



**IN THE COURT OF APPEAL**

**AT ELDORET**

**CORAM: OMOLO, GITHINJI & WAKI, J.J.A**

**CRIMINAL APPEAL 27 & 28 OF 2004**

**BETWEEN**

**1. LAZARUS WANJALA MUSUBILI**

**2. JOSEPH WEKESA MASINDE.....APPELLANTS**

**AND**

**REPUBLIC.....RESPONDENT**

**JUDGMENT OF THE COURT**

The appeals of **LAZARUS WANJALA MUSUBILI** and **JOSEPH WEKESA MASINDE**, the appellants herein, were consolidated and their learned counsel *Mr. J.W. Wafula* argued the two appeals together and the issues he raised in respect of the appeals were the same. The appellants were tried and convicted on a joint charge of manslaughter contrary to **Section 202** as read with **Section 205** of the Penal Code. The particulars of the charge were that on 3rd July, 1994 at Birunda Farm, *Birunda Sublocation* in *Trans Nzoia District*, the two appellants jointly unlawfully killed *Benjamin Wanyonyi* hereinafter “the deceased”. Upon being convicted on that charge by an acting Principal Magistrate at Kitale, the appellants were, on 10th November, 1999 some four years after the offence, sentenced to five years imprisonment but it appears that having lodged their appeals in the High Court they were subsequently released on bail pending the hearing of their appeals. Their appeals were eventually heard by a Commissioner of Assize, *Mr. Birech* who by his judgment dated 24th September, 2003, dismissed the appeals, cancelled their bails and ordered them to start serving the sentence of five years imprisonment imposed on them by the trial magistrate. *Mr. Wafula* informed us that the appellants are serving their sentence and will come out of prison in 2008 unless their appeals to this Court are allowed.

From the foregoing narration, it is clear that these are second appeals and the Court can deal only with matters of law. *Mr. Wafula* contended that there were two issues of law for the consideration of the Court. The first such issue was the failure by the prosecution to call as a witness the mother of the two appellants, one *Mary Masinde*. The evidence adduced before the trial court shows that the deceased was found stealing cassava from a shamba belonging to the family of the appellants. He was beaten to death and *Mary Masinde* ran to the home of the deceased and informed *Rose Wanjala Wanyonyi (P.W.1)* who was the wife of the deceased that the deceased was at her home.

*Mr. Wafula* argued before us that *Mary Masinde* was a vital witness in the sense that she must have seen the persons who had assaulted the deceased and since the prosecution chose to leave her out, he

contended that the magistrate and the superior court ought to have drawn the inference that the prosecution did not call Mary Masinde because they knew that if she had been called to testify, she would have given evidence adverse to the prosecution. That principle was established by the Court of Appeal for East Africa in the Ugandan case of **BUKENYA AND OTHERS V. UGANDA** [1972] E.A. 549. Mr. Wafula relied heavily on that case. The holdings in that case relevant to Mr. Wafula's arguments are to be found in page 549 of the report and they are that:-

“(i) -----

***(ii) The prosecution must make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent;***

***(iii) The Court has the right and the duty, to call witnesses whose evidence appears essential to the just decision of the case;***

***(iv) Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution”***

This case has been faithfully followed in various decisions which Mr. Wafula cited to us, such as **NG'ANG'A V. REPUBLIC** [1981] KLR 483 wherein it was stated.

***“The prosecution may elect not to call a material witness but they do so at the risk of their own case-----“***,

and **NGUKU V. REPUBLIC** [1985] KLR 412 where it was also held that:

***“Where a party fails to produce certain evidence, a presumption arises that the evidence, if produced, would be unfavourable to that party; this presumption is not confined to oral testimony but can also apply to evidence of tape recording which is withheld.”***

There was no dispute on the recorded evidence that it was Mary Masinde who went to the wife of the deceased and informed her about her husband having been found stealing cassava and being beaten. The wife gave evidence as P.W.1. She did not say that Mary Masinde had told her the names of the persons who assaulted the deceased. In her evidence she specifically stated that when she arrived at the home of Mary Masinde she found only the deceased and the two appellants. Then there was the evidence of **Saulo Wafula Zephania (P.W.2) and Richard Mutende Mwerema (P.W.3)**. These two stated in their evidence that upon hearing cries for help they separately went to the scene and each was emphatic in his evidence that upon arrival, they found only the deceased and the two appellants and that the appellants were assaulting the deceased. **Mary Masinde** was not there and both the trial Magistrate and the superior court believed the evidence of **P.W.1, P.W.2 and P.W.3**. There was nothing inherently improbable in the story given by these witnesses and the two courts below were entitled to believe their evidence. P.W.2 and P.W.3 never saw Mary Masinde at the place where the deceased was being assaulted. It is clear from the evidence that the deceased was taken to the compound of Mary Masinde from the cassava Shamba where P.W.2. and P.W.3 found him being assaulted. Only the two appellants were with the deceased and Mary Masinde must have gone to the home of the deceased after the deceased had been brought to her compound.

In these circumstances what adverse evidence could **Mary Masinde** have given against the prosecution? She was never at the scene of the assault and as we have pointed out, she herself never told **P.W.1** that she had seen the persons who had assaulted her husband. We are satisfied like, the two courts below, that Mary Masinde was not a material witness and in terms of the **BUKENYA** case the evidence of **P.W.2** and **P.W.3** could not be described as barely adequate. They said they saw the two appellants assaulting the deceased and even if there had been other persons at the scene, that would not have lessened in any way the involvement of the two appellants in the assault upon the deceased. We reject the contention by the appellants that the failure to call Mary Masinde affected the prosecution's case in any way; it did not.

The second issue of law raised by *Mr. Wafula* was that the superior court denied the appellants their constitutional right to be represented by an advocate of their choice. It appears that in both the subordinate court and in the superior court the appellants were represented by *Mr. Nyabochwa Advocate*. It was the firm of *Mr. Nyabochwa* who filed the appellants' petition of appeal in the superior court. The record of the superior court shows that the appeal first came up for hearing on 6th June, 2003; the appellants were present but *Mr. Nyabochwa* was absent. It appears he had been absent on two previous occasions. The appellants asked for the adjournment and the matter was adjourned to 18th July, 2003 but the hearing resumed on 16th September, 2003. The appellants were present but once again *Mr. Nyabochwa* was absent. The appellants did not ask for an adjournment. Instead, they told the court,

**“We are ready to proceed with our appeal”**

In the face of this statement by the appellants, we are at a loss to understand Mr. Wafula's contention that the superior court deprived the appellants of their constitutional right to be represented by counsel of their choice. Nothing of the kind took place and we must reject that contention as well.

These were the issues of law raised before us. We have rejected each one of them and the consequence must be that the consolidated appeals by the two appellants must fail. We order that the appeals as regard the conviction be and are hereby dismissed. The sentence imposed on each appellant was lawful and we cannot interfere. In the event the appeals are dismissed in toto.

**DATED and DELIVERED at ELDORET this 23rd day of September, 2005.**

**R.S.C. OMOLO**

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**JUDGE OF APPEAL**

**E.M. GITHINJI**

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**JUDGE OF APPEAL**

**P.N. WAKI**

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**JUDGE OF APPEAL**

**I certify that this is a**

**true copy of the original.**

**DEPUTY REGISTRAR**