



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYAMIRA**

**CRIMINAL CASE NO. 8 OF 2020**

**THE REPUBLIC.....PROSECUTOR**

**=VRS=**

**WILFRED EVANS NYACHUBA.....ACCUSED**

**JUDGEMENT**

The accused is charged with the offence of **murder contrary to Section 203 as read with Section 204 of the Penal Code**. The particulars of the offence are that on 16<sup>th</sup> April 2020 at Bokisero village, Bokurati One sub-location in Nyamira North Sub-county within Nyamira County the accused murdered **WILFRED OSONGO NYACHUBA**.

Briefly the facts of this case are that the accused and the deceased are siblings who lived in the same homestead as their mother Dorca Moraa Nyachuba (Pw1). Their father was deceased and the accused who was the older of the two allegedly suspected and was bitter that the deceased and their mother were in a sexual relationship. Their mother (Pw1) testified that a week before the deceased died he had an altercation with the accused which was quelled by their village elder. She testified that she thought the issue was settled but on 16<sup>th</sup> April 2020 at about 9.30pm the deceased was returning to his house after having dinner in her house when she heard as if something had fallen outside. She then heard the accused saying ***“this man you have kept him like your husband.”*** She went outside the house and found the deceased lying on the ground. She flashed a torch towards him and on seeing blood oozing from the back of his head and face she started screaming. She stated that she at the same time saw the accused running to his house with a stick like the one used to make ugali. She stated that the accused had used that stick to hit the deceased and that he went and locked himself in his house. She estimated the distance at which she saw the accused as twenty metres. Her shouts attracted neighbours. She named the first person to arrive at the scene as Buocha and stated that Buocha assisted her to carry the deceased to his house because it was raining. She stated that her continued screaming attracted more people to the scene. The Assistant Chief was then notified and he in turn called the police who went and collected the body of the deceased. Pw1 testified that the deceased had bled a lot and his body had turned cold. She stated that all the while the accused was holed up in his house. She stated that she did not know the motive which led the accused to kill the deceased because they were good friends who would even share chores. She stated that before locking himself in his house the accused uttered words to the effect that he had done away with the deceased. She also recalled the accused complaining that she was treating the deceased like her husband by giving him food whereas she did not do the same for him. Pw1 discounted that she had a sexual relationship with the deceased. She also denied that the deceased had ever sneaked into her house and attempted to rape her.

Daniel Onyango Moikoba (Pw2) a village elder, neighbour and kin of Pw1 testified that he was among the people who went to the scene on the fateful night. He testified that on arrival they were taken to the place where the body of the deceased was and that he observed the deceased had an injury on the head and right eye. He testified that Pw1 and one Dennis Ongere carried the deceased's body into the house. Pw1 then led them to the accused's house but the door was secured with a padlock. He stated that they broke the padlock but on going inside they saw the accused was inside the house and so they returned the padlock and started conversing with him while they were outside. Pw2 testified that the accused told him it was good that he had gone there and narrated to him how he fought with the deceased after finding him sleeping with their mother. Pw2 told the court that it was then that he stepped aside and called Jackline Kerubo their Assistant Chief who promised to report the occurrence to Ekerenyo Police Station. Shortly after that police officers arrived at the scene and carried the body of the deceased and also arrested the accused. Pw2 also told the court that the accused and the deceased used to fight a lot and that the accused used to accuse the deceased of having sexual relations with their mother. He narrated how on 4<sup>th</sup> April 2020 their mother (Pw1) reported to him that someone had gone into her house while she was sleeping and turned her. He stated that Pw1 used to drink alcohol and that when he visited her house following the report he found the accused holding a hat. He stated that the accused told him that he hit the intruder he found sleeping with his mother on the back with a hammer. He stated that the accused told him that he and the intruder fought and that the intruder ran away but left his hat behind. Pw2 stated that both Pw1 and Pw2 identified the hat left behind as the property of the deceased. He also testified that on the said night they looked for the deceased until they found him. He stated that when they found the deceased he had in his possession the hammer the accused claimed to have hit the intruder with. Pw2 told the court that on the fateful night the accused admitted to killing the deceased and said it was because he found him (the deceased) with their mother.

