



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**HIGH COURT CRIMINAL CASE NO. 105 OF 2010**

**BETWEEN**

**EVANS OCHENGO..... ACCUSED/APPLICANT**

**ELKANA OMO SO ONDUSO.....ACCUSED/APPLICANT**

**ROBERT ONYANCHA..... ACCUSED/APPLICANT**

**AND**

**REPUBLIC..... RESPONDENT**

**JUDGMENT**

**BACKGROUND**

1. The accused persons were charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code the particulars of which were that on the night of 8<sup>th</sup> and 9<sup>th</sup> November 2010 at Bokiamburi sub-location within Nyamira country murdered JOHN ABICHA MASIRA.
2. On 29/11/2010 they pleaded not guilty to the said charge before Hon. Justice M.A. Makhandia as he then was and on 24/6/2010 their trial commenced before Hon. Justice R.N. Sitati who heard five prosecution witnesses and put the accused on their defence before proceeding on transfer.
3. On 21/4/2015 upon compliance under Section 200 of CPC the accused persons gave their unsworn defence before me. I must state for record purposes that I did not have the advantage of hearing and seeing the prosecution witness but has read the record proceedings before Justice Sitati for purposes of this judgment.

**PROSECUTION CASE**

4. To prove its case the prosecution called five witnesses whose testimony was as follows:-Pw1 John Kebaso Morendi testified on oath that on 8/11/2010 he saw the 3<sup>rd</sup> accused and the deceased together, after ten minute, the 1<sup>st</sup> and 2<sup>nd</sup> accused passed by them on a motor bike towards the main road. On 9<sup>th</sup> November 2010 he was informed of the death of the deceased.
5. Pw2 Ruth Kwaboka Kebaso corroborated the evidence of Pw1 and stated that on 8/11/2010 she was together with the deceased and the accused persons at their place of work. Upon receiving payment, the 1<sup>st</sup> and 2<sup>nd</sup> accused wanted to go with the deceased to the drinking den which he declined opting to go the posho mill.

6. It was Pw2's further evidence that the 1<sup>st</sup> and 2<sup>nd</sup> accused said that if the deceased did not go with them to the drinking den, they would beat him up since he had formed the habit of drinking their alcohol and not buying for them in return. Under cross examination she testified that the relationship between the accused persons and the deceased was very good and that they used to share jokes for the twelve years she had know them.

7. Pw3 Dr. Maurice Raute performed post mortem examination on the body of the deceased and formed the opinion that the cause of death was cardiorespiratory arrest due to head injury and that the object used was blunt. Pw4 Thomas Masire's evidence was that he identified the body of the deceased but did not know what or who killed him. Under cross examination he stated that he did not know whether there was a grudge between the deceased and the accused persons.

8. Pw5 PC Allan Yumbi the investigation officer visited the scene and interrogated the villagers who did not know what had happened and that upon further investigation from the deceased co-worker he established that the accused persons had been threatening the deceased who never bought them changaa and that they were with the deceased. It was his further evidence that upon the arrest of the accused persons the 2<sup>nd</sup> accused had fresh bruises which he allegedly sustained while fighting the deceased.

9. When put on their defence the accused persons gave unsworn evidence in which Dw1 EVANS OCHENGO stated that on 9/11/2010 he was at home with his father, mother and brother when he was arrested by police. He stated that on 8/11/2010 he did not see the 2<sup>nd</sup> and 3<sup>rd</sup> accused Dw2 ELKANA ONDUSO stated that he knew the deceased but on the material day he was watching over his cousins ship and did not see the deceased on 8<sup>th</sup> neither did he see his co-accused until 9<sup>th</sup> when he was arrested.

10. Dw3 ROBERT ONYANCHA's evidence was that he did not work with the deceased on 8<sup>th</sup> since he did not leave his home. It was his evidence that he did not see pw1 and pw2 on the material day and that when his father was alive Pw2 was working at their home having hired their farm and when his father died he told his mother to take over the farm which Pw2 was not happy with and therefore every time he passed through their farm he used to warn him. It was his evidence that explains why pw2 gave false evidence against him.

## **SUBMISSIONS**

11. When invited by court to make their final submissions the prosecution submitted that they had proved their case beyond reasonable doubt that the deceased actually died from the injuries he sustained during an attack. It was submitted that the accused persons had a common intention to kill the deceased. It was submitted further that since the accused persons were the ones last seen with the deceased alive common sense demanded that the accused persons explain where and when they parted company with the deceased as provided for under Section 111 (1) of the Evidence Act.

12. On behalf of the defence it was submitted that since no one saw the accused kill the deceased the court can only find them guilty based on circumstantial evidence if it meets the standard set out by Justice P.N. Waki as the then was In Mombasa High Court Criminal Case No. 59 of 1995 Republic V Khadija Salimu. It was submitted that the circumstantial evidence that the deceased was last seen alive with the accused persons has been controverted by their testimony. It was further submitted that the prosecution failed to prove malice aforethought on the part of the accused persons even if the court was to find that the accused persons were with the deceased on 8<sup>th</sup> of November.

13. From the proceedings and submissions herein the only issue for determination is whether the prosecution proved its case against the accused persons beyond reasonable doubt. The prosecution case as submitted by the defence was solely based upon circumstantial evidence that is to say that the accused persons where the ones last seen with the deceased.

14. It is a fact that none of the prosecution witnesses witnessed the accused persons or any of their attack the deceased. The only nearer evidence is that of Pw5 to the effect that when arrested the 2<sup>nd</sup> accused had

fresh bruises which were allegedly sustained while fighting the deceased. No evidence was tendered to confirm whether there was any fight between the same and the deceased and if so at which place and whether the deceased died from the said fight.

15. There is also no evidence on record to support the prosecution submission that the accused persons were the ones last seen with the deceased as pw1 testified that he first saw the 3<sup>rd</sup> accused with the deceased on a motor bike while under cross-examination he stated that they were in a car and further the pw2 who was with pw1 did not corroborate his evidence.

16. I would therefore agree with the submission by the defence and upon the authority of R V JOSEPHAT MUIRURI MERU HIGH COURT CRIMININAL CASE NO. 168 OF 2002 that in law suspicion alone, no matter how strong cannot be a basis for conviction.

17. Having found as a fact that there is doubt as to whether the accused persons were the last persons to have been seen with the deceased and the accused persons having given their defence which have not been disapproved by the prosecution this discharges the burden placed which upon the accused persons as submitted by the prosecution under Section 111 of the evidence act.

18. As regards malice aforethought I would agree with the submission by the defence that as per the evidence of pw2 it was a mere joke between the accused persons and that deceased that they would beat him if he did not buy them alcohol on the material day and could not be construed as an intention to kill the same for declining to go with them for drinking as evidence on record shows that he thereafter went with them to the drinking den.

19. I therefore find that the prosecution has failed to prove its case beyond reasonable doubt against the accused persons and therefore acquit all the accused persons under the provisions of Section 215 of CPC.

20. The accused persons shall be set free forthwith unless otherwise lawfully held.

**Delivered, signed and dated at Kisii this 2<sup>nd</sup> day of July 2015.**

**J. WAKIAGA**

**JUDGE.**

**In the presence of:**

**Mr. Onderi advocate for Mr. Ochoki the accused persons.**

**Mr. Mojale for the state.**