



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

H.C. CRIMINAL CASE NO. 7 OF 2013

REPUBLIC -----PROSECUTOR

VERSUS

CLEOPHAS BARUA IDEWA----- ACCUSED

JUDGMENT

1. On 12th February 2013, Johnstone Simiyu (Deceased) succumbed to injuries that are said to have been inflicted on him on the previous night. A Post Mortem conducted on the body of the Deceased on 18th February 2013 revealed that the cause of death was a severe head injury secondary to blunt force trauma.
2. Cleophas Barua Idewa faces a charge of Murder contrary to Section 203 as read with Section 204 Penal Code. It is alleged that he murdered the Deceased on 11th February 2013 at Oukureu location Amogoro Division within Busia County. The Prosecution lined up 5 witnesses to prove this allegation.
3. Julita Simiyu (PW3) is the wife of the Deceased. On 11th February 2013, she was indisposed and she remained at home. While at home a person by the name Emuyu visited the home. He was a friend of the Deceased. Shortly upon his arrival Emuyu made a telephone call and a lady by the name Mary came by. It was the evidence of the witness that Emuyu and Mary exchanged warm greetings and Mary left.
4. At around 1.00 p.m. Mary returned with food which she served to Emuyu and the Deceased. Mary then joined them for drink. At about 6.00 p.m. Emuyu and Mary left together. The Deceased remained behind in the house.
5. At about 8.30 p.m., on the same night, the witness says that she heard Emuyu screaming. He was shouting

“I am dying Barua is killing me.”

She also heard someone else shout.

“Someone has stolen my wife”.

That the voice was that of Barua. At this juncture the Deceased left the house and intervened and separated Emuyu and Barua. Later at 9.00 p.m. she heard a voice of someone called Ekim threatening,

“open your door before I reach there”

Suddenly Ekim forced the door to the room open and held the Deceased by his trouser and dragged

him out. The two started to fight in front of the house. Shortly, Barua came in with his other son Babu. They were armed with sticks and a club. They too confronted the Deceased and accused him for spoiling Barua's wife. They assaulted him.

6. That they used sticks and punched him on his chest and abdomen. They also used bricks that were outside the house to hit the Deceased on his head. The witness told court that she was able to see and recognize the Deceased from the assistive light of the telephone handset that Babu carried. She also alluded to some moonlight. The witness raised an alarm by screaming and one David Waswa and Etyang came to their rescue but only to find the assailants leaving the scene.
7. On that day Jacob Omugogo (PW4) was at the home of PW3 and Deceased. The two are grandparents of PW4. In support of the evidence of PW3, the witness told Court about how Mary and Emuyu visited the Deceased and how the three enjoyed a drink of alcohol. Sometime later the visitors, Mary and Emuyu, left and the Deceased remained behind. According to the witness the two left after dark.
8. But later, Barua and his two sons came to the home of the Deceased. His two sons are Ekim and Babu. They forced the door open and they dragged the Deceased out. That they dragged him up to under a mango tree and assaulted him. It was the evidence of the witness that Barua used a brick which he had picked from within the compound to hit the Deceased on the head. On his part Ekim used a stick to hit the Deceased on his chest, while Babu hit him on the hand. The witness said that although it was dark, Barua had a telephone handset with an Assistive light. That it was only Barua who had a handset that produced the light.
9. Peter Khaemba Wafwafwa (PW2) is a Village elder of Kakeu village and is a blood brother of the Deceased. While at his home on the 11th February 2013 at about 10.00 p.m. he received some visitors. Amongst them was one David Waswa. They informed him that the Deceased had been assaulted by Barua and members of his family. He immediately left for the home of the Deceased. There he found the Deceased lying under a tree within the compound. The Deceased was in critical condition and was unable to speak. Using the Assistive light of his mobile handset, he saw that the Deceased had injuries to his head. At the scene he found PW4. After speaking to the young boy, he called the Chief a Mr. Barasa (PW1) and informed him that PW4 had told him that Barua and his sons had killed the Deceased.
10. The witness helped take the Deceased to Kocholia Hospital where the Deceased received some medication and was discharged. However on the following morning his condition deteriorated and he was returned to hospital at 8.00 a.m. Later, the Deceased passed on.
11. Joshua Ikunsai Barasa (PW1) received the news of the assault of the Deceased from PW2. He instructed PW2 to mobilize young men to take the Deceased to hospital. The following day he visited the home of the Deceased at about 7.00 p.m. only to find that the Deceased had been taken to hospital earlier in the day. The witness later received news of the death of Deceased.
12. David Ochieng Okoth (PW5) is a Police Officer and was at the material time attached to Malaba Police station. On 12th February 2013, at about 11.00 a.m. he together with Chief Inspector Murithi, PC Gikonyo and PC Ekayi visited a scene of murder at Olukureu location. On reaching, the scene they established that one Johnstone Simiyu (the Deceased herein) has been murdered. The body was removed for preservation at Bungoma District Hospital mortuary. It was his evidence that after the incident the Accused and his sons who were suspects disappeared. The witness however stated that the police found the Accused Person in his house later on that day (12th February 2013) and arrested him. At the time of testifying before Court on 15th November 2014, the other two suspects were still at large.
13. Doctor Were Mbiri (PW6) is a Medical Officer at Bungoma District Hospital. He produced the Post Mortem Report in respect of the Deceased that was prepared by Dr. Raymond Damba following an examination on the body of the Deceased on 18th February 2013. The significant findings by the Doctor on the external appearance of the body were early predatory markings. The witness explained that rodents had eaten part of the skin. On the Internal appearance of the body, the Doctor observed abnormality on the head. There was Bi-temporal Muscles Hematoma and massive Bilateral Subdural Hemorrhage. As the Doctor was required to ascertain the cause of death of the Deceased, he returned an opinion that it was because of severe head injury Secondary to Blunt Force Trauma.
14. In Defence, the Accused gave an unsworn statement. He told court that he is a farmer and that on