Chief Inspector David Mursoy (Pw5) of DCI Nyamira North told this court that immediately he received a report concerning the incident he

put together a team of police officers and proceeded to the scene. He testified that they found the accused holed up in his house for fear of being lynched. He stated that he identified himself to the accused and convinced him to open and surrender which he did. Pw5 testified that he got into the house and handcuffed the accused and did a thorough search for the murder weapon. He stated that he found a blood stained plank at a corner of the living room and took possession of it (the plank was produced in evidence as Exhibit P3). From there the team proceeded to the deceased's house and documented it. They then carried the body and took it to the mortuary while the accused was taken to the police station. Thereafter the police took the plank found in the accused's house, a short sleeved shirt and a pair of trousers which the deceased was wearing at the material time and a specimen of his blood to the government chemist for analysis. The court heard that when the analysis was done it turned out that the blood on the plank (Exhibit 3) and on the trousers had a DNA profile which matched that of the deceased. The report however showed that the DNA profile generated from the blood stains on the shirt the deceased was wearing belonged to unknown male person. The exhibit memo form and report of the analyst were produced as Exhibit P6 while the trousers and shirt were produced as Exhibit 4 and 5 respectively. The plank had been produced as Exhibit 3.

The court further heard that a post mortem which was conducted on the body of the deceased on 20<sup>th</sup> April 2020 established the cause of death to be a penetrating deep cut wound on the skull on the occipital region leading to intracranial hemorrhage.

When this court put the accused on his defence he elected to make a sworn statement and not to call any other witness. He began by telling the court that he is a brick layer and that he worked for one Nyakundi. He then stated that on the material day he left work at 6.30pm bought some maize, had it milled, bought some cooking oil and fingerlings and went home. He stated that he went to bed at 7.30pm and soon thereafter it started raining. He stated that he heard his door being broken and got out of bed to check who it was and when he asked the person to identify himself a voice answered that it was the village elder. He stated that he however refused to open because he was afraid and that people started breaking his window glasses with some saying they would call the police. He stated that those people had bright torches flashed towards his house but he still refused to open and only did so when the police arrived. He testified that it was when he opened the door for the police that he was informed that his brother had been killed. He stated that the police collected the body and took it to Ekerenyo. The accused explained that he had very expensive things in his house hence the reason he refused to open the door for the villagers. He admitted that the blood stained plank produced by the prosecution as the murder weapon was found in his house but stated that he did not know how it got there. He claimed not to have seen the deceased or his mother on the material night and stated that he had last seen the deceased when he came home the previous week. He denied he killed the deceased and stated he did not know what killed him. He told the court of an incident when his mother screamed and he went to her aid and a man ran away and left his hat behind. He stated that when they called the village headman concerning the matter he promised them the man would be unearthed.

For the prosecution to secure a conviction for the offence of murder the following elements must be proved beyond reasonable doubt: -

**(a) Death of the deceased and the cause of that death.**

**(b) That the death was caused by an unlawful act and that the accused caused the unlawful act.**

**(c) That the accused acted of malice aforethought. (See Section 203 of the Penal Code and also the case of Anthony Ndegwa Ngari v Republic [2014] KLR).**

In this case the death of the deceased and the cause of that death are not disputed. The accused and his mother (Pw1) confirmed the death and the post mortem established the cause of that death as a penetrating deep cut wound to the skull on the occipital region of the head leading to intracranial hemorrhage. The doctor who performed the post mortem also noted a deep wound on the left supraorbital region of the head.

From the totality of the evidence there is also no doubt that the death was caused by an unlawful act. The deceased had left his mother's house to go back to his house after getting some water to drink when he was attacked and brutally beaten. Earlier he had eaten dinner in his mother's house and left only to return after a while for drinking water. Pw1 heard a loud thud outside as if something had fallen and when she went outside she saw him lying on the ground. He was bleeding profusely. A neighbour who was the first to arrive upon hearing her screams helped her to carry the deceased to his house as it was raining heavily. Chief Inspector Mursoy (Pw5) the investigating officer in the case, confirmed that he was taken to the primary scene which was outside the house. He testified that there was blood and signs of a struggle there. He also stated that there was a pool of blood in the sitting room where he found the deceased lying. There is no doubt therefore that this was a homicide. From the manner the same was committed it clearly was not sanctioned by the law and there is no evidence to demonstrate that it was excusable under any of the circumstances provided in law. I am satisfied therefore that the fact of death, the cause of that death and that the death was by an unlawful act were proved beyond reasonable doubt.

