



REPUBLIC OF KENYA



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**Republic v Mteso (Criminal Case 20 of 2018)
[2022] KEHC 12902 (KLR) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 12902 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL CASE 20 OF 2018**

**A. ONG'INJO, J
JULY 28, 2022**

BETWEEN

REPUBLIC PROSECUTION

AND

NYUNDO MWATSUMA MTESO ACCUSED

JUDGMENT

1. The accused Nyundo Mwatsuma Mteso is charged with the offence of murder contrary to Section 203 as read with Section 204 of the *penal code*.
2. Particulars are that Nyundo Mwatsuma Mteso on the 25th day of April 2018 at Bejidodo Village in Samburu Location within Kwale County murdered Nyevu Mwembe Ndoro.
3. The prosecution case was that the deceased was seated at the veranda of her house while cooking in the evening of April 25, 2018 at 8.00pm when according to Chakaya Mwembe the accused who was staying with them in the same, compound and who is his cousin went to their house armed with an axe and panga and cut the deceased 3 times on the head with an axe. PW 1 said that he saw the accused and it was when he saw accused cut the deceased that he switched off solar lamp in order to escape and he went out the between accused persons legs and he started screaming. He said accused tried to pursue him but then diverted and entered some bushes.
4. PW 1 said that he ran to Mwangalas home and Mtunda Mwachaka his uncle came home where they found his mother had died. That Mwandogo Rai also went to the home among other neighbours and Rai and Mwachaka went to police and reported. That police went to scene and collected the body and took it to Kinango Sub District Hospital Mortuary. PW 1 identified the axe that was used by the accused to cut the deceased – Ex P1. He also identified the blood stained clothes the deceased was wearing – Ex P 2(a) &(b).



5. PW 1 said that he was present when photographs were taken. PW 1 said he had no disagreement with the accused who was his cousin. He said there was a disagreement between his mother (the deceased) and Mjeni Mvura. PW 1 said he put off the lamp after the accused had killed the deceased and he passed between his leg and ran outside. He said the axe used to kill the deceased was picked by people who came to the scene and it was not left in the house.
6. PW 1 testified that his uncles Mkunda Mwachaka, Mwandogo Rai & other people responded to his scream. He told the 2 uncles that it is accused who cut his mother. He said among the other people who went to the scene were Jira & Fatuma who are his inlaws. PW 1 said the accused was brought up by his mother although he was born in Samburu. He said that the accused persons mother Luvuno Mwandigo died. That she was a sister to his father. He said Mbega Mwembe was his brother and Jira Mwachaka is their neighbour. He denied having told the deceased that he didn't have land at their home after his mother died.
7. PW 2 Mbega Mwembe testified that on 25/4/2018 received report from Mangale Njera that his mother had been cut by accused and she died. PW 2 said Nyundo Mwatsuma the accused herein is his cousin. That he went home & on April 26, 2018 he proceeded to Kinango Hospital Mortuary to collect the body for burial after postmortem. PW 2 said he saw injuries on the head of his mother.
8. PW 2 testified that his mother was killed because she reported to him that accused was having sexual relationship with his wife while he lived in Likoni and the wife was at home. He said he was due to go home on Saturday to handle the issue with elders but his mother was killed on a Wednesday. PW 2 said he had no disagreement with the accused and he treated him as his brother. He said the deceased had not wronged the accused. PW 2 said he didn't tell accused to go to his paternal fathers land. He said he didn't know how accused was arrested.
9. PW 3 Mtunda Mwachaka testified that the deceased was his sister-in-law – married to his elder brother. He said the accused was his nephew and that he was brought up by the deceased and they lived in same compound. He testified that on April 25, 2018 at 7.30pam he was in the house when he heard people crying. He said the noise was coming from the deceased persons house. That he went there and found the daughter of the deceased Kadzo & Jakaya and they told him the mother had been killed.
10. He found the body on the floor with injuries on the left hand, head & face and there was blood on the floor. That Jakaya told him that the accused appeared and struck the deceased with an axe. PW 3 reported to Chief of Kinagoni Location Maruwa Dzibo and he was advised to report at Samburu police station. He went to Samburu Police Station and made the report. That he waited for OCS Taru Police Station and they proceeded together to the scene in police vehicle. That police officers took photographs at the scene and the deceased body was taken to Kinango Sub-District Hospital Mortuary.
11. That on April 26, 2018 he and Mbega Mwema went back to the mortuary, identified the body for postmortem and body was released for burial. PW 3 testified that the axe used to kill the deceased was picked next to a bush close to the deceased house and he informed police about it and he kept it Insafe custody until it was collected by police from Taru police station and he recorded a further statement on April 27, 2018.
12. In cross examination PW 3 said the axe was collected next to a bush by some women within the homestead and it was full of blood. He said after reporting the axe had been recovered he kept it in accused persons house which had no door. That he kept it on one of the rafters in the house as he felt it was safe there. PW 3 said that Jakaya told him soon after the incident that accused attacked and killed the deceased when they were preparing to eat. PW 3 said accused could go to their homestead



