REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL CASE NO. 15 OF 2015

REPUBLIC.....PROSECUTOR

=VRS=

JONES NYATIGO ACHOKI.....ACCUSED

JUDGEMENT

1. The accused person is charged with Murder contrary to Section 203 as read with Section 204 of the Penal Code.

2. The particulars of the charge are that on 16th October 2010 at Gianche village, Mwabosire Sub-location in Nyamira District within Nyamira County the accused murdered Peris Nyagechanga Ondieki.

3. The accused pleaded not guilty to the charge and at the trial in which the prosecution called a total of 8 witnesses the accused was ably represented by Mr. Okenye, Advocate. The prosecution was led by Principal Prosecution Counsel, Mr. William Ochieng.

4. Briefly the facts of this case are that on 16th October 2010 the deceased and her grandson, Vincent Otwoli Ogendi (Pw1), had just come home from the shamba and were having lunch when three men entered the house. They inquired if a young man they alleged to have given money to buy timber for them had come there. They did not disclose the name of the young man but said they were looking for him because he had run away. The deceased asked them if the young man they were looking for was their witness. They responded that he was not and at that juncture one of them, who according to Pw1, was the younger of the three, exhorted the others to hurry up. It was then that they asked if that was Ondieki's home. The deceased told them to specify which Ondieki as there were many Ondiekis. After that they told the deceased to show them where they could buy timber but she declined and told them it was about to rain. As she was going out of the house the younger of the three men got hold of her hand. One of them had already gone outside. When the younger of them held her hand the other man who had been left behind took out handcuffs from his pocket and said they were policemen. The deceased started crying but they nevertheless forcibly took her to a waiting car. Pw1 followed them but was prevented from getting into the car. He followed the car but could not catch up with it. When Pw1 informed his aunties what had happened they gave him money to follow the car but when it went towards Kimara he gave up and went back home. Pw1 described as a G-touring white in colour but stated that he was not able to read its registration number. Upon return he reported the matter to his relatives who in turn reported the matter to the clan elder, area chief and the police. A search which included announcements on the Baraka FM Radio, was mounted but the deceased could not be found.

5. On 17th October 2017 Sergeant William Lakeshon Ole Kamwaro (Pw5) who was in charge of Siabei Administration Police Post in Narok had just come from Church when he was informed about a dead body that had been seen in some bushes. He went to the scene with his junior officers and observed that it was a woman, who appeared to have been shot. There was blood around her. He collected two spent cartridges which he suspected to have been fired from a Barettta Pistol. He also observed that the body might have been taken there by a vehicle as there were tyre marks with a different type of soil. Sgt. Lakeshon called the OCS Narok who with his deputy went and collected the body and the spent cartridges. Signals were then sent all over the country. When word reached Nyamira the deceased's relatives were informed and were thereafter taken to Narok where they identified that body as the deceased's. Three days later the body was brought to Nyamira County Hospital Mortuary where a post mortem was conducted which confirmed that the cause of death was hypovolemic shock secondary to massive exsanguination.

6. The doctor who performed the post mortem noted that the body had several bullet wounds. The descending colon was perforated, the spleen shattered, the spinal cord was trisected as was the spinal column.

7. The court heard that the accused person was arrested in Nyamira for an unrelated incident and was taken to Narok where that incident had occurred but when an identification parade was conducted in regard to this case he was picked out by the witnesses. He was subsequently brought back to Nyamira and charged with this offence.

8. The accused gave sworn evidence in which he denied killing the deceased and stated that he was in his home at Mabundu on that day. He contended that he has never killed and that he did not know the deceased.

9. In summing up Mr. Okenye, Learned Counsel for the accused adopted the written submissions he filed after the close of the prosecution's case. In those submissions he stated that there was no evidence to connect the accused person to the offence; that the motor vehicle that was allegedly used to abduct the deceased was not properly identified or recovered; that none of the witnesses knew the kidnappers who had introduced themselves as police officers and even had handcuffs. Counsel submitted that the body was full of gun shots when it was recovered. He contended that there was no proper identification parade and that in any event the identification parade conducted by Pw6 at Narok concerned a robbery. He stated that the identification documents were not produced and that the evidence of Pw1 regarding the parade is not reliable. Counsel further stated that whereas the deceased died due to massive haemorrhage due to gunshot wounds no ballistic evidence was called to shed light on the ownership of the guns used. He stated that the cartridges were not produced in evidence and that the evidence of the investigating officer (Pw6) was that he does not know who killed the deceased. Counsel urged this court to find that the charge against the accused person had not been proved beyond reasonable doubt and therefore acquit him.

10. Counsel for the prosecution did not submit.

11. To prove murder, the prosecution must prove beyond reasonable doubt that: -

(a) The deceased died.

(b) That the accused killed the deceased.

(c) That the death was as a result of an unlawful act, and;

(d) That it was of malice aforethought.

12. There is evidence that on the material day the deceased was abducted from her home in Nyamira by three men only to be found dead in a bush in Narok which is several kilometres away. The results of the post mortem showed that she was shot. It is my finding that the post mortem apart from proving her death also corroborated evidence that she was killed. Her killers must have abducted her with an intention to kill her. The injuries inflicted upon her were so severe that they could not have been accidental. It is my finding that her death was caused by an unlawful act and that it was of malice aforethought. All the ingredients of the offence of murder were proved and what is left to determine is whether the accused person committed this heinous crime.

