



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL CASE NO. 6 OF 2013

(Consolidated with Criminal No. 7 of 2013)

REPUBLICPROSECUTOR

VERSUS

ROBERT BARSА ADAMU1ST ACCUSED

EVANS BARASA OSCAR ALIAS DADY.....2ND ACCUSED

JUDGMENT

The accused persons 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 were that on the night of **8th February 2013 at Maili Saba Sinyerere within Trans Nzoia County jointly with another not before court Murdered Linus Kimutai Rop.**

The accused denied the offence prompting the prosecution to call several witnesses whose evidence can be summarised as follows;

PW1 Erick Chesoni a mason by occupation stated that he was a friend and a workmate to the deceased as well as a neighbour. That on the said date at night he heard some screams emanating from a nearby shop. He went to the scene and he heard the deceased shouting that he was being killed. He went there and saw the accused and another fellow called Wafula having pinned the deceased down. Wafula was holding a wire while the second accused was holding a stick and the first accused holding a hurricane lamp. The deceased was injured. Wafula insisted that he was a thief that is why they were beating him. They then removed a wallet from the deceased pocket and there was Kshs 300 which was in it which they shared. In the process the deceased managed to escape. The witness later learned from the deceased mother that he had been taken to hospital. He visited the deceased at the hospital who thanked him for saving his life. He also told him that he had gone to the accused's house to see some girls. After few days he heard that he had died.

PW2 Alfred Wanyonyi Wanyama also heard shouts and screams from a person saying that he was not a thief and the said noise emanated from the accused's homestead. He stood at the fence and he saw the two beat a person he could not recognise. He also saw them picking the deceased wallet as well as PW1's intervention.

On cross-examination he said that he feared for his life that is why he did not rescue the deceased.

PW3 Enock Kiplagat Rop was the deceased brother. He got the information concerning the incident

and he went to the hospital the following day where he met the deceased who told him that Robert , Daddy and Wafula had assaulted him. He testified further that the deceased died later while undergoing treatment. He also attended the postmortem exercise.

PW4 Eunice Mary Apakalwa was the deceased mother in law who testified that she heard a knock at her door on 9/7/2013 at around 1 am and on opening she realised that the person knocking was a neighbour who notified him concerning the deceased's injuries. He went to the deceased's house and found him with injuries on the head and arms. He called for a police vehicle which then rushed him to the hospital where he unfortunately died while undergoing treatment.

PW5 Wilfrida Nekesa testified that the two accused person are her brother. She testified that at around 11 pm the deceased knocked on their door. The second accused arrived then started beating the deceased whom she did not know. He was then joined by the first accused and another. That it was only when PW1 came that he was rescued.

PW6 Hosea Kiplagat was the deceased brother who testified that he was called by phone when the deceased was admitted after being injured by thugs. He was told by the deceased about the people who injured him who apparently were the accused herein. Wafula the 3rd person apparently escaped. He also identified the deceased body during postmortem exercise.

PW7 Dr Godfrey Obale Omukoya produced the postmortem report on behalf of Dr Michael Rikiche who conducted the postmortem exercise and concluded the cause of death as head injury severe anaemia secondary to bleeding.

When put on their defence the accused gave unsworn evidence. **Accused 1** stated that he was asleep in his house when at around 2 am he heard some noise from the children's house shouting "thief, thief." He rushed out and found a thief having been apprehended and was being beaten. Since it was dark he was told to take a hurricane lamp close to the person but he took off and could not be arrested. He found that the TV and battery had been removed from the children's house and the door had been broken. He told the children to sleep. He then stayed for some days doing his business but was arrested on a Thursday by police officer and later charged with the offence at hand which he still denies.

DW2 equally said that on the material day he went as usual to his business and thereafter he went to watch Cinema in the evening and came back and slept. He heard the door being knocked and when he opened he saw someone with a torch but he kept quiet. He then wrestled him and he fell down. He screamed and neighbours came to his rescue but the intruder managed to escape. He was a stranger who was not even known to the neighbours. They reported to the villager elder. He continued in his work thereafter but was later informed that the 1st accused had been arrested. He was later equally arrested and charged with the offence which he still denied.

Analysis and Determination

The defence did file written submissions which I have had the chance to peruse together with the two authorities annexed. The state apparently did not file written submissions.

There is no doubt that the deceased died as a result of the injuries sustained during the assault that night. It is not also disputed that the incident occurred within the compound of the accused persons. The only issue is whether it was they who assaulted the deceased.

From the evidence on record, the accused did not deny so. The only argument is that they thought the deceased was a thief and that is why he was assaulted. But was this the case? I do not think so. PW1 and PW5 were emphatic on their evidence. It was PW1 who came to the deceased rescue. Had he not come perhaps the persons would have continued to assault him. The third person included one Wafula who was never charged but featured prominently during trial.

The deceased prior to his death conversed with PW1, PW3 as well as PW4. It was therefore evident that

the deceased had all the time before his demise to explain who the attackers were. Neither was it proved in any way that the deceased while at the hospital was in such an incapacitated state that he could not talk.

The injuries sustained by the deceased were caused by blunt objects. PW1 clearly stated that DW1 was holding a hoe stick as well as a wire. These objects were used to assault the deceased.

The accused defences in my view does not aid their case. Even if the assailant was a suspected thief, why would they assault him especially in a situation where they managed to apprehend him. None of the accused person called any witness including the children who were present as well as the neighbours to back up their claim.

I find that both principles of *actus reus* and *mens rea* were established by the prosecution. The purpose of the accused holding the “thief” was to finish him. It was only the intervention of PW1 that he managed to escape and luckily enough was still able to tell others who his assailants were. As earlier indicated the assault took place rightly at the house or compound of the accused. It is not even explained by the accused that the deceased was armed or not. Infact if he was a thief why would he knock at the children's house?

In the premises I do find that the prosecution has established a case against the accused beyond any shadow of doubt and I thus convict them accordingly under the provisions of Section 203 of the Criminal Procedure Code.

Delivered this 25th day of January 2017.

H.K. CHEMITEI

JUDGE

In the presence of:

Kakoi for state

Majanga for accused – present

Kirong – Court Assistant