



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CRIMINAL CASE NO. 7 OF 2017

THE REPUBLIC.....PROSECUTOR

VERSUS

EDWIN OBARE NYACHIRO.....ACCUSED

RULING

The accused person is charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. The information states that on the night of 3rd and 4th September 2017 at Nyairanga village in Bokurati I Sub-location, in Nyamira North Sub-county within Nyamira County jointly with others not before court the accused murdered Benard Nyauma Nyamboto, deceased. The accused pleaded not guilty to the charges and was represented at the trial by Advocate Ondigo.

The prosecution called four witnesses and at this stage I am required to determine whether there is evidence that the accused committed this offence so as to warrant him to be put on his defence as required under Section 306 (2) of the Criminal Procedure Code.

There is no direct evidence that the accused killed the deceased. The evidence adduced is circumstantial. The deceased according to the witnesses was a friend of the accused person. He mostly used to stay far from home but on the material day he had gone home and even eaten lunch in his mother's house. Later in the day he left only to be found dead in the home of the accused person. The court heard that he was in a vest and underwear and his body seemed to have been lying there for some time. When a post mortem was conducted it was discovered that he had died due to massive intracerebra and intercranial haemorrhage due to blunt head trauma. These injuries suggested that he had been killed. The investigating officer (Pw4) testified that when the matter was reported he went to the scene and found a grey pair of trousers which was blood stained burning in the house where the accused and his mother lived. He also stated that he found a blood stained panga, some chang'aa and jericans in the house. He took them as exhibits. The shirt, panga, a pair of navy blue trousers and a sample of the deceased's blood were then sent to the government analyst for forensic examination but the report was negative. The report was produced as exhibit 2. Pressed as to why he charged the accused person, the investigating officer's (pw5) response was as follows: -

“I tried to find out why the deceased would have been killed. Though I did not find a direct witness I found out that the deceased had left his home at around 5pm on 3rd September 2017. From 3rd September to the day the body was found the deceased was missing. The accused was a chang'aa brewer and the deceased had gone there to drink. I learnt that on the night of 2nd and 3rd September 2017 the deceased and four other men were drinking chang'aa in the accused's house. The deceased is alleged to have left the other four and sneaked into the house of the accused's mother to have sexual intercourse with her and the reportee allegedly found them and alerted the accused. The accused and the other four men are alleged to have confronted the deceased and removed him from the house he shared with his mother. I am not going to call the person who gave me this story to testify.”

In Cross examination the investigating officer was even more dramatic. He stated: -

I charged the accused because one, he sold chang'aa to the deceased, two because I found the trouser burning in his house and thirdly because the panga was in his house and further because him and his mother had disappeared.”

It is however evident that what the government analyst received was a partially burnt shirt not trouser - (see paragraph 3 on items received at item No. 3). As for the blood on the panga it certainly did not belong to the deceased. If what the investigating officer (Pw4) took to the government analyst was a burnt shirt, why did he and the brothers of the deceased say what they found burning in the house was a pair of trousers? It is also doubtful that that trouser belonged to the deceased as there was contradiction in the evidence of the witnesses. It is clear from the evidence of the investigating officer that the foundation of the case against the accused person is hearsay – hearsay that he killed the deceased because he found him having sexual relations with his mother. We can no longer act on such evidence. At this time and place of witness protection it is unacceptable that the investigating officer can tell the court that he could not call the person who gave him this information. A conviction cannot in this case stand as hearsay evidence cannot sustain a conviction. Even circumstantial evidence can only

form the basis of a conviction if “it points irresistibly to the accused” and if “the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt.” – See Kariuki Karanja Vs Republic [1986] KLR 190.

It is my finding that the evidence in this case is not circumstantial but hearsay. Finding chang’aa, jericana and a panga in a house is not enough to charge someone with murder. Those are items that one can find anywhere. There is in any case evidence that the house in which those things were found belonged to the accused’s mother not to him. Pw1 and Pw2, the deceased’s brothers who knew the home better than the investigating officer were categorical that the house belonged to the mother of the accused. The charge against the accused person has not been proved to the required standard and I prefer to give him the benefit of doubt. Accordingly, I find that there is no evidence that he committed the offence and acquit him under Section 306 (1) of the Criminal Procedure Code. He should be set at liberty forthwith unless otherwise lawfully held.

Signed, dated and delivered in Nyamira this 21st day of February 2019.

E. N. MAINA

JUDGE

In the Presence of: -

Mr. Ondigo for Accused

Mr. Jami for State

C/A – Mobisa

Accused Person