



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYAMIRA**

**CRIMINAL CASE NO. 18 OF 2019**

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

**VERSUS**

**JOYCE NYABOKE NYACHUBA.....ACCUSED**

**JUDGEMENT**

The accused is charged with murder contrary to Section 204 of the Penal Code.

**The particulars of the offence are that on the night of 21<sup>st</sup> July 2019 at Bogisero village, Bokurati One Sub-location, Nyamira North Sub-county within Nyamira County the accused jointly with others not before court murdered Tobias Rioba Nyachuba.**

The accused pleaded not guilty to the charge whereupon the prosecution called four witnesses to prove its case.

Briefly the prosecution's case is that on the material day at around 9am Nixon Momanyi Nyachuba, a brother of the deceased and son to the accused was working on a parcel of land allotted to him by his father when his older brother Ronald started pelting him with stones. He raised the alarm and the deceased who was working in his own parcel nearby heard and went to his rescue. It was then that their brother Ronald who was armed with a club and panga hit the deceased on the head with the panga. Ronald was joined by his wife and together they shoved the deceased to the ground. At that juncture their mother, the accused in this case, arrived with a club which she used to hit the deceased on the head. Meanwhile Nixon (Pw1) was shouting for help and when the accused, Ronald and his wife saw villagers coming to the scene they fled leaving the deceased bleeding profusely. He was taken first to Ekerenyo Sub-county Hospital, then to Keroka General Hospital and eventually to Tenwek Mission Hospital where he succumbed to the injuries.

John Masara (Pw2) testified that he is the deceased's uncle and that on the material day he was called by his brother one Samuel Omari to go help him take the deceased to hospital. He stated that he found the deceased lying on a bed at Ekerenyo Hospital. His head was bandaged and he was crying in pain. Pw2 alleged that the deceased told him that he had been beaten by the accused, his brother Lameck and Lameck's wife. He stated that at Ekerenyo they were referred to Nyamira county Hospital where they were told to take him either to Kisii Referral Hospital or Tenwek Mission Hospital. They elected to take him to the latter where he died at around 2pm. They took the body to Nyamira Hospital Mortuary. The witness further stated that on 30<sup>th</sup> July 2019 he witnessed a post mortem that was conducted on the body of the deceased at Bwomboga Hospital. He stated that the deceased had cut wounds on the forehead and legs. Dr. Goga Fredrick (Pw4) conducted a post mortem on the body on 30<sup>th</sup> July 2019 and formed the opinion that death was as a result of epidural haemorrhage following trauma to the head. Dr. Goga testified that there was a cut wound measuring about 5cm in length on the right temporal region, a deep cut wound on the midshaft tibia which had a dressing and sutures insitu and an epidural haematoma on the right side of the brain.

In her defence, the accused made an unsworn statement and told this court that on 21<sup>st</sup> July 2019 she was at home when she heard noise and on going outside she saw people fighting. She stated that she went to the scene and found her sons Nixon Momanyi and Ronald Kwamesa fighting over her portion of the land despite each having their own portion. She stated that when Tobias saw her approaching he struck the ground with a panga then ran off to his house. She contended that nobody beat Tobias but conceded that he died in hospital on 22<sup>nd</sup> July 2019. She stated that her other sons disappeared from home after the incident. She discredited her son Nixon Momanyi's evidence by stating that he is a 36 years old school dropout who goes home at midnight and demands she cooks for him and when she exhorted him to get a wife they disagreed and hence the reason he fabricated evidence against her. She vehemently denied killing the deceased and contended that she loved him and she now shoulders the burden of looking after his children.

In summing up, Mr. Bwonwong'a Advocate submitted that the prosecution did not prove its case beyond reasonable doubt; that the accused's motive of going to the scene was to rescue the deceased who was being assaulted by his brothers and she had no intention of committing a crime. Mr. Bwonwong'a just like the accused sought to discredit the evidence of Nixon Momanyi (Pw1) and submitted that Pw1 could have lied against the accused for refusing to cook for him. Counsel wondered why members of the public who responded to the screams were not bonded to testify. He contended that this case had no independent witnesses. Mr. Bwonwong'a also submitted that the alleged dying declaration alluded to by John Masara (Pw2) was not corroborated; that the rungu (murder weapon) was not produced in

evidence and the fact that the other accomplices have never been arrested could only mean that the accused is not the one who killed the deceased. Counsel observed that it is impossible that one can carry five stones in one hand and a panga in the other and urged this court not to believe the evidence of Pw1 on that account. Mr. Bwonwong'a submitted that the evidence of such a witness cannot be reliable and contended that Pw1 did not know the cause of the scuffle and that she was not hiding but had left her house when it collapsed.

