



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL CASE NO. 5 OF 2019

REPUBLIC.....PROSECUTION

VERSUS

ISSAC KALABAI.....ACCUSED

J U D G M E N T

The accused **ISAAC KALABAI** is charged with the offence of Murder contrary to section 203 as read with Section 204 of the Penal Code.

Particulars of the offence is that on the 20th day of January 2019 at Sindani Village of Kimilili sub location at Kimilili Sub-County within Bungoma County murdered **PATRICK KALABAI MAKOKHA**.

The prosecution case is that the deceased Patrick Kalabai Makokha is the father of the accused Isaac Kalabai. The deceased wife was called Jennifer. On 20.1.2019 at around 8 p.m., **PW1 Margaret Akinyi Ekitar** who is a neighbor of the deceased was in her house when she heard Jennifer the wife of the deceased screaming for help. She went out and saw Jennifer running towards her house. She went to the house of Jennifer and saw deceased lying outside his house. she asked Jennifer what had happened and Jennifer told her deceased had assaulted her. She then saw a taxi which took deceased to hospital. She then saw accused come back with deceased and carried him to the house. Jennifer went and slept in her house. The next day she received information deceased had died.

On being cross-examined by Mr. Onkangi for the accused, she stated she did not see who assaulted the deceased nor did she observe any injuries on him.

PW2 Dickson Wandayi Wasike was in his house when he was informed by his wife that there was a fracas at the home of deceased. He found the deceased together with accused and his brother James. He observed and saw deceased had injuries on hands and ear. They called taxi and they took him to Kimilili cottage hospital where he was treated and discharged. The deceased told the hospital staff that he had been assaulted by his children. The next day he received information that deceased had died.

On being cross examined by Mr. Onkangi he testified that he accompanied the accused and his brother when taking deceased to hospital but did not see who had assaulted him but heard deceased say he was assaulted by his children.

PW3 Emmanuel Kalabai the son of the deceased aged 11 years old was in the house when deceased came home and asked where Jennifer their mother was. He informed him that she had gone to collect goats. When Jennifer came the deceased started quarreling with her. Jennifer ran out screaming. Deceased followed her. Jennifer was screaming for help. On seeing this the witness ran away. He stated that he did not see accused hit the deceased. He later saw accused and Dickson bring the deceased from hospital. The following day the deceased died.

On cross examination, he stated he did not see who assaulted the deceased.

PW4 Ann Kulabai the daughter of the deceased testified that the deceased quarreled with Jennifer over her coming late. Jennifer ran away to the house of Mary. Accused came and the (witness) ran away. She testified she did not see accused assault the deceased.

PW6 Andrew Wamalwa the taxi driver was called and took the deceased to hospital and he observed that he was bleeding. The deceased was saying that his children are the ones who had assaulted him. **PW8 Copl Paul Ngesa** attached to DCI Kimilili received a report that there was an incident of murder at Sindani area. He proceeded to the scene where he received information that accused was the one who had assaulted the deceased. Accused was arrested and later charged with the present offence.

PW5 Dr. Wanambisi Caleb Watta who performed the post mortem on deceased found he had multiple cut wounds on lower limb, cut on left ear, right wrist, abrasives on lumber area and a welling on abdomen. Upon opening the body, he found swelling and blood in the intestines. He formed opinion that cause of death was abdominal injury occasioned by blunt object.

The accused on being put on his defence gave sworn evidence. He testified that on the material day he was called by his brother who informed him the deceased wanted to speak to him. He went there and deceased told him he was in pain and wanted to be taken to hospital. He took him to Kimilili hospital where he was treated and they brought him back. The next day they took him to hospital where he was admitted and died while undergoing treatment. He denied that he assaulted the deceased. He stated that he did not know who assaulted the deceased.

The accused is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.

Section 203:

“Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of the offence of murder”

The Ingredient of the offence of murder which the prosecution must prove beyond reasonable doubt are

- 1. The fact and cause of death*
- 2. The unlawful act or omission causing the death.*
- 3. That it is accused who occasioned the unlawful act.*
- 4. That the accused had the requisite malice aforethought or intention to kill or cause grievous harm.*

That the deceased died is not in dispute. Indeed even the accused in his evidence confirmed that he together took the deceased to hospital where he was admitted and died while undergoing treatment.

PW5 Dr. Wanambisi Caleb Watta who performed the post mortem on the body of the deceased found he had multiple cut wounds on the lower and upper limbs and there was extended intestine and leading to swelling of the abdomen. He formed opinion that the cause of death was due to abdominal injury as a result of blunt injury.

Did the accused inflict the injuries from which the deceased died while undergoing treatment?

PW1 Margaret Akinyi who visited the scene upon responding to scream testified that on arrival she found the deceased outside the house but did not see who assaulted him. **PW2 Dickson Wandayi Wasike** who also went to the scene testified that deceased was saying he had been killed by his children. He also testified that he did not know who assaulted him. **PW3 Emmanuel** the son of deceased testified that when he saw deceased chasing the wife Jennifer outside he ran away and did not see how he sustained the injuries.

PW4 Ann Kalabai the daughter of the deceased stated in her evidence that she did not see accused assault the deceased. **PW7 Joseph Kundu** the brother of the deceased only went and found deceased had bandages on the hand and took him to Dream Land hospital.

None of these prosecution witnesses testified how deceased sustained the injuries. The accused defence is that he found the deceased already injured and he together with others took him to hospital. It is important to mention that Jennifer the wife of the deceased who is alleged to have quarreled with the deceased was not called as a witness or was she arrested as a suspect. Her evidence was central and crucial as to the person who inflicted the injuries on the deceased. In the absence of this witness, the prosecution evidence has gaps which are fatal to their case.

From the evidence I am satisfied that the prosecution has failed to prove a charge of murder against the accused beyond reasonable doubt. I therefore find the accused Isaac Kalabai **NOT** guilty of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code and acquit him under Section 215 C.P.C. Accused Isaac Kalabai be set at liberty unless otherwise lawfully detained.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 27TH DAY OF JANUARY, 2022.

S.N RIECHI

JUDGE