13. The case against the accused person depends wholly on the evidence of Vincent Otwoli (Pw1). This is the witness who testified that he was with the deceased at the time the three men who subsequently abducted her arrived. He testified that at the material time they were having lunch. The men spoke with the deceased before finally saying they were police officers and took her with them. This witness also claimed to have identified the accused person during the incident. In court he pointed to him as the person he saw at the scene and also the one he identified at an identification parade conducted at Narok Police Station.

14. In the case of **Maitanyi Vs. Republic [1986] KLR 198** the Court of Appeal held as follows as regards the evidence of a single witnesses: -

"1. Although it is trite that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult.

2. ……

3. The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision, it must do so when the evidence is being considered and before the decision is made.

4. Failure to undertake an inquiry of careful testing is an error of law and such evidence cannot safely support a conviction."

15. As can be seen the test is very high. The investigating officer in this case testified as Pw6. He gave the impression of a very casual investigator who did not even require the eye witness to give a description of the three people who he alleged had abducted the deceased. He neither gave dates or the names of places and he appeared to be completely out of touch with the facts of this case. It was his testimony that when he arrested the accused person he recovered several vehicles in his compound yet knowing very well that a vehicle was used in this crime, he did not cause Pw1 to see the vehicles to confirm if the one that the deceased was taken in was one of them. I also did not hear him state that he asked Pw1 to give him a description of the men who had taken his grandmother away. Although this witness stated that the accused was identified by two witnesses, only Pw1 claims to have identified him at the parade. In any event, evidence of that identification parade was worthless as the officer who conducted it was not called as a witness. The identification forms were exhibited but they were not tendered in evidence.

16. Pw1 stated that out of the 3 men he could remember the accused. He referred to the accused as the short one. The witness stated that when they went to Nyamira he was taken to a cell with about 20 people. He did not give a description of those people – whether they were all of the same height and description. This makes the evidence of the identification parade even more worthless. The witness did not know the accused person before and even though the abduction occurred in broad daylight an identification parade was crucial to exclude the possibility of error. In the Case of **Murube & Another Vs. republic** the court stated: -

"….. In the evaluation of the evidence of the identifying witness, the court was to ensure beyond all reasonable doubt that the witness was honest and unmistaken about her identification of the appellants….."

17. As regards the dock identification, when Pw1 stated that the "short one" was the one in court he was not pressed to say what made sure that he was indeed the one. The courts have treated dock identification with disdain and in the case of **Njoroge Vs. Republic [1987] KLR 19** the holding of the court in regard to such evidence was: -

> ***"3: A dock identification is worthless and a court should not rely on such an identification unless it has been preceded by a properly conducted identification parade. A witness should be asked to give a description of the accused and then a fair identification parade should be arranged…."***

18. This was reiterated in the case of **Mwenda Vs. Republic [1989] KLR 464** when the court held: -

> ***"The practice of inviting a witness to identify a defendant for the first time when the defendant is in the dock is undesirable…."***

19. The Judges of Appeal explained themselves as follows in **Amolo Vs. Republic [1991] KLR 392** at page **395:** -

> ***"The reason for the courts' reluctance to accept a dock identification as part of the wider concept, or principle, of law that it is not permissible for a party to suggest answers to his own witness, or, as it is sometimes put, against leading a witness is that to do so would clearly detract from the veracity of the evidence given and reduce its value. For it is manifest that in all criminal cases, save perhaps a few company, by-law or minor traffic prosecutions, the accused person stands in the dock of the court.***
>
> ***Consequently it is self-evident to the witness that the person standing in the dock is the one whom the prosecution desires to be identified. If however the procedure outlined in Gabrield (sic) Njoroge's case (suppra) is followed that danger is eliminated, or at least much reduced."***

20. I have already made reference to the holding of the Court of Appeal in the case of Gabriel Njoroge Vs. Republic [1987] KLR 19 which was cited with approval in Amolo Vs. Republic. It is my finding that in the absence of evidence that Pw1 had given a description of the accused to the police and in the absence of an identification parade there is no evidence upon which this court can safely convict the accused. Where a witness should have been called but was not called such as the Inspector who conducted the identification parade one must draw a negative inference that his evidence would have been adverse to the prosecution's case and I do so in this case.

21. Although this court put the accused person on his defence, a more critical evaluation of the evidence based on the decisions referred to discloses that there is doubt as to whether the accused indeed committed this offence. It was his evidence that he was at his home in Mabundu when this offence was committed a fact which was not challenged.

A gun was involved yet there was no ballistic expert called to tell the court whether the accused had any connection with that gun. The prosecution left a lot of gaps in its case. It would be a travesty of justice to acquit a guilty man but it would be worse to convict one who is innocent. I prefer to give the accused the benefit of doubt.

22. Accordingly, I find that the case against him was not proved beyond reasonable doubt. I find him not guilty of murder and acquit him. He is free unless otherwise lawfully held.

Signed, dated and delivered in Nyamira this 29th day of March 2019.

E. N. MAINA

JUDGE