



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
CRIMINAL CASE NO.28 OF 2011

REPUBLIC.....PROSECUTOR

VERSUS

BONFACE WABWIRE KHAEMBA.....1ST ACCUSED

ARNOLD SAKHASIA KHAEMBA.....2ND ACCUSED

EUNICE WANJALA KHAEMBA.....3RD ACCUSED

CRISPUS WANJALA SINDANI.....4TH ACCUSED

DAVID WAFULA KHAEMBA.....5TH ACCUSED

JUDGEMENT

1. Bonface Wabwire Khaemba, Arnold Sakhasia Khaemba, Eunice Wanjala Khaemba, Crispus Wanjala Sindani and David Wafula Khaemba are faced with the charge of murder contrary to Section 203 as read with 204 of the Penal Code.

2. The particulars of the offence are that the 5 persons murdered Samuel Wafula Saisi (deceased) on the 18th of October 2011 at Namasanda sub-location within Bungoma County.

3. The accused persons denied the charge. The Prosecution called a total of 5 witnesses whereas the accused all gave sworn statements and called 3 witnesses.

4. The Prosecution case briefly is that the deceased had a land issue and had asked the Chairman of their clan for a meeting to discuss with the family of the 1st, 2nd, 3rd and 5th accused.

The deceased had wanted to be in the meeting with his brother, whom he attended with first and on failing to find the Chairman his brother left.

Later in the afternoon the deceased was summoned in order to fix another date. The deceased went alone and shortly after arrival the accused persons attacked him injuring him on the head killing the deceased.

5. **PW1 Ann Namukuru Wafula** testified that the meeting of 18th did not take off as the Chairman was late. However, at 2p.m. 4th accused went for her father upon the Chairman's arrival. Shortly thereafter she came out of the house, heard screams coming from accused home, she followed the screams, found a crowd, got into one house and found her father kneeling and accused number 1, 4 and 5 holding his neck,

the father was bleeding, she felt his heart but it was not beating, his cap, socks and shoes were missing and his phone scattered, she enquired from accused 3 what had happened, accused 3 did not answer but left for the bedroom and returned with a panga chasing the witness away. The witness ran out shouting attracting a crowd at which point the accused persons followed behind carrying the body of the deceased to the house and left the body there. This witness and the brother later reported the matter to the police.

6. PW2 Benson Simiyu Wafula son of the deceased repeated the evidence similar to PW1 on how their Father ended up at Khaemba's. He testified further that their father walked to the meeting with 4th accused and how later a boy known as John was sent to them to tell them that their father was sick. His sister PW1 left to Khaemba's, he followed and met with the accused numbers 1,2,4 and 5 carrying his father's body. Their father was bleeding from the nose and the neck was hanging on one side. He also stated that his father had no dispute with accused, and had not been involved in any accident before. He denied that the accused persons had attempted to take the deceased to hospital.

7. PW3 Alice Nangami Wafula widow of the deceased, similarly narrated how the deceased ended at the Khaemba's. She corroborated the evidence of PW2 that a few minutes after the deceased left for the Khaemba's one named John went back to call them. She got out of the house and heard screams. Since she was unwell she did not go to Khaemba's but her children did and shortly she saw PW1 return with shoes and a phone in her hand and the accused persons behind her carrying the deceased. It was her further testimony that her husband had not been involved in any accident and was not sick. She saw the 1st, 2nd, 4th and 5th accused persons carrying the deceased.

8. PW4 Dr. Raymond Damba produced a post mortem report. The same indicated the following findings;

- Hernia in the digestive system
- Fracture of the skull around the temporal region
- Cerebral artery bleeding.

Cause of death was given as:

Cardio respiratory arrest due to cerebral artery bleeding due to fracture of skull on the right caused by trauma.

9. PW5 PC John Aguya produced the statement of police Officer Chelimo since deceased who had investigated the case. The statement indicated that the Officer had received information of the death of Wafula Saisi who had been killed in the first accused house over a disagreement on land. That the 1st accused and others had called the deceased and as they discussed neighbours heard screams and on going to the scene they found the deceased body. On being cross examined he confirmed that the report did not indicate that there were signs of struggle at the scene.