11th February 2013 he remained at his home until 12.00 noon, when he left for Malaba. He later returned home at 7.00 p.m. and remained with his family at home. That he never left his home on that night. On the next day he proceeded on his normal duties. That at around 4.00 p.m., some police officers visited him and asked him to accompany them to Amagoro Administration Police Camp and later to Malaba Police Station. While at Malaba Police Station he was informed of the death of the Deceased and asked about it. He was then locked up and later arraigned in court facing the current charges. He denies the offence.

15. So as to establish its case the Prosecution had to prove, beyond reasonable doubt, that the Accused inflicted or aided in inflicting the wounds that caused the death of the Deceased. And Secondly, that the Accused Person possessed malice aforethought. On the first limb, the Prosecution case would have to hinge heavily on the evidence of PW3 and PW4 who are said to be eye witnesses.
16. There is undoubted evidence that on 11th February 2013, the Deceased, one Mary and one Emuyu spent the afternoon drinking alcohol and generally making merry at the home of the Deceased. Present in the house was the Deceased's sick wife (PW3) and grandson (PW4). There was also evidence that in the evening of that day, the visitors left and the Deceased remained behind in his house. In her Evidence in Chief PW3 put the time of departure at about 6.00p.m. While PW4 says that they left when it was already dark.
17. That at about 8.30 p.m, PW3 heard Emuyu Screaming out,

“I am dying Barua is killing me”

It was also her evidence that she heard Barua say

“Someone has stolen my wife”

It is not quite clear how she recognized those voices as the Prosecution did little to probe the issue of voice recognition. Anyhow, that the witness saw Emuyu and Barua fighting and the Deceased intervened and separated them. Noteworthy, however, is that PW4 who was in the same house as PW3 and the Deceased never mentioned this incident in his evidence.

18. The evidence of both witnesses (PW3 and PW4), is that later on that evening the Accused Person and his two sons stormed into the house of the Deceased. PW3 was more specific on time. She said it was at about 9.00p.m. Clearly darkness had set in because, according to PW4 it was already dark when Mary and Emuyu left earlier that evening and the invasion happened sometime after that.
19. PW4 was doing his homework when the alleged assailants made entry, while PW3 was sleeping with the Deceased. It was the evidence of PW3 that before Ekim (a son of the Accused) forced the door open he had shouted,

“open your door before I reach there”

What the Prosecution failed to establish is how the witness recognized that the voice of the person shouting was that of the Ekim.

