



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL CASE NO.10 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

PROTUS SIFUNA SIMIYU.....1ST ACCUSED

WILBERFORCE WEKESA SIMIYU.....2ND ACCUSED

JUDGEMENT

1. **The accused persons are charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal code. The particulars of the charge were that on the 28th day of March 2015 at Matunda Sirare village within Transzoia County jointly with another not before court murdered JOSEPH ESINGAH.**
2. The accused each denied the charge and the prosecution called several witnesses to prove its case. Their evidence is worth a summary before looking at the merits or otherwise of this matter.
3. **PW1 JOHN NABIBIA WEPUKHULU** testified that on the material day, 28th March 2015 at around midnight he was sleeping in his house when he heard some people talking and saying that someone was being beaten. He woke up and when towards the scene and on the way he met the first accused Protus. They found the deceased sitting down and one Job was hitting him on the head. The second accused Willie came with a metal rod, “*tarimbo* “.
4. He went on to state that when the deceased heard his voice he told him that he had been killed. He saw blood oozing from the head. Job who wanted to beat him also told him that the deceased had assaulted his sister. The deceased thereafter left for his house.
5. He advised them to go to the village elder but the 1st accused left before reaching the village elders house. They woke him up and told him what had transpired. He further said that Job told them that the deceased had gone to their home and abused them and beaten their sister. The following day he went to his house where he found him lying at the door. He was taken to the hospital but they received a report that he had died.
6. When cross examined he said that he did not witness the deceased being assaulted and that he did not know where the deceased got the injuries as he found him already injured.
7. **PW2 DR FAUSTIN SHITOTE** produced the post mortem report on behalf of Dr. Odhiambo who found that the deceased had sustained serious bodily injuries and that the cause of death was severe head injury.
8. **PW3 WACHIRONGA JOSEPHAT** testified that he was in charge of *nyumba kumi* in his village. He said that at midnight of 28th March 2015 while asleep in his house he was woken up by PW1 and as he opened the door he met him together with the 2nd accused and Job. He told him the two had beaten up the deceased. The 1st accused was not there. The 2nd accused had a metal rod and a stick. He told them to report to the police.

9. The following day he heard people screaming and they came to inform him about his death. On cross examination he said that he did not witness his death. He said that he gave the iron rod to the police.

10. **PW4 PC GEORGE ORINA** carried out the investigations by recording witness statements after the matter was reported at the station on 30th March 2015 by pw1. He said that the deceased had a problem with his wife because of extra marital affairs. That the deceased had assaulted her and her family took her to the hospital where she was treated and discharged. Her family together with the accused persons retaliated on the same day. They assaulted him using crude weapons and pw1 the following day went to his house and found him injured.

11. He was taken to Matunda hospital but was referred to Kitale referral hospital but died while undergoing treatment. He said that after arresting the two they did confess to him although there was no formal confession. He said that one Job was still at large. He went ahead and produced the iron rod which was given to him by the village elder.

12. When placed on their defence the accused gave unsworn evidence denying the charge. The first accused **Protus Sifuna Simiyu** said that on 28th March 2015 he went to his work at Western Seed where he is a guard and he came back at 6pm where he had dinner with his family. At night he heard people screaming at the road and he rushed to the scene where he met the deceased with his brother in law Job Simiyu who told him that the deceased had injured his wife.

13. The deceased was bleeding and they went to *nyumba kumi* house. He went to his home and later to his work when he heard that he had died. He was arrested on 3rd April 2015 and charged with the offence.

14. Accused 2 **Wilberforce Wekesa Simiyu** testified that the deceased was his father. That on 28th March 2015 he went to plant vegetables in the farm of Joseph Natembeya and thereafter they went to drink alcohol with one Julius Natembeya where they met the deceased but left thereafter as they did not like the alcohol.

15. He went on to state that the deceased passed near his home and had removed his shirt and was harmed with a hammer. He heard him say that "*nimemalisa*". He met Amos Namatayo who was alleged to be the deceased wife's boyfriend. They went with a metal bar and broke his house. The issue was later resolved by the village elder Joyce Pepela.

16. Later at night between 9 and 10pm he heard people screaming and he rushed to the scene where he found Job holding the deceased who was bleeding from the head. Job told him that he was returning him to his house after disciplining him. They took him to the village elder where they left the metal rod. He was later arrested and taken to Kiminini police station where he alleged that he was beaten and his kidney injured.

17. The parties after the close of the defence case were ordered to file written submissions which apparently were only filed by the state counsel. The substantive ingredient of the offence of murder is malice aforethought. The critical aspects of this legal principle which must be established include the cause of death which must have been caused by the unlawful act or omission on the part of the accused and that such act were committed with malice.

18. The cause of deceased death was injury due to severe head injury as found by the pathologist. The evidence by pw1 in particular seemed to have exonerated the accused persons in terms of their direct involvement. The person mentioned by the witness was one Job Simiyu who was the brother in law of the deceased.

19. Pw1 stated that accused one did not do anything while the 2nd accused was holding a metal bar when he arrived at the scene. He said that Job had beaten the deceased after he assaulted his sister.

20. The learned state counsel has submitted that circumstantially the accused are connected to the deceased death. Although this may have been the suspicion, the key witness pw1 did not find them assaulting the deceased. The name of Job Simiyu featured prominently. Although accused two may have been seen with the metal rod there was no evidence that he used it to assault the deceased.

21. More importantly, the incident occurred at night. The entire thread of the prosecution case did not touch on the issue of the light at the scene. Was there any light sufficient enough to have enabled the witnesses see the whole tragic episode." It appears and this was not contested that the deceased had issues with his wife. He had accused her of extra marital affairs and from the evidence

gathered by the investigating officer it was a habit for the deceased to have beaten her. On the material period she had been taken to the hospital earlier in the day.

22. From the evidence on record it is apparent that there is no direct nexus linking the accused and the offence. The real suspect was the said Job Simiyu whose whereabouts was not explained even by the investigating officer. There seems to have been no efforts to trace and arrest him.

23. For the above reasons the prosecution has not demonstrated any malice aforethought on the part of the accused. There is no sufficient direct or circumstantial evidence to link the accused and the offence.

24. They are hereby set free under the provisions of **Section 215 of the Criminal Procedure Code** unless they are otherwise lawfully held. The sureties are hereby discharged.

DELIVERED, SIGNED AND DATED AT KITALE THIS 11TH DAY OF DECEMBER 2020.

H K CHEMITEI

JUDGE.



While the design, structure and metadata of the Case Search database are licensed by [Kenya Law](#) under a [Creative Commons Attribution-ShareAlike 4.0 International](#), the texts of the judicial opinions contained in it are in the [public domain](#) and are free from any copyright restrictions. Read our [Privacy Policy](#) | [Disclaimer](#)