnesses who were well known to him. It was submitted that the accused was identified through recognition. It was submitted that the accused's defence did not challenge the prosecution evidence.

12. On behalf of the 1st accused it was submitted that the same was not identified as **PW1** confirmed having not known them and neither did she recognize them. She did not indicate the source of lighting. It was submitted that according to **PW2** it was the mob that assaulted the deceased which contradicted the evidence of **PW1**. It was submitted that conditions prevailing were difficult and not suitable for identification for which the case of **KIILU & ANOTHER v REPUBLIC [2005] 1KLR** was submitted. It was contended that the 1st accused's *alibi* defence was not considered as the evidence of **DW2** was unchallenged to the fact that he was with the Appellant throughout the material day for which **UGANDA v SEBYALA & OTHERS [1969 EA 204]** was submitted together with **VICTOR MWENDA MULINGE v REPUBLIC [2014] eKLR** and **KIARIE v REPUBLIC [1984 KLR]** on the procedure if the accused raises *alibi* that the accused does not bear the burden of proving *alibi*. It was finally submitted that there were glaring inconsistencies in the prosecution case.

13. On behalf of the 2nd accused it was submitted that **PW1** did not know any of the accused because it was dark which contradicted **PW2's** evidence. It was contended that no identification parade was conducted.

ANALYSIS AND DETERMINATION

14. To sustain a conviction in a murder charge, the prosecution must prove beyond reasonable doubt the following elements of the offence:-

- a) *Proof of death and the cause of death.*
- b) *Proof that it was caused by an unlawful act of omission or commission on the part of the accused person.*
- c) *That it was caused with malice aforethought.*

15. The fact and cause of death of the deceased is not in dispute. There is evidence on record on the death of the deceased and the cause therefore through the evidence of **PW3** the medical doctor. It therefore follows that the prosecution proved this element of the offence beyond reasonable doubt.

16. On whether the said death was caused by the accused person either singly or jointly, save for the evidence of **PW1** and **PW2** which were contradictory in nature, there was no other evidence either directly or circumstantially linking the accused persons with the offence. The conditions prevailing being at night was not ideal for the identification of the accused persons. The prosecution failed to tender in evidence on how the accused persons were arrested neither did they call those who arrested the accused persons so as to link them to the offence.

17. I would agree with the submissions by the accused persons that this was a clear case where the police should have conducted identification parade upon the accused persons' arrest. In this, I find support in the Court of Appeal decision in **JALI KAZUNGU GONA V REPUBLIC [2017] eKLR** in which the court stated as follows:-

“13. The evidence against the Appellant was one of identification. In WAMUNGA v REPUBLIC [1989] KLR 424 this court while discussing the caution to be taken where the only evidence against an accused is of identification succinctly stated: -

“Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of mere identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification”.

18. There is no evidence placed before the court to support the identification of the accused persons, and there being no any other evidence

linking them to the offence, I find and hold that the prosecution did not prove its case against them beyond reasonable doubt.

19. It is further clear that the 1st accused raised an *alibi* defence which was not displaced by the prosecution at the end of the trial. Whereas there is strong suspicion on the involvement of the accused person with the death of the deceased. Mere suspicion however strong cannot be a basis for the conviction in criminal trial.

20. I therefore find and hold that there were gaps in the prosecution which remained unfilled at the close of the defence case and the benefit thereof should go to the accused persons.

21. I therefore find that the prosecution has failed to prove its case beyond reasonable doubt and therefore find the accused persons not guilty and accordingly dismiss the charge and acquit both accused persons. The same shall be set free forthwith unless otherwise lawfully held.

Dated, delivered and signed at Lodwar this 2nd day of October, 2019.

.....

J. WAKIAGA

JUDGE

In the presence of:-

_____ *for the State*

_____ *for the 1st Accused*

_____ *for the 2nd Accused*

Accused 1 & 2 _____

_____ *- Court assistant*