- from time to time to greet them. He said he didn't hear anyone say accused was not entitled to land in that homestead.
13. PW 4 Dr. Gathendu Edwin of Kinango sub-county hospital conducted postmortem on the body of the deceased herein after it had been identified by Mbega Mwembe and Mtunda Mwachaka on April 26, 2018. He was of the opinion cause of death was severe head injury secondary to depressed skull fracture to the occipital – ExP2. He said blunt force must have caused the skull fracture.
 14. PW 5 Mjeni Vuraa testified that on April 20, 2018 he was at home with her mother-in-law Nyevu Mwembe. That at 8.00pm she was in her house and at 10.00pm she received a phone call from Hamisi at her husband who told her he would be going home to cut her neck together with her husbands. That she reported to the Assistant Chief and she was referred to Mzee Chaka to accompany her to Area Chief. That Area Chief said Mzee Chaka to summon her husband but he refused to attend.
 15. That on April 25, 2018 at about 8.00pm she heard her in-law Chakaya screaming and running away. That she also took her children and ran away and went to Mzee Chakas place. That when they later returned home in company of many people they found her mother-in-law had been killed at her veranda.
 16. PW 5 said that he had 4 children between her & Hamisi and that she didn't have any other husband. She said they stayed in same compound with her mother in-law but didn't have electricity. She said the accused who is her brother-in law came later to the home and had stayed for one year and he had his own house within the homestead.
 17. She said that her husband suspected she had an affair with the accused and that is why he threatened he would come and cut her throat. PW 5 denied having any other relationship with the accused. She said that it is Nyundo who killed the deceased but she didn't see him. She said she heard Chakaya scream "Mama ameuawa na Nyundo".
 18. PW 6 – Jackson Mwarutswa Dzibo – Assistant Chief of Kinagoni Sublocation testified that on April 25, 2018 he received a phone call from the deceased neighbour who reported she had been cut with an axe. He advised them to go and report at Samburu police station and he also called the Chief who in turn informed the Assistant County Commission. PW 6 said that he learnt a young man brought up by the deceased is the one who killed her.
 19. PW 7 P.C. Josephat Rotich investigated the offence. He testified that on April 25, 2018 at 10.50 pm the OCS Chief Inspector Pius Chemondo called and informed them a report of murder had been made from Beji Dodo Village. They proceeded to Samburu Police Station where they met 2 elders who accompanied them to scene where they found a crowd of people. They found deceased person body lying near the door in a pool of blood.
 20. That PW 1 the son of the deceased who witnessed the offence recorded a statement and said it is accused who cut his mother. PW 7 said the suspect was not at scene. They took photographs and collected body which was taken to Kinango Hospital Mortuary where postmortem was done on April 26, 2018. He said on April 26, 2018 the OCS called and informed him the suspect had been arrested at Mariakani Police Station. Accused was detained for 10 days as per order from Mariakani court and upon completion of investigation he was charge. PW 7 said the murder weapon an axe was recovered in a bush within the homestead and PW 3 recorded a further statement to that effect.
 21. The axe, deceased persons clothes were forwarded for analysis at Government Chemist and it was confirmed the blood stains on the axe had generated DNA profiles that matched the DNA profile on the deceased persons clothes – ExP 4(a) &(b) produced by PW 8. He said axe was recovered in



