



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL CASE NO. 35 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

JOSEPHAT MAKANJA BARASA.....1ST ACCUSED

HEZRON KUNDU..... 2ND ACCUSED

JUDGMENT

The two accused persons namely **JOSPHAT MAKANJA BARASA** (hereinafter referred to as the 1st accused) and **HEZRON KUNDU** (hereinafter referred to as the 2nd accused) are jointly charged with the offence of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE**. The particulars of the charge are that

“On the 3rd day of April 2013 at Kamere Trading Centre of Naivasha Municipality within Nakuru County jointly murdered EMMANUEL WEKESA”.

Both accused persons pleaded ‘**Not Guilty**’ to the charge. The trial commenced before **Hon. Lady Justice Helen Omondi** on 4/2/2014. The Honourable Judge heard the evidence of all the nine (9) prosecution witnesses and delivered a ruling on 21/3/2014 placing both accuseds on their defence. At this point the trial judge was transferred to Bungoma High Court. I took over the hearing and recorded the defence of both accused persons.

Following is a brief summary of the prosecution case. **PW1 ESTHER SIMULI SIKUKU** told the court that the deceased ‘**Emmanuel Wekesa**’ was her husband. During the period in question the couple had disagreed and **PW1** had left her matrimonial home and sought refuge in the home of her aunt **CATHERINE MTENYO PW2**. On 3/4/2013 at about 8.00pm the deceased made several phone calls to **PW1** but she declined to take his calls. The deceased then made a call through the mobile number of **PW2** and told **PW2** to ask his wife **PW1** to meet him for a discussion.

In her evidence **PW2** told the court that upon receiving the phone call from the deceased. She told him that she could not allow **PW1** to meet with him unless she received authority from the parents of **PW1**.

Shortly thereafter the deceased arrived at the home of **PW2** and began banging on the door demanding access to his wife and hurling insults. **PW2** stated that due to the commotion they phoned the 1st and 2nd accused who were their relatives to come and talk to the deceased to persuade him to leave the premises. The 2nd accused came to the scene first following by the 1st accused. They both spoke to the deceased and

persuaded him to leave. The 1st accused then led the deceased away from the house while the 2nd accused remained outside the house conversing with **PW1** and **PW2**.

Suddenly the deceased came running back wielding a panga and a stick. Everyone became alarmed and each person scampered for safety. The deceased aimed the panga at the 2nd accused intending to cut him. The 2nd accused took to his heels and in the process of running away jumped over a trench near the house. The deceased who was chasing the 2nd accused either did not notice the trench or miscalculated its width and fell into that trench. Members of the public rushed to help the deceased. The 2nd accused collected the panga which had also fallen into the trench. Members of the public tried to rush the deceased to hospital but he was already dead. **PW1, PW2** and the 2nd accused went to report the matter to the police station. Police launched investigations into the matter after which the two accused persons were arrested and charged with the offence of murder.

As stated earlier following the closure of the prosecution case both accused's were placed on their defence. They each gave a sworn statement in which each denied any involvement in the death of the deceased. They called one witness in support of their defence.

This court must now analyze the evidence on record and determine whether this charge of murder has been proved beyond reasonable doubt as required by law.

The offence of murder is defined by Section 203 of the Penal Code as follows:

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder”.

Therefore in order to successfully prove the charge of murder the prosecution must adduce evidence sufficient to prove beyond reasonable doubt the following key ingredients of the charge.

- (i) Proof of fact as well as the cause of death of the deceased
- (ii) Proof that the deceased met his death due to an unlawful act or omission on the part of the accused(s)
- (iii) Proof that said unlawful act or omission was committed with malice aforethought.

On the question of the death of the deceased, there can be no controversy. Several witnesses including **PW1** and **PW2** told the court that the deceased died at the scene. **PW3 DENNIS NABWIRE WANJALA** a brother to the deceased and **PW4 ISABELLA NAFULA WANJALA** a sister to the deceased both told the court that they rushed to the scene in an attempt to rescue the deceased and take him to hospital. However they realized that he was already dead at the scene. All these witnesses who knew the deceased well identify him as '**Emmanuel Wekesa**'.

Evidence regarding the cause of death was tendered by **PW6 DR. TITUS NGULUNGU**, a pathologist based at the PGH Nakuru. **PW6** testified that on 5/4/2013 he performed the autopsy on the body of the deceased. He noted bruising around the neck and features of pressure and trauma around the neck. **PW6** opined that the cause of death was '**Asphyxia due to pressure to the neck**' consistent with manual strangulation (more on this later). The doctor filled and signed the post-mortem report which he produced in court as an exhibit **P. exb 2**.

Having proved the fact as well as the cause of death the prosecution is required to go further and tender evidence to prove that it was one of the two accused (or both of them) who strangled and killed the deceased.

This is a case where there were several eye-witnesses to the incident. Not a single witness has mentioned having seen any person strangle or throttle the deceased. No witness saw either of the accused persons put

their hands around the neck of the deceased. Indeed the witnesses all mention the presence of a panga at the scene, the implication being that it was this panga which was the murder weapon.

However nowhere in the evidence of **PW6** did he mention having seen any cuts or wounds likely to have resulted from sharp force trauma on the body of the deceased. Indeed the post-mortem report is clear that the cause of death **did not** result from any kind of sharp force trauma. Thus the evidence of the doctor and the post-mortem report are totally at variance with the evidence of the prosecution witnesses. This is an anomaly which remains unexplained.