20. It was the evidence of PW3 that Ekim forced the door open and accused the Deceased of spoiling his mother. He held the Deceased by the trouser and dragged him out. Thereafter the Accused and his son Babu joined in assaulting the Deceased. The version of PW4 was that the Accused and his two sons Ekim and Babu forced the door open and dragged the Deceased out.
21. Posing there for a moment, how did PW3 and PW4 identify the people who stormed into their house on the night of 11th February 2013 and drag out the Deceased? There is evidence that darkness had set in and although PW4 was doing his homework, no evidence was led on the source and/or quality of the light in the house. As to the recognition of the voice of Ekim, the Prosecution never inquired from PW3 how she was able to tell that the voice was that of Ekim. And no questions, such as, how often the two spoke and when they last spoke were fielded to help the Court test the reliability of that evidence. Sadly, as will soon be apparent, these were not the only failings on the part of the Prosecution.

22.The Court now turns to incident outside the house. It is alleged that the theatre of violence was compound of the home of PW3. Both PW3 and PW4 gave concurring evidence that the Accused and his two sons Ekim and Babu assaulted the Deceased under a mango tree. How were the two able to see and recognize the assailants? PW3 stated,

“I was able to see and recognize them from the light from the telephone. There was also some light from the moon but they were assaulting the Accused under a mango tree. It was dark there”

The witness had earlier testified that Babu carried the telephone handset that provided light. In cross-examination the witness stated,

“This happened under a mango tree. It was dark and light was needed to see the going on. The assailant used light from mobile phone handset”

23.As for PW4, he stated,

“Babu dragged the Deceased out where they beat him. I was outside with my grandmother screaming. It was dark. Barua had a phone handset with light.”

Barua is the Accused herein. Aside from the contradiction of the evidence of the witness and that of PW4 as to who between Babu and the Barua had the handset that provided light, it seems to me that what the

witnesses were telling court was that the primary source of light was that from an Assistive light of a telephone handset.

24.The downside of the Prosecution case was that no inquiry was made to test the quality of that light and of recognition generally. No question was posed on the intensity of the light. There was no interrogation of how the two recognized the assailant? Did they see the faces of assailants or did they see or notice some other special features on the assailant that made them recognize them? No examination was done as to whether the view between where the witnesses stood and where the assault took place was clear or impeded? Such questions would help the Court reach a decision as to whether the evidence of recognition was reliable.

25.The manner in which the Prosecution treated both the voice and visual recognition was, with respect, most unhelpful. It is for this reason that the Court reaches a decision that the Prosecution did not prove, to the standards required in Criminal Law, that PW3 and PW4 identified or recognized the people who dragged out the Deceased from his house and assaulted him. Having failed to do so, it is needless for this Court to evaluate the rest of the evidence.

26.Before ending this Decision, I feel constrained to make one observation. Where the circumstances of a case reveal that identification is difficult but there is evidence of voice recognition or visual identification or recognition, it is an elementary duty of the Prosecution to lead a detailed and relevant scrutiny on the quality of such voice or visual identification/recognition. When this is not done then the Court is left anxious because in an adversial System of Justice the intervention of Judge at trial is limited. The Judge may not do more than to

“...Hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the role of an advocate” (Lord Denning, L.J. in Jones V National Coal Board (1957) 2 ALL ER 155 at page 159)

27.For the reasons given, this Court finds that the Prosecution has failed to prove that Cleophas

Barua Idewa murdered Johnstone Simiyu. This Court Acquits the Accused Person. He shall be set at liberty unless held for some other lawful reason

F. TUIYOTT

JUDGE

DATED, SIGNED AND DELIVERED AT BUSIA THIS 7th DAY of JULY 2015

IN PRESENCE OF:

OILE.....COURT CLERK

ONSONGO.....FOR ACCUSED

OBIRI.....FOR STATE