



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 14 OF 2016**

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

**=VRS**

**GEORGE MOSETI OYIEKO.....-THE ACCUSED**

**JUDGEMENT**

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

The particulars of the charge are that on 5<sup>th</sup> January 2016 at Gekano Sub-location in Manga Sub-county the accused murdered Phillip Mongare Ondima. The accused who was represented by Mr. Ondari, Advocate pleaded not guilty to the charge.

To prove its case, the prosecution called four witnesses. The first witness PC Daniel Toya (Pw1) testified that the only role he played in the case was to witness a post mortem conducted on the body of the deceased on 11<sup>th</sup> January 2016. The post mortem was allegedly conducted at Christa Marriane Hospital in Kisii. Mary Moraa Mongare (Pw2) is the wife of the deceased. Her evidence was that she did not witness the murder but that she saw the deceased's body lying in a field besides a woman who she identified as the accused's mother. She also claimed to have heard her husband saying that he was killed by George Moseti, the accused in this case.

Pw3, Daniel Achoki Nyagaka, is a brother of the deceased. His testimony was that he went to the scene after receiving a call and that he was among the people who took the deceased to hospital. He stated that at the scene the deceased was lying beside a woman who had also been beaten. He stated that he did not talk to the deceased either at the scene or on the way to hospital but that while at the scene the deceased shouted - "Nisaidieni. Mwenye ameniua ni George."

Pw4 also a brother of the deceased told the court that he received information regarding the occurrence on 5<sup>th</sup> January 2016. He came home and the first thing he did was confirm that his brother was dead. He did this at the Christa Marriane Mortuary. After that he contacted his area Chief who alerted him that the accused and his parents had fled the area. He then went to Keroka Police Station and confirmed that a report had been lodged. Thereafter on 12<sup>th</sup> January 2016 he attended a post mortem which was conducted by one Dr. Oeri. He stated that the doctor informed him the deceased had bled internally and that his legs were fractured. After the post mortem the body was released to them for burial.

The court heard that the accused person was arrested in Njoro. Pw1 stated that once the family of the deceased told the police they had seen the accused in Njoro they were issued with a warrant of arrest whereupon police officers at Njoro arrested the accused and his parents and handed them to Keroka police station. The accused was subsequently charged with this offence.

The accused made an unsworn statement in which he maintained his innocence and stated that on the day it is alleged he killed the deceased he was in Nakuru where he used to work. He conceded that he was arrested in Nakuru and taken to Keroka police station. He contended that he has never killed and will never kill.

In summing up Mr. Ondari submitted that the prosecution had not proved its case beyond reasonable doubt and the accused ought to be acquitted. The prosecution did not offer any submissions Prosecution Counsel Miss Okok on her part preferring to rely on the evidence on record.

The offence of murder is committed when a person by an unlawful act and malice aforethought causes the death of another. To succeed therefore the prosecution must prove:

**(a) The fact of death of deceased.**

**(b) That the death was caused by an unlawful act of the accused, and;**

**(c) That it was of malice aforethought.**

To prove malice aforethought, the prosecution must prove one or more of the circumstances provided in **Section 206 of the Penal Code.**

I have considered the evidence on record carefully, this time giving it closer attention, and it is my finding that the charge against the accused person was not proved to the required standard.

To begin with, the prosecution did not produce the post mortem report. This is because the doctor who they intended would produce it was not called as a witness. Whereas the death of the deceased may not be disputed the cause of his death was not proved. This omission renders it impossible for this court to make a finding that the death could only have been caused by a human hand and nothing else. Moreover, there is no evidence to connect the accused to that death. The evidence against him is purely circumstantial as no single witness claims to have seen him killing the deceased. That evidence however falls short of proving that he committed the offence. The evidence is of a dying declaration allegedly made to Pw2 and Pw3. However, this evidence was shaky. To begin with Pw2 was very inconsistent and was clearly not telling the truth. She began by stating that her husband did not say anything at the scene. It was only after much prodding by prosecution counsel that she alleged to have heard her husband saying he was killed by George Moseti. The inconsistency in her testimony rendered her unreliable and untrustworthy and it cannot be used to convict the accused person. As for the deceased's brother Pw3 it is interesting that he left it till the end to say that he heard the deceased saying **"Nisaidieni. Ule ameniua ni George."** Moreover, who is this George? There could be many other people called George other than the accused. It is also doubtful that the deceased could have uttered those words. This is because the deceased's wife (Pw2) who was among the first of the deceased's kin to arrive at the scene did not allege to have heard those words. What she claims the deceased said was totally different.

The accused said he was in Nakuru on the day it is alleged he committed this offence. Nobody alleges to have seen him at the scene and because the prosecution's case is that he was arrested in Nakuru it is possible that he told this court the truth. If the prosecution wanted to dislodge the alibi they would have called the Chief alluded to by Pw4 as telling him that the accused fled to Nakuru/Njoro. The Chief would have shed light on the last time the accused was seen in the vicinity of this crime and when it is that he disappeared. In the absence of that evidence coupled with the evidence of Pw1 this court has no alternative but to believe the alibi defence. Accordingly, I find the accused not guilty of the charge and acquit him. he shall, unless otherwise lawfully held, be set at liberty forthwith.

**Signed, dated and delivered in Nyamira this 30<sup>th</sup> day of May 2019.**

**E. N. MAINA**

**JUDGE**