



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL CASE NO. 18 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

MOSES EKAROT ORAMISI.....ACCUSED

JUDGMENT

1. Deogracious Ania (The Deceased) was found lying along Ateret/Aletio murram road by John Odima Akune (PW1). It later turned out that he may have dead by this time. The Doctor who performed a Post Mortem examination on his body returned an opinion that the cause of the death was hypovolaemic shock secondary to External bleeding. Moses Ekarot Oramisi (the Accused) faces the charge of Murdering the Deceased on the night of 1st and 2nd December 2012 at Apegei location, Chakol Division within Busia County. That offence is contrary to Section 203 as read with Section 204 of the Penal Code.

2. On the fateful night there was a fundraising at the home of Alex Auta. Many people attended the Harambee. Also served at the Harambee was traditional alcohol. It is the evidence of PW1 that about 3.00a.m. four young men being the Accused, Emuje Emuje, Ofula and a brother of the Deceased and two girls came to where the visitors were drinking. The young men threatened to beat up the Deceased. And that the Accused held the Deceased by the neck. The people present separated them.

3. Fifteen (15) minutes passed and the witness heard noises from a neighbouring farm, about 100 meters away. The two girls were complaining that the four young men had attempted to rape them. The Deceased responded to the distress call of the girls and went to where the noises came from. He returned after 2 minutes and told the gathering that the four had attempted to rape the girls.

4. After a short while, the Deceased answered to a call of nature. It was at that point that the witness heard some noises from the road. On reacting to the noises he saw the Deceased lying down. Beside him was the Accused who was holding a rungu. In cross-examination the witness said that Accused was holding a piece of firewood. That when Moses saw the witness, he ran away. The witness then tried to attend to the Deceased but at this point one Emuje Emuje hit him. PW1 fell to the ground and on coming round he returned to the place where the Harambee was being held and informed the people there what had happened.

5. John O. Outa (PW2) is the father to the Deceased. On the morning of 2nd December 2012, at about 4.00a.m., he got information that his son had been killed. He visited the scene which was on a road. There he found his son dead. His son had injuries to his ribs and neck. He was bleeding from his mouth

and nose. The witness later identified the body of the Deceased to Dr. Patson Kubuta(PW5) who conducted a Post Mortem on the Deceased's body.

6. The Post Mortem was conducted on 5th December 2012. The external appearance of the body revealed that the Deceased had bruises on the submental area (chin), indurated (curving) of the chest, fracture of the sternum (middle bone of the chest) and extensive inflammatory swelling on the mandular area. The Doctor also conducted an internal examination of the body. He noticed that the lungs had partially collapsed. There were features of bleeding in the chest cavity and blood around the pleural space. There was also extensive free blood in the abdomen. The Doctor formed the opinion that the Death of the Deceased was caused by Hypovolaemic shock secondary to internal bleeding.

7. Cpl. Erick Kasamba (PW6) investigated the circumstances surrounding the Death of the Deceased. Members of the public informed him that some suspects were at large. On 24th July 2014, Dismas Omela Ania (PW3) identified the Accused to two Administration Police Officers who arrested him. Cpl. Michael Ochola (PW4), a Police Officer attached to Adungosi Police Station and three of his Colleagues proceeded to Muhoroni on 17th July 2014 where they re-arrested three persons but released two. The person who was not set free was the Accused.

8. Invited to make his Defence, the Accused made a short unsworn statement. There is no difficulty reproducing it verbatim,

"I am Moses Ekarot. I hail from Apegei. On the night of 1st and 2nd December 2012 I was at home Kajoro. I never heard any report. I heard about the death of the Deceased after I left for Muhoroni where my father works. I got to know this when I was arrested at night at about 9.00p.m. and taken to Mohoroni Police Station and later to Adungosi where I was told about the charge I face. I did not kill the Deceased. That is all."

9. PW1 knew the Accused as his neighbour. The Evidence of the witness is that he saw the Accused at about 3.00 a.m. when he in the company of three young men and two girls, came to the venue of the Harambee. The four caused a commotion and that he saw the Accused hold the Deceased by the neck but the people present separated them. Later the witness says he saw the Accused holding a weapon (rungu or firewood) standing beside the Deceased who was lying down. The Deceased had sustained injuries to which he succumbed.

