

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL CASE NO. 60 OF 2015

THE STATE.....PROSECUTOR

VERSUS

MICHAEL OMBATI MOSOMI.....ACCUSED

RULING

The accused is charged with Murder contrary to Section 203 as read with 204 of the Penal Code. It is alleged that on the night of 27th and 28th March 2012 at Rinyoni village in Borabu District within Nyamira County, jointly with another not before court, he murdered Mary Kemunto Machoka.

The accused pleaded not guilty to the charge following which the prosecution called seven (7) witnesses to prove its case. Among those witnesses was a doctor (Pw6) who performed a post mortem on the body of the deceased on 30th March 2012. He gave evidence that the deceased's clothings were torn, her hands and legs were tied with a rope and she had multiple bruises on the head, hands and legs. She also had a haematoma on the right side of the head and her brain was swollen. In the end he formed the opinion that the cause of her death was severe head injury secondary to assault.

There is therefore no doubt that the deceased's death was by a human hand. There is also no doubt that whoever caused that death acted unlawfully as it was not a death sanctioned by the law. This court also finds it a fact that whoever caused the death of the deceased did so of malice aforethought. This I deduce from the nature of the injuries inflicted upon her which ultimately led to her death and the fact that her legs and hands were tied. Clearly the assailant did not give her any chance to escape as the intention was either to kill her or to occasion her grievous harm. I find that all the ingredients of the offence of murder have been proved beyond reasonable doubt and the only issue for determination is whether there is evidence that the accused person committed this offence – **see Section 306 (1) of the Criminal Procedure Code.**

My finding is that there is not sufficient evidence to connect the accused person to the death of the deceased. In other words, there is no evidence that the accused person committed this offence. There was no direct or circumstantial evidence against the accused person and if there was it was not brought to court. What there is is suspicion that the accused is the one who killed the deceased. This suspicion arises from what the deceased's brother (Pw4) and her son (Pw5) allege to have heard the accused saying to the deceased a week or so before she met her death. These two witnesses testified that there was a land dispute between the accused and the deceased and that a few days before she was killed the accused had told her that she was not going to live on that land for a long time. Pw4 alleged that the deceased had reported the threats to him and he had advised her to lodge a complaint to the police. Pw5 testified that he heard the accused shout those threats to his mother from the road. What is intriguing however is that these two witnesses did not tell the police about these threats when they recorded their statements. It is also instructive that whereas the murder occurred in 2012 the accused was not arrested until 2015 - three years later. The record shows that he was arraigned on 3rd June 2015. According to the investigating officer (Pw7) the people he initially arrested were the deceased's worker and his wife. It was his evidence that he made these arrests after going through the file. That as a matter of fact the said worker and his wife were charged in the Keroka SRM's Court for robbery with violence. They were however freed and turned into witnesses. It is clear therefore that apart from what this worker and his wife may have told the investigating officer there was no evidence that would have led the investigating officer to suspect the accused person. Pw4 and Pw5 did not tell the police about the threats allegedly made to the deceased by the accused and this must have come as an afterthought after the accused was arrested by the police. If these threats were real, then they would have been mentioned to the police at the earliest opportunity. As for the alleged worker and his wife they were not called as witnesses. This despite this court issuing warrants of arrest and granting several adjournments for the prosecution to bring them to book. The reason or explanation given for not calling them was not satisfactory. A phone is not the only means by which a person against who a warrant of arrest is in force can be traced. The only inference that one can draw is an adverse one; that the evidence of these two witnesses would have been prejudicial to the prosecution's case. Without their testimonies there is no evidence to connect the accused to the murder of the deceased. Suspicion no matter how strong cannot be the basis for a conviction. Accordingly I find him not guilty of the charge and acquit him under Section 306 (1) of the Criminal Procedure Code. He shall be released forthwith unless otherwise lawfully held.

Signed, dated and delivered in open court this 20th day of June 2019.

E. N. MAINA

JUDGE