



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL CASE NO. 5 OF 2016

REPUBLIC.....PROSECUTOR

=VRS=

JOSEPHAT MANOTI OMWANCHA.....1ST ACCUSED

DOMINIC OKEMWA OMBOGO.....2ND ACCUSED

JUDGEMENT

The accused persons are charged with Murder contrary to Section 203 as read with Section 204 of the Penal Code. The information states that on 13th December 2012 at Simbauti Farm in Borabu District within Nyamira County the accused persons jointly with others not before court murdered Tom Mokurumi.

They pleaded not guilty to the charge. To prove the charge, the prosecution called seven witnesses.

In proceedings partly recorded by my predecessor Wakiaga J and partly by myself, the court heard that the deceased was employed at the home of the father of the 1st accused. He was a herdsman. On the material day at about 6am the deceased took milk to the house of Damarice Kemunto (Pw1) who lived nearby then went back. They agreed that he would go for the money at 11am. However, at about 11.30am a certain woman who was not known to any of the witnesses in this case but who claimed to have been related to the deceased intimated Ruth Mwikali (Pw5) the deceased's neighbour, that she had gone to the house of the deceased but did not find him. She reported to have seen a lot of blood in the house. The woman had allegedly wanted to lease a portion of land from the deceased.

Ruth Mwikali (Pw5) reported the matter to Sawara Ororo Anasi (Pw2) their village elder. They went and followed the blood trail and the same led them to the pit latrine where they noted that blankets had been stuffed into the toilet. It was at that juncture that Pw2 reported the matter to the authorities. Police officers went to the scene and when they demolished the toilet they found the body of the deceased. They removed it and took it to Gucha Hospital Mortuary. The police also took a slasher which they found at the scene.

A post mortem conducted on the body on 18th December 2012 opined the cause of death was severe haemorrhage and severed spinal cord secondary to deep cut wounds to the head due to assault. The post mortem report which was produced by Dr. Samuel Ochere (Pw3) as the doctor who had conducted the post mortem could not be found without occasioning unreasonable delay, states that the deceased had a deep occipital cut wound extending to brainstem/spinal cord – 20cm long and 9cm deep; multiple abrasions on the back and a 10 x 6cm abrasion on the left rib cage. The report also states that the deceased's spinal column and spinal cord were severed and that his skull was fractured with bone and brain matter loss. Ruth Mwikali (Pw5) told this court that she had seen the 1st accused with the deceased a day earlier but before that she had seen the 1st accused a week earlier. She also stated that on the material day she met the 1st accused at about 9am and when she asked him where the deceased was she told him he had gone to get a jembe at Simbauti.

Sgt. Japheth Ngetich (Pw6) told this court that because these people pointed fingers at the 1st accused, calls to his cell phone were however not going through forcing the Pw6 to track him through Safaricom. He was subsequently arrested at Dandora in Nairobi. He was brought to Nyamira Police Station where he is said to have recorded a confession admitting to killing the deceased and implicating the 2nd accused. He is also said to have admitted stealing the livestock belonging to his father which the deceased had been employed to herd. The two accused persons were subsequently arraigned in court.

When they were put on their defence the 1st accused made an unsworn statement detailing how he was apprehended in Nairobi and taken to Keroka. He called Jason Onkoba Keana (Dw3) who testified that he could not have killed the deceased because on the day it is alleged he committed the offence, he (1st accused) was in his (Dw3's) house in Nairobi.

The 2nd accused merely stated that he was arrested on a Tuesday at 8pm just after he arrived from work. He stated that he was arrested for an offence he knew nothing about.

The offence of murder is defined in Section 203 of the Penal Code which states: -

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

To prove the charge, it must not only be established that the accused killed the deceased through an unlawful act but that they did so of malice aforethought. **Section 206** of the **Penal Code** sets out the manner in which malice aforethought is established.

In this case there is no direct evidence that the accused persons killed the deceased. There is evidence that on the fateful morning the deceased who was a herdsman was seen alive at 6am. Pw1 stated that he delivered some milk to her house as he often did. Pw1 stated that he was well and that they even agreed that he would go back to collect his money at 11am. There is evidence that the deceased was killed. It was proved beyond reasonable doubt that his body was found in a pit latrine. It had multiple severe injuries and his killers had tried to cover their misdeeds by stuffing blankets into the toilet. The court heard that there was a trail of blood from his house up to the latrine. Pw5 (Ruth Mwikali) testified that at about 11.30am as she was coming from the kiosk she met the 1st accused person and asked him if the deceased was at home. He told her that the deceased had gone to Simbauti to get a jembe. Pw5 (Ruth Mwikali) told the court that the deceased lived in that home alone but the 1st accused, his employer's son, would also stay there occasionally. She stated that she knew both the 1st accused and the deceased well and that the reason she had inquired into the whereabouts of the deceased was that she wanted him to lease her land. The court heard that soon thereafter Pw5 (Ruth) met a woman who told her the deceased was not home but there was blood in the house. Pw5 (Ruth) informed the village elder (Pw2) and they both proceeded to the scene. From the evidence of Pw1, Pw2 and Pw5 it is evident that the deceased met his death between 9am and 11am.

I am satisfied that the death of the deceased arose from an unlawful act. As I have stated there is no direct evidence of how the deceased was killed or who his killer(s) were. I am however satisfied beyond reasonable doubt that there is circumstantial evidence that the 1st accused participated in the crime. Pw5 had seen him tilling the land with the deceased the previous day. She also stated that she had seen the 1st accused there a week earlier. Other than the deceased and the 1st accused nobody else was living in that farm. The 1st accused's father (Pw4) attested to that fact. The fact that Pw5 also saw him that morning places him in the scene of crime. I do not agree with Counsel's submission that Pw5 gave inconsistent evidence. She was clear that she met the 1st accused at about 9am on the material day. She had also seen him the previous day and before that a week earlier. The 1st accused made a confession which was recorded by Senior Superintendent of Police Grace Makupe (Pw7). The statement was made in English and it gives a very vivid description of what the accused and his accomplice did to the deceased. It could not have been made up. This and the evidence of Pw5 renders the defence of the 1st accused and the evidence of his witness untrustworthy. Pw5 knew the 1st accused very well. She saw him in broad day light. The circumstances prevailing could not have given rise to mistaken identity. They even spoke. It cannot therefore be true that on that day he was elsewhere other than at his home where this crime was committed. Grace Makupe SSP (Pw7) did not know him before and therefore had no reason to frame him. I am satisfied that he confessed to the crime voluntarily without any inducement, coercion or intimidation. I am satisfied that he committed the offence of murder. The injuries inflicted on the deceased and the fact that his body was concealed in a pit latrine is proof that those who did it had an intention to kill him.

For the 2nd accused other than being implicated by the 1st accused, there is no evidence either direct or circumstantial to connect him to the offence. The mention of his name by the 1st accused is evidence of the weakest kind and cannot form the basis for a conviction. I find him not guilty of the offence and acquit him. I find the 1st accused guilty of murder contrary to **Section 203** as read with Section 204 of the Penal Code and convict him accordingly.

Dated, signed and delivered at Nyamira this 25th day of January 2019.

E. N. MAINA

JUDGE