The prosecution witnesses all concede that this incident arose due to a domestic disagreement between the deceased and **PW1** who was his wife. **PW1** had gone to seek refuge at the home of **PW2** who was her aunt. On the material day the deceased had gone to the home of **PW2** demanding to be allowed to hold a discussion with his wife.

A stand-off ensued and the deceased became rowdy and was insulting **PW1** and **PW2**. The 2 accuseds who were not initially at the scene were only called in by **PW2** to help resolve the situation.

When the 2 accused went to the scene they were both unarmed. Both **PW1** and **PW2** state that the two spoke to the deceased and told him to leave. Indeed it was the 2nd accused who led the deceased away and the deceased left together with the 2nd accused. It appeared to all that the situation had been diffused.

However almost immediately, thereafter the deceased came back in a rage wielding a knife and a panga and threatening the people there. All scattered for their lives. **PW1** and **PW2** told the court that the deceased aimed his panga at the 2nd accused and began to chase him. Not surprisingly the 2nd accused ran for his life. He jumped over a trench which was in his path but it seems the deceased failed to notice or avoid the same trench and fell into it as he pursued the 2nd accused.

Both **PW1** and **PW2** were there from the very beginning and witnessed what happened. They both gave clear and concise evidence and both remained unshaken under cross-examination.

PW3 and **PW4** were both called to the scene **after** the deceased had been injured. They both sought to imply that the 2nd accused had assaulted the deceased but none of them saw how the deceased sustained his injuries. It is also pertinent that both **PW3** and **PW5** were siblings of the deceased and were not objective witnesses. They were biased and were clearly out to blame a third party for the death of their kin. **PW3** admitted under cross-examination by defence counsel that

“I did not witness anyone attacking the deceased”.

Likewise **PW4** admitted under cross-examination that

“I did not see anyone assault the deceased”.

I therefore find no evidence to prove that either of the accused’s in any way attacked or assaulted the deceased.

The two accuseds in their defences each denied having in any way assaulted the deceased. They called as a witness one **EMMANUEL NYIKULI KALAMU DW3**. This witness told the court that on the material date he and 1st accused had travelled back from Nairobi together. **DW3** stated that he was in the house of the 1st accused when they were informed about the commotion at the house of **PW2**. This witness accompanied the 1st accused to the scene. **DW3** confirms in all its material aspects the testimony of **PW1** and **PW2** which corresponds to the defences of the two accused persons. **DW3** stated that he saw the deceased wielding a panga and chasing the 2nd accused. The 2nd accused jumped over a trench paved with cement but the deceased failed to navigate that same trench. He tripped and fell into the trench all the while holding the panga.

DW3 told the court that he did record a statement with the police and despite having been bonded by the investigating officer and having attended court, he was made to stand outside the court and was never called to testify in the matter. **DW3** even complained to the office of the DPP and to Senior Police Officers about the failure to have him testify in the case.

Why would the prosecution bond a crucial eyewitness to attend court and then fail to put him on the stand? It is clear that the prosecution was trying to avoid calling any witness who would not favour their case. The court is entitled to draw an adverse inference from the action of the prosecution in failing to call this witness to the stand. Clearly this was not a professional and unbiased prosecution. The police and prosecutors are all officers of the court. They have an obligation to assist the courts in the pursuit of truth and the dispensation of justice. To deliberately conceal from the court important eyewitnesses testimony amounts to a severe dereliction of duty.

I was able to observe the demeanour of **DW3** as he testified. He gave clear and cogent evidence and he remained unshaken under cross-examination. His demeanour was honest and I am convinced that he was telling the truth. **DW3** was not related to any of the protagonists in this matter. He was in my view an objective witness.

From the evidence on record it is clear that the deceased was the author of his own misfortune. He was the aggressor in this case. Having been persuaded to leave the scene and indeed having left the scene, the accused then came back to the venue armed with a panga. The deceased was agitated and was ready to do battle with those whom he felt were keeping him away from his wife.

There is no evidence of any unlawful act or omission on the part of either of the accused persons which contributed to the death of the deceased. The 2nd accused when faced with an assailant wielding a panga did what any normal man would do – he ran for his life.

After the incident the 2nd accused picked up the panga and stick which the deceased had and together with **PW1** and **PW2** went to report the incident at the police station where they handed in the exhibits. These are not the actions of a guilty man. If the 2nd accused had in any way harmed the deceased is unlikely that he would have voluntarily gone to report the incident to the police.

With respect to the 1st accused, there appears to have been no valid/logical reason for his arrest. He is not said to have engaged the deceased in any way. He was only charged because he went to tell the deceased to stop being a nuisance.

Based on the foregoing I find that there is absolutely no evidence to implicate the two accuseds in the death of the deceased. The cause of death as opined by **PW6** does not support the evidence on record. There was no allegation by any witness that the deceased had been strangled by any person let alone by the 1st and 2nd accused. It remains unclear what led to the death of the deceased. The prosecution as I have found was biased and crucial evidence was deliberately excluded from the court.

I find that the prosecution have totally failed to prove the *actus reus* of the offence of murder. Accordingly I enter a verdict of ‘**Not Guilty**’ and I acquit each accused of the offence of murder. Each accused is to be set at liberty forthwith unless otherwise lawfully held.

Dated and Delivered in Nakuru this 21st day of July, 2017.

Mr Obutu holding brief for Mr. Mongeri

Mr. Chigiti for the DPP

Maureen A. Odera

Judge