10. The Accused was known to the witness as they were neighbours and the evidence of PW1 would be that of recognition. But this was in the night and although there was moonlight, this is how the witness described the quality of that light:-

The moonlight was not bright enough but I was able to see well.

The Defence Counsel had referred this Court to proceedings in Busia Criminal Case No. 21 of 2012 **Republic Vs- Vincent Iswat Ekasiba** in submission that the Accused herein was charged only on the basis of suspicion. In that Trial Vincent Iswat Ekasiba had been charged (but acquitted) of the same murder which the Accused now faces. Looking at the evidence of PW1 in the proceedings in **Vincent Iswat Ekasiba (Supra)**, describing the same incident, one notices that it is remarkably consistent with what the witness testify here. This is what PW1 said:

"At 4.00 a.m. I heard noises from the road. I went to where the noises were I found Moses Ekarot holding one wooden plank and another was on the ground. These are the planks [PMFa + 1b]. When I saw Moses he was 6 meters away. I was able to see him because there was moonlight. It

was bright enough for me to see him.

The Deceased lay where Moses stood. As I approached, Moses ran away. I tried to assist the Deceased to wake up, one of the boys hit me on the head. I do not know where they emerged from. The person who hit me is Emuje Emuje I fell and lost conscious”.

11. That said the quality of light may not have favoured easy recognition and this Court must heed the warning sounded in **Abdulla Bin Wendo & Another Vs. Reg(1953) 20 EACA 166** and followed in **Roria Vs. Rep (1967) EA 583**.

“Subject to certain well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error”.

So where if any, is the evidence that provides corroboration" The Prosecution case is that after the incident the Accused disappeared from his home and was at large. Indeed it took the police from early December 2012 to 14th July 2014 to arrest the Accused at Muhoroni. This was about 19 (nineteen) months later. How did the Accused explain his absence from home" The Accused simply stated,

“ I heard about the death of the Deceased after I left for Muhoroni where my father works”.

The reason why the Accused moved out of home would be in the special knowledge of the Accused and Section 111 of the Evidence Act places an onus on the Accused to give a reasonable explanation.

12. This Court finds that the explanation given by the Accused was superficial and insufficient. All he said is that he had moved to Muhoroni where his father works. The Accused did not bother to corroborate this. His father would have given useful evidence in this regard. The Accused is facing a serious charge but chose to give an explanation that was far too casual to be sufficient.

13. The unusual or strange conduct of an Accused person soon after an incident may offer support for the Prosecution case (**Malowa vs Republic [1980] eKLR**). This Court finds that the conduct of the Accused of changing his place of abode soon after the incident supports the evidence of PW1 that he saw the Accused standing over the body of Deceased as he lay down injured. The Accused was holding a weapon. The Post Mortem result shows that the nature of the weapon was consistent with the injuries sustained by the Deceased and to which he succumbed. And the conduct of the Accused, soon after the incident, was not consistent with one of innocence. It is my finding that the Accused, alone or with others, inflicted the fatal wounds on the Deceased.

14. What about the aspect of *Mens Rea*" Mr. Owiti, State Counsel, submitted that the Post Mortem Report revealed massive injuries and that the person who inflicted them must have intended to kill the Deceased or at least to cause grievous harm. Indeed reading the Report, it seems that the injuries sustained by the Deceased were serious. But Mr. Owiti and I make these observations as lay Persons in the field of Medicine. One of the witnesses for the Prosecution was the Doctor who conducted the Post Mortem examination. If the Prosecution theory was that, given the severity of the injuries the person inflicting them must have only had an intention either to cause grievous harm or death, then the State Counsel should have led the Doctor to explain this. The State, however did not do so. The Doctor simply

set out the injuries sustained by the Deceased and his opinion of the cause of death without more. Unless the severity of the injuries are so obvious, it is preferred that the gravity of injuries be explained by an expert. Here the Court would have preferred an explanation by the Doctor. The Accused must benefit from the failure of the Prosecution to firm up its theory through Medical opinion.

15. The upshot is that I find the Accused person guilty of the lesser offence of Manslaughter. I do hereby convict him of the Offence of Manslaughter contrary to Section 202 as read with Section 205 of the Penal Code.

Dated, signed and delivered at Busia this 3rd day of December 2015

F. TUIYOTT

J U D G E

In the presence of:-

Mr. OileC/Assistant

Mr. Owiti for the State

Mr. Juma H/B for Manwari.....for Accused person



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