



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL CASE NO. 12 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

SAMWEL PAMBA WABWIRE.....ACCUSED

JUDGMENT

1. **Samwel Pamba Wabwire** is 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 31<sup>st</sup> day of May 2017, at **Munando** village in **Bukhayo West** location of **Busia** County, jointly with others not before court, murdered **Wilfred Egesa Wabwire**.
3. The accused and the deceased were brothers. The prosecution case is that after the accused and two others had alleged that the accused was involved in witchcraft, they attacked and fatally injured him.
4. **Samwel Pamba Wabwire**, the accused, contended that the deceased was found lying wounded on a path. His widow alleged that he suspected him (accused) to have been involved. He denied any involvement.
5. The issues for determination are:
  - a) Whether the deceased was found on a path;
  - b) Whether the accused was involved in beating him up; and
  - c) If he was, whether this amounted to the offence of murder.
6. When the deceased was preparing to take a bath outside his house, he invited Jennifer Nekesa Omolo (PW1) his widow to go out and listen to the insults which were being hurled at him. This witness testified that she stood at her door and heard Samuel Pamba and Kizito Mangenyi, the deceased's brothers and Bossy their nephew insulting the deceased. They accused him of having killed many people through witchcraft and lately caused the accident of Lawrence Wanjala through witchcraft, as well. They threatened to kill him. She managed to persuade them to go away for it was at night and that they could talk over the issue the following day. They complied.
7. Later when Jennifer Nekesa Omolo (PW1) and the deceased were in the house, Kizito called the deceased out and told him that he had a message to deliver. When her husband went out, she testified that she heard Kizito tell her husband that Samuel had asked him to stop witchcraft. When the deceased asked him how he knew he practiced witchcraft, she heard the sound of something being hit. She went out.
8. She found the deceased lying down bleeding and his brain and blood were oozing out. The accused, Kizito and Bossy were each armed with a club and were beating her husband. She raised an alarm. Kizito and Bossy ran away while the accused remained at the scene. The club he had was wrestled from him by his brother James who gave it to their mother.
9. James Nyongesa Wabwire (PW2) testified that when he was attracted by the alarm raised by Jennifer Nekesa Omolo (PW1), he went out and found Samuel Pamba (the accused herein), Kizito and Boniface Ouma also known as Bossy beating the deceased with clubs. He had a spotlight and Samuel Pamba asked which dog was directing the spotlight at them. He got hold of Samuel Pamba and wrestled from him the club he was using to beat the deceased with. He gave the club to their mother. Kizito and Bossy ran away when he held Samuel Pamba. This is what their mother Marita Ajiambo Abwire (PW3) testified to.
10. The accused in his defence contended that Jennifer (PW1) found her husband lying on a path. When he went out in answer to her alarm, she enquired whether he was the one who had beaten him. He denied the allegations.

11. The defence contended that the prosecution relied on circumstantial evidence that was very weak. What is circumstantial evidence? In the case of **Mohamed & 3 Others vs. Republic [2005]1 KLR 722** circumstantial evidence was explained as follows:

**Circumstantial evidence means evidence that tends to prove a fact indirectly by proving other events or circumstances which afford a basis for reasonable inference of the occurrence of the fact at issue. The circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved.**

In the instant case, there was no reliance on circumstantial evidence for the evidence adduced by the prosecution was direct evidence.

12. Though the incident was at night, it involved close relatives who knew each other very well in addition to the spotlights they had. The accused interacted with Jennifer (PW1) his brother James Nyongesa (PW2) Marita, his mother. When he was leaving the scene, Margaret Mubweka Wabwire (PW4) with the help of a spotlight recognized him.

I therefore find that contrary to his contention, the accused participated in beating the deceased who later succumbed to the injuries inflicted by the trio.

13. For an offence of murder to be established, the prosecution has the onus of proving beyond any reasonable doubts that the accused had malice aforethought. Section 206 of the Penal Code Provides:

**Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—**

**(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;**

**(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;**

**(c) an intent to commit a felony;**

**(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.**

In the instant case the prosecution through the evidence of Jennifer Nekesa Omolo (PW1) on the utterances made before the deceased was fatally beaten by the accused and his other two accomplices coupled with the evidence of the beating as testified to by the eye witnesses and confirmed by the medical evidence of Dr. Hillary Kiplagat (PW7) establish beyond any reasonable doubts that the accused and his accomplices had the requisite mens rea to commit the offence he is charged with.

14. From the evidence on record, I am satisfied that the prosecution has proved the offence of murder against the accused. I find him guilty and accordingly convict him for the offence of murder contrary to section 204 of the Penal Code.

**DELIVERED and SIGNED at BUSIA this 11<sup>th</sup> day of December, 2019**

**KIARIE WAWERU KIARIE**

**JUDGE**