- the direction that accused was seen running to after offence. He said accused presented himself at Mariakani Police Station and reported that he feared the person he had beaten had died.
22. The accused was placed on defence and he gave sworn statement and said that Ngoro Mwembe & 3 people went to his house on April 26, 2018 and identified him and he was arrested and taken to Mariakani police station and placed in cells. That the following day he was taken to court and charged with offence of murder. He said he didn't record a statement. He said he was taken to Taru Police Station and brought to court after 10 days. He said he was staying in Mariakani whereas Chakaya – his uncles son-and his mother were staying in Kinangoni which is a distance where you pay 400/= as fare.
 23. He said he left Kinangoni in 2017 because of land dispute between him and Mbega Mwembe, Chakaya and Ngoro Mwembe. He said that his mother was given land by the father and when she died his uncles children started having a problem with him and they demanded he should go back to where he was born in Kinango.
 24. He said that Mbega alleged he had an affair with his wife as one of the means to ensure he left for them his mother's inheritance. He said the allegations were false. He said he decided to leave as he didn't want to quarrel. He said he didn't attack the deceased on April 25, 2018. He said he was framed so that his land is grabbed. He said a weapon was planted in his house to frame him. He said the last time he was in Kinangoni was December 2017.
 25. From the evidence on record the issue for determination is whether prosecution proved beyond reasonable doubt the charge against the accused of murder. The fact that the deceased Nyevu Mwembe Ngoro died and that her death was caused by an unlawful act is not in doubt.
 26. PW 1 the son of the deceased witnessed her being cut on the head with an axe. The axe was recovered and forensic analysis established that the DNA profile generated from the blood stain on the axe matched the DNA profile generated from the blood stain on the deceased person clothes.
 27. Indeed Dr. Gathendu was of the opinion that the cause of deceased death was severe head injury secondary to depressed skull fracture of the occipital. The kind of injuries sustained by the deceased and which caused her death could only have been inflicted by a person who intended to cause grievous harm or kill the victim. The person must have been actuated with malice aforethought. The issue in dispute is whether it is the accused who committed the unlawful act that caused the death of the deceased.
 28. The accused raised a defence of alibi. He said he was last at his uncles place to visit his aunt the deceased in December 2017 and that he didn't kill the deceased. He said he left his uncles homestead because of land dispute between him and his uncle's sons including PW 1 & PW 2. PW 1 & PW2 denied having told the accused that he had no land in the homestead. Evidence was adduced that the accused was brought up by the deceased person and PW 1 & PW 2 treated him as their brother.
 29. PW 2 said that his mother reported to him the accused was having an affair with his wife and he promised to go home on a Saturday as he was living in Likoni to go and sort out the issue with elders but before he could go home his mother was hacked to death on Wednesday.
 30. PW 5 Mjeni Vura the wife of PW 2 confirmed that PW 2 called and threatened to go home and cut her with her husband as he suspected she had an affair with the accused and she reported to Area Chief and PW 2 was summoned but he refused to attend before the chief.
 31. PW 5 said that accused was her brother-in law and he had his house within the same homestead. She confirmed the accused had been at home for over one year prior to the murder incident.
 32. PW 1 who witnessed the mother being hacked to death said that he identified and recognized the assailant as the accused who was his aunts son cut the deceased with an axe on the head and that he put



off the lamp in order to escape going between accused persons legs and accused tried to pursue him before changing courses and running away through a bush within the homestead. PW 7 P.C. Rotich testified that the accused surrendered to police at Mariakani on his own and reported that he feared the person he had beaten had died. It is therefore not true that Ndoro Mwembe & 3 Others went to his house. The accused person's defence of alibi was not only raised late in the day but it is also outweighed by the evidence of the prosecution witnesses.

33. This court therefore finds that the evidence of the prosecution witnesses placed the accused person at the scene of the offence and this court finds that the charge of murder has been proved against him beyond reasonable doubt. He is found guilty and convicted under Section 322(1) *Criminal Procedure Code*.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 28th day of July 2022

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of: -

Ogwel - Court Assistant

Ms. Nzamba Advocate for Accused

Accused - Present in person

Ms. Kambaga for State

Hon. Lady Justice A. Ong'injo J

28/07/2022

Ms. Kambaga

Accused may be treated as 1st Offender

Ms. Nzamba Advocate for Accused

Accused person is a young man yet to start a family. He is 39 years. We pray for court leniency and grant non-custodial sentence to enable him have a life out of detention.

Order

Mention 12/09/2022 for Victim Impact Statement.

Hon. Lady Justice A. Ong'injo J

28/07/2022