10. At the close of the Prosecution case the accused were placed on their defence. They gave sworn evidence as follows;

DW1 Bonface Wabwile Khaemba (1st accused). He is a lorry driver. On the fateful day he was at his place of work in Naivasha. He was arrested while home to attend to the funeral of the deceased herein. PW1 must have mistaken his identity when she mentioned him.

11. DW2 (2nd accused) Arnold Sakhasia Khaemba a cousin to the deceased. He was called for a meeting to be chaired by Fred Barasa on 18/10/2011 at about 1p.m., as the deceased had a land issue for discussion with their father. Accused 4 was sent to get the deceased. A few minutes into the meeting the deceased accused their father of fraudulently having acquired land. He also appeared uncomfortable, he then let go his walking stick and fell. Fred the chairman held him, removed his shoes and sent one John to call his family. John returned with PW1 who found Fred doing first aid. They wanted to take the deceased to hospital but his brother declined and they took him home.

The deceased was not bleeding as alleged and neither was PW1 chased away. She was among those who wanted deceased taken to hospital. The deceased fell on his face after hitting his chest. They were all shocked. He did not know how deceased obtained a fracture.

12. DW3 Eunice Khaemba (3rd accused) stated that the deceased is her in-law's child. On 18/10/2011 the deceased wanted to talk to her husband, he went to their house and sat inside, he did not join as others had lunch as he said he had already eaten. The person chairing the meeting was one Fred Barasa. The deceased said he had documents from lands office which he wanted to bring and asked for another meeting. He then beat his chest, and shortly fell on his stomach. Fred sent one John to call the wife. His daughter came and Fred decided the deceased be taken to Jordan Hospital they left the witness did not follow them.

Further, she stated that DW1 was not at the meeting. PW1 could not have heard screams as she returned with John who had been sent to call them. She did not chase PW1 with a panga as alleged. Neither did any one hold the deceased's neck neither is it true that the deceased bled. She had known the deceased well. They had no land dispute. It is the deceased who called for the meeting to discuss land issues. She did not know details of why the meeting was called. The meeting was in her house due to her husband's advanced age. The deceased fell down 15 minutes into the meeting. He fell on his face, nothing hit him.

13. DW4 (4th Accused) CRISPUS WANJALA SINDANI a Cousin to the deceased. He went severally to check on the deceased to remind him of a clan meeting but missed him. At 1.30p.m. he went back and met the deceased who told him he was not well. They walked together to the meeting. The meeting was chaired by one Fred Barasa. The deceased informed the meeting that he did not think that the Khaemba's land was legally acquired. He was asked to explain, but he could not answer, he hit his chest, shortly thereafter he fell. They were all shocked. Fred got courage and tried to do some first aid. Fred then sent for his family and suggested that they take him to Jordan hospital. The deceased daughter PW1 arrived took his shoes and phone and started wailing attracting people.

He denied having held the deceased by the neck and confirmed that Accused No.1 was then in Naivasha. Further Charles the deceased brother stopped them from taking the deceased to hospital. He also stated that the deceased was not very healthy. PW1 was not chased with a panga as alleged and that Fred had removed the deceased shoes and socks as he tried to do first aid.

14. DW5 (Accused 5) David Wafula Khaemba. A meeting was held at his father's on 18/10/2011 chaired by Fred Barasa where the. Deceased brought up an issue of land saying he did not think that their father has the land legitimately, the deceased was put to task, he looked down, hit his chest and shortly fell. The chairman removed his socks and shoes as he did first aid and then sent John to call the deceased relatives. John returned with PW1 as deceased was still being held by Fred. The deceased had been injured before.

DW1 was not at the meeting. The deceased did not bleed. The meeting had been peaceful and there were no screams that could have attracted people.

The deceased fell on his face with a bang but did not hit anything.

15. DW6 Francis Simiyu stated that he was at the meeting and as the deceased was talking to Fred Barasa, he went silent, hit his chest and fell. Fred held him and tried first aid but the deceased did not respond. Fred asked John to call his family as he thought the deceased had malaria PW1 came back with John. They decided to take the deceased to hospital but his wife stopped them. So did Charles his brother.

It was not true that they beat the deceased or that there were screams, neither was PW1 chased with a panga.

