



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Case 90 of 2004

REPUBLIC.....PROSECUTOR

VERSUS

EVANS SIBO NZARIA &

EVANS ONGECHI NYASIMI.....ACCUSED

JUDGMENT

The accused persons, Evans Sibbo Nzaria and Evans Ongechi Nyamisi were jointly charged with others not before the court the offence of murder contrary to section 203 as read with section 204 of the Penal Code.

The particulars are that on the 15th day of December 2001 at Kisii village, Industrial area within Nairobi area province jointly with others not before the court, murdered Harrison Babu Maleya [hereinafter referred to as the deceased].

The prosecution called 6 witnesses in support of the state case.

Paramena Omwanyi Maleya (PW1) is the brother to the deceased. On 15th December 2001 the deceased woke up at his house and left about 5.00 am. He escorted him up to the gate. A few minutes later somebody by the name Kimeu Mbakuu informed him that his brother was being beaten by a mob. He rushed to the scene. It was his evidence that threereat he found Evans Sibbo Nzaria, Evans Ongechi Nyasimi, Kennedy Kamau and other people whom he hadn't known before. As he called the police on his mobile phone the assailants fled. About one hour later the police arrived. One officer was Evans Ndulu. The other he only knew by appearance. The said police officers picked up the deceased and took him to Kenyatta National Hospital. The deceased was talking incoherently then and died on arrival at the said hospital. He returned to Industrial Area Police Station where he was given a letter to take to the office of the chief, Azina Estate, so that the accused persons would be traced and arrested. He divulged to the chief the name of the assailants. He recognized them in court as the two accused in the dock.

It was his evidence that at the point of the assault were street lights. The said lighting system enabled him to recognize the accused persons whom he had known before the incident. The accused persons went underground and were later arrested in 2004.

Cross-examined by the defence lawyer he had this to say:

“Evans Sibbo had black and white T-shirt, a black coat and a black trouser. Evans Ogechi had a T-shirt and a jacket. I knew the accused person before. The first accused had a metal and the second accused

had a rungu...”

No. 67968 PC Philemon Ibiepai (PW2) recalled events of 15th December 2001. He received a call from Control Room Nairobi area to the effect that somebody had been assaulted by a mob. In company of Sergeant Mbai he proceeded to South C, Kisii village, in a Land Rover and found a group of people gathered by the roadside. One male adult was lying on the ground unconscious. On enquiry they were told that he was victim of mob justice. He was alleged to be a thief. One witness who turned up to be the brother of the deceased, said that he could recognize the assailants. That person is PW1. They facilitated the taking of the body to Kenyatta National Hospital. In the course of the day, he was told the person they had taken to the hospital had passed on. Inspector Langat took over the investigations from them. In 2004 he was informed that the two suspects had been arrested. He then recorded his statement.

Pius Kimeu (PW3) was on his way to work on 15th December 2001 about 5.30 am. He witnessed a fight within Kisii village. On arrived at the scene he discovered that the victim was known to him. He then informed PW1 that his brother was being beaten by a group of 8 people. He identified Evans Sibbo (A1) and Evans Ogechi Nyasimi (A2) as some of the assailants. The victim was swollen of the head and blood was oozing from his chest. Cross-examined by the defence counsel he testified thus:

“There was moonlight. It was 5.30 am. There was electricity. Where I was and where fighting was going on was 5 metres away. I saw the second accused. When I came back with the brother of the deceased I found two people.”

However he had not known the accused persons before. The deceased had a swollen head at the back of the head. He had also had a wound on the neck. He saw the second accused running away from the scene.

No. 210723 Cpl Silvestine Mokaya (PW4) was attached to Huruma Chief’s camp in 2003. He recalled that on 20th April 2008 one Peratum Wairimu (PW1) brought a letter from OCS Industrial Area ordering him to arrest two people whom the bearer of the letter would facilitate the identification of. In the company of PW1 he went to Kisii, village in Nairobi, and arrested the two accused persons whom he identified in court.

Dr. Jane Wasike Simiyu (PW5), a pathologist with National Public Health Laboratories, attached to City Mortuary, had worked with Dr. Maundu between 2002 - 2004 at the City Mortuary. He produced the post-mortem report on behalf of Dr. Maundu who had since retired in terms of the of the provisions of section 33 as read together with section 71 of the Evidence Act.

It was her evidence that as a result of the examination he formed the opinion that the cause of death was head injury – brain haemorrhage – subdural. The post-mortem report was signed and dated 3rd January 2000. He produced it as exhibit 1.

In his defence the first accused, Evans Sibbo Nzaria, denied the offence. He raised an alibi that he was not in Nairobi on the fateful day. He came back to Nairobi 20th April 2004. When he went to Kisii village to collect some money he was arrested by three AP’s in uniform. He was taken to the chief’s camp and later to Industrial Area police station. He was charged with murder.

The second accused, Evans Ogechi Nyasimi, testified that he woke up in the morning of 15th December 2001. On his way to work, about 7.30 am, he met three boys, by the gate of the estate who narrated how a mob had beaten somebody who had stolen money. He accompanied them to Vitafoam mattress works. In the evening he went to buy food. On the way back he was arrested by an AP from South B chief’s camp. He denied the charge.

The prosecution maintained that the prosecution had established the case of murder beyond reasonable doubt. The defence on the other hand contended that PW1 only came to the scene after PW2 had summoned him. He was not an eye witness. That in any event PW2 confirmed that there was a mob

justice inflicted on deceased by the road-side. That the arrest of both accused was at the instance of PW1. No investigation was ever carried out. That the medical evidence was not conclusive in any event.

That there is only one eye witness (PW1), who is coincidentally also the brother of the deceased, who maintained that he found Evans Sibon Nzairia, Evans Ongechi, Kennedy Kamau and some other people beating the deceased. When he called the police on his mobile phone the mob dispersed. That he had known the accused persons before this incident. Other than himself there is no other eye witness account of the events of that fateful morning.

In my view this case turns on credibility of PW1. He claims to have found the two accused persons at the scene and that he had known them before. That he reported the incident in 2002 contemporaneously with the assault on the deceased. The two accused were arrested two years later.

I have had the advantage of seeing PW1 in the witness box. He did not strike me as a straightforward person. Although he claimed to have known the accused person before he did not elaborate how and in what circumstances he knew the two accused persons. The incident happened about 5.30 am. Although PW1 claims that there was electricity and moonlight at the scene, I have doubt about his evidence. He did not strike me as an independent witness. He appeared to me to have a grudge which he was out to square with the two accused persons. No investigation was ever done in this matter and in my considered view it would be extremely dangerous to nail the two accused persons on the evidence of one witness who in my opinion is not partial but whose evidence is equally doubtful.

Accordingly, I am not satisfied beyond reasonable doubt that the two accused were properly recognized while in the process of beating the deceased. I therefore return verdict of NOT GUILTY in respect of both accused persons. The two accused are therefore set free unless lawfully held for some other lawful reasons.

Dated and delivered at Nairobi this 30th day of November 2007

N.R.O. OMBIJA

JUDGE