Mr. Majale, Learned Senior Prosecution Counsel Preferred to rely on the evidence on Record.

The result of the post mortem performed on the body of the deceased revealed that he died due to epidural haemorrhage following blunt trauma to the head. The report indicates that he had a 5cm in length cut wound on the right temporal region; a deep cut wound on the midshaft left leg tibia and an epidural hematoma on the right temporal region of the brain. In my view these injuries as well as the cause of death, are consistent with Pw1's evidence that the deceased was clobbered on the head with stones and a club. There is therefore evidence beyond reasonable doubt that the deceased was killed. From the circumstances surrounding the death it is also clear that the same was as a result of an unlawful act. The deceased did not provoke his attackers and had merely answered to his brother Pw1's cry for help. **The only issues for determination therefore are whether the accused person in this case took part in the unlawful act that caused the death of the deceased and if she did whether she had the necessary malice aforethought that would lead this court to find that she murdered the deceased.**

Having carefully considered the evidence and submissions from both sides I am satisfied that the accused person took part in the unlawful assault that resulted in the death of the deceased. I find it a fact from the evidence that she hit the deceased on the head with a club when she arrived at the scene of the altercation between her sons who included the deceased in this case. This incident occurred at 9am hence in broad daylight and I am satisfied therefore that Pw1 who is the key witness in the case was able to see clearly all that took place. The prevailing circumstances were more than favourable for a positive identification more so given that the witness, the deceased and the assailants all belong to the same family and therefore there was no possibility of a mistaken identity. As for the contention that Pw1 fabricated evidence against the accused for refusing to cook for him I find that far from convincing. I observed the demeanour of Pw1 when this allegation was first put to him by defence Counsel and could not help but notice the shock on his face. It would be more natural for a son to lie to cover up for his mother and the opposite is therefore highly unlikely. The shock written on Pw1's face when this allegation was put to him in my view proves that it could not be true. I find it a fact therefore that the accused took part in the unprovoked attack upon her son, the deceased, and that as a result of the attack the deceased sustained the injuries that resulted in his death. Indeed, she too fled her home only to be arrested a month later when she returned for the burial of her late husband. Their house collapsed when she was already in hiding and is not the cause of her self exile. To the contrary I find that she fled for fear of being arrested for what she had done; her conduct after the incident points to her guilt. If the dying declaration made by the deceased to Pw1 required corroboration it would find this in the eye witness given by Pw1 and the conduct (fleeing from home) of the accused and her accomplices.

What about malice aforethought? The circumstances from which malice forethought is established are set out in **Section 206 of the Penal Code** which states: -

**“206. Malice aforethought shall be 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.”**

In the case of **Republic v Tubere S/o Ochen [1945] 12 EACA 63** it was held that: -

**“Malice aforethought can be deduced from inter alia the nature of weapon(s) used, the part of the body targeted and the nature of injuries inflicted upon the deceased.”**

(See also **Karani & 3 others v Republic [1991] KLR 622** and **James Masomo Mbacha v Republic [2015] eKLR**).

In this case Pw1 testified that it was him who was attacked by his brother Ronald and the deceased became a victim only because he went to his (Pw1's) rescue. Pw1 also testified that the accused, their mother, rushed to the scene after hearing noise and when she found her son Ronald and his wife beating the deceased she joined in and hit him on the head once. It is clear from the circumstances of this case therefore that the accused had not formed an intention either to kill the deceased or to cause him grievous harm. There is also nothing in the evidence to suggest that she had knowledge that the injuries she inflicted her son could either lead to his death or cause him grievous harm. The upshot therefore is that the prosecution did not prove malice aforethought beyond reasonable doubt as to warrant this court to find the accused guilty of murder. She nevertheless took part in an act that unlawfully caused the death of the deceased and in the premises I find her guilty of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code and convict her accordingly.

**Signed, dated and delivered in Nyamira this 23<sup>rd</sup> day of April 2020.**

**E. N. MAINA**

**JUDGE**