16. DW7 Fred Barasa Mtali. He attended a clan meeting at Khaemba's on 18/10/2011. He was not the chairman. At the meeting, he met 2-5th accused, 1st accused was not present. 4th accused went for the

deceased so that a date for another meeting could be set. 4th accused returned with the deceased and those present chatted generally and agreed to fix another date as the 2nd accused went to get an exercise book, he returned, the witness enquired what the issue was. The deceased said he wanted to know why there were 2 portions of land and why Khaemba's land passed through his father's. The deceased who had his phone on one hand, and held his chin with the right hand, then hit his chest as if he was choking, he then fell. The witness stood and held him but the deceased did not respond. He then noticed his trouser was wet and he wondered. He then called John, a child and sent him to the deceased family as he thought the deceased may be down with malaria. The deceased daughter arrived, he questioned them and the witness explained the situation and suggested they take him to Jordan as they carried the deceased his brother stopped them twice and said that there was no need of incurring expenses. They then took him to his home and placed him on a mattress. The witness left for his house only to learn that there was word that the deceased had been killed by people he was with.

The matter was reported to Bungoma police and after 1 week he learnt that the accused persons had been arrested. 1st accused was not at the meeting. It was his testimony further that the deceased was not killed, the deceased had no dispute with either the witness or the Khaembas and when the deceased fell he hit the floor.

17. This is a criminal case and the onus of proving the guilt of the accused persons is upon the Prosecution.

18. This being a murder charge; three ingredients need to be proved. Firstly, the fact of death has to be established. Secondly there has to be evidence linking the act or omission leading to the death of the deceased to the accused, thirdly there has to be evidence that the act or omission was laced with malice aforethought.

19. From the evidence on record and more specifically the evidence PW4 the deceased died arising from a head injury.

20. The Prosecution had no direct evidence linking the accused persons to the injuries sustained by the deceased. The Prosecution has relied on circumstantial evidence; to the effect that, the deceased died while in the house of the Khaembas, he was found to have a head injury and since PW1 found him being held by DW7 those present must have killed him.

21. PW1 said she found her father's neck being held by 3 people and he was bleeding from his nose and mouth, his shirt was soaked in blood, and by the time she arrive, she found him already dead.

PW2 equally mentioned that he found his father bleeding from the nose. However, there is contradiction between the evidence of PW1, 2 & 3. PW2 did not see blood coming from the mouth or a soaked shirt. PW3 the wife to the deceased and the mother of PW1 and 2 did not mention blood or a soaked shirt.

I find the evidence of key Prosecution witnesses exaggerated and contradictory. However, the evidence by the accused persons and their witnesses were credible and consistent in that the deceased called for a meeting, it did not take off as the clan chairman was absent and other members had left, he was called so as gone to fix another date as those present chatted a few minutes into the meeting he collapsed and died.

22. The Law on Circumstantial Evidence requires that three tests be satisfied I) *the circumstances from which an inference of guilt is to be deduced must be cogent and firmly established.* II). *Those circumstances ought to have a definite tendency unerringly pointing towards the guilt of the accused* and III). *The circumstances taken cumulatively should form a chain so complete that there is no doubt from the conclusion that within all human possibility the Crime was committed by none other than the accused.* See **Kipkering Arap Koskei & Another versus republic (1949) 16 E.A. C.A 135 & Omar Mzungu Chimere Vs Republic Criminal Appeal No.56 of 1998.**

23. From the above, it is clear that the Prosecution case has gaps and which must be resolved infavour of the accused persons. There is no evidence that the accused persons beat the deceased, nor did any other

act that may have caused his death. The evidence that the deceased was bleeding remains uncorroborated. It is not clear either whether the fracture was as a result of the fall or not. No malice aforethought was established either. In all DW7 who was an independent member of the clan agreed to a large extent with the defence evidence. I found him a credible and believable witness. Having found glaring gaps in the Prosecution case I must say that the Prosecution failed to prove its case to the required standard and I am therefore unable to convict the accused persons and acquit them in the circumstance. They are set free unless otherwise lawfully held.

DATED and DELIVERED at BUNGOMA this 1st day of February, 2018

ALI-ARONI

JUDGE