



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
CRIMINAL CASE NO. 32 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

GEORGE SIMIYU KUNDU.....ACCUSED

JUDGEMENT

1. The accused herein one George Simiyu Kundu is faced with the offence of murder contrary to section 203 as read with 204 of the Penal Code.

The particulars of the offence are that on or before the 6th of August 2014 at Chiliba village Mabusi location within Bungoma County the accused murdered Patrick Wambwoni Wamalwa.

2. The accused did not admit the charge and the matter went to full trial with the Prosecution calling 8 witnesses. At the close of the Prosecution case the Court found the accused had a case to answer. The accused gave a sworn statement but did not call any witnesses.

3. According to the Prosecution, PW2 Crysantus Khaoya Wafula a resident of Chiliba Bumula held a circumcision ceremony for his son at his home on the 5th of August 2014 where about 80 guests attended including the deceased and the accused. Those present included PW3. There was drink and food. The ceremony ended at 8p.m. Later some of the villagers dispersed. The deceased was found dead early the next day with a big wound on the side of his head. There was no blood on his clothes or where he was found lying. The accused also received injuries and was taken to a dispensary for treatment between 7.30 and 8p.m of the night of the circumcision ceremony escorted by his father and PW3. The blood was found at the accused 2nd wife's door and at his gate. The clothes he had the previous night his shirt and trouser were also soaked in blood.

4. The accused was suspected because of the bloody clothes and blood stains in his house. This is evident from the testimony of PW6 who stated

*“we suspected the accused because there was blood
at the gate, door of his house and he had injuries and
the deceased died 30m away from the gate”.*

5. The Prosecution had no direct evidence linking the accused to the murder of the deceased, there was no eye witnesses to the incident and an attempt was made to rely on circumstantial evidence.

6. PW6 deduced his suspicion from what he saw. His suspicion was not corroborated by any of the villagers save for his colleague PW8 who was of the same view as PW6.

7. The police took the bloody clothes, blood from the door and the gate they also got blood sample from the deceased and submitted them to the Government Chemist for analysis, but despite numerous adjournment no report was forthcoming from the government chemist and therefore no evidence was placed before Court connecting the blood on the accused clothes, at the gate and door to the deceased.

8. PW3 testified that on the material night as he came from PW2's ceremony when about to enter his gate, he heard screams coming from accused's home. He went to the place and found the accused bleeding profusely and using a shirt to stop the bleeding?

On his part the accused stated in his evidence that as he reached his gate from PW2 he was attacked by unknown people on a bike and he sustained injuries. Further that his father in keeping with their tradition slaughtered a chicken and spill blood at his door to allow him enter his house. The prosecution has termed this a fabrication and a cover up between the accused and PW3 who supported the version as stated by the accused.

9. PW7 Dr. Raymond Damba of Bungoma produced a post mortem report on behalf of his colleague Dr. Were Mbiri without any objection from the defence.

The post mortem report indicated that the deceased had sustained a deep cut wound on the skull, bruises on the left hand and dry blood clots. The cause of death was given as acute cardio respiratory collapse due to injuries on the head with subdural haematoma.

10. In order to sustain a charge of murder three ingredients are necessary, firstly there must be proof of death of the victim, secondly proof that the accused committed the act, thirdly that the accused committed the act with malice aforethought.

11. There is evidence from both the Prosecution and the defence that the deceased was found dead with a big wound on the back of his head on the morning of 6th August 2012. PW7 a medical doctor produced a post mortem report which confirms the death.

12. The issue for determination is whether there is evidence placed before Court either direct or circumstantial linking the accused to the death.

13. As stated earlier there was no eye witness to the incident. The Prosecution has relied on what it deems to be circumstantial evidence. In Abanga alias Onyango vs R Cr. A. No.32 of 1990 the Court of Appeal held;

“It is settled Law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three

tests (i) the circumstances from which an inference of

guilt is sought to be drawn, must be, cogently and

firmly established (ii) those circumstances should be a

definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstance taken cumulatively,

should form a chain so complete that there is no escape

from the conclusion that within all human probability the

crime was committed by the accused and none else”.

14. The accused received an injury, his evidence as to how he sustained the injury was corroborated to some extent by PW3, this indeed may sell. However how the deceased met his death remains grey. What would have corroborated the theory being advanced by the Prosecution is the results from the Government Chemist which was not placed before the Court.

15. The Prosecution case as it stands does not meet the threshold necessary in proving a criminal charge;

“beyond all reasonable doubt”.

16. In the circumstance the doubt must be resolved in favour of the accused person.

17. The accused herein is therefore acquitted and released unless otherwise being lawfully held.

DATED at BUNGOMA this 2ND day of MARCH, 2017

ALI-ARONI

JUDGE