The next issue for determination is whether the accused perpetrated the unlawful act. The case against the accused person is based on circumstantial evidence since even his mother (Pw1) was candid that she did not in fact see him assaulting the deceased. Her evidence was that she heard a thud and went outside to see what it was only to see the deceased lying on the ground and the accused who was carrying a stick fleeing to his house and locking himself up. There was no other direct eye witness to the occurrence but I have tested the evidence of Pw1 with the greatest care and I am satisfied that she positively recognized the accused person as the person she saw fleeing from the scene. She knows the accused person very well as he is her son and was just twenty metres from him, a distance close enough to see him properly. Their houses were also close to each other and she certainly could not have mistaken him or the house to which he fled and locked himself. I also find that her evidence was corroborated by other witnesses including the investigating officer (Pw5) who confirmed that when they got to the scene the accused was hiding in his house, a fact which was also admitted by the accused. The reason he gave for not coming out of the house was not plausible. The only things he claimed to have brought home that evening were some fingerlings, maize meal and cooking oil and those could not have been so expensive as to cause him to lock out his fellow villagers from his house. It is my finding that he refused to open because he wanted to give the impression that it was not him who had committed the offence. This explains why his door was secured with a padlock from the outside.

Pw1 testified that when she saw the accused fleeing the scene he had a stick/plank in his hand. The accused admitted that a blood stained plank was recovered from his house. He identified the plank as the one produced in evidence. I am satisfied therefore that the plank found in his house was the murder weapon. That this was the murder weapon was proved beyond reasonable doubt by the government analyst's

finding that the blood thereon belonged to the deceased. The accused admitted that the weapon was found in his house. His explanation that he did not know how it got there is not convincing as there was no evidence that anybody else gained entry into his house before the police got there. Pw2 testified that after breaking the padlock and seeing the accused inside the house they returned the padlock and started speaking with him while they stood outside. They did not enter the house and the accused himself did not allege that anyone did. Therefore, it is safe to presume that it was him who took the stick to his house. I find that taken as a whole the inculpatory facts in this case are incompatible with the innocence of the accused and are incapable of explanation upon any other reasonable hypothesis other than his guilt. I am satisfied beyond reasonable doubt therefore that the accused was the perpetrator of the unlawful act that culminated in the death of the deceased.

I am further satisfied that the accused committed the act with malice aforethought. **Section 206 of the Penal Code** provides that malice aforethought is deemed to be established by evidence proving any one or more of the following circumstances: -

**“(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;**

**(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;**

**(c) an intent to commit a felony;**

**(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”**

This was not the first time the accused had attacked the deceased. In his defence he admitted so and this was corroborated by village elder Daniel Onyango (Pw2) to who the accused’s mother (Pw1) had previously lodged a complaint. On that occasion the accused had attacked the deceased with a hammer on suspicion that he was having sexual relations with their mother (Pw1). The accused seemed jealous that the deceased would eat in their mother’s house while he (accused) had to make his own meals. The accused had also openly vowed to kill the person who was having an affair with their mother and it is apparent from his own testimony that he suspected that person to be the deceased. Pw1 testified that on the fateful night she heard the accused saying he had finished the deceased which means that he had set his mind to do so. The injuries occasioned upon the deceased also betray an intention to kill or to cause him grievous harm. I am therefore satisfied that malice aforethought was established beyond reasonable doubt. The prosecution has proved the case against the accused beyond reasonable doubt. In the premises I find him guilty of the offence of murder contrary to **Section 203** as read with **Section 204 of the Penal Code** and convict him accordingly.

**SIGNED, DATED AND DELIVERED ELECTRONICALLY AT NYAMIRA THIS 18<sup>TH</sup> DAY OF MARCH 2021.**

**E. N. MAINA**

**JUDGE**