



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 57 OF 2015**

**REPUBLIC.....PROSECUTOR**

**VRRSUS**

**1. ELIJAH MAGUTI MAINA.....1<sup>ST</sup> ACCUSED**

**2. AGNES NYABOKE MAINA.....2<sup>ND</sup> ACCUSED**

**JUDGEMENT**

The accused persons, a son and mother, are charged with Murder contrary to Section 203 as read with Section 204 of the Penal Code. It is alleged that on 20<sup>th</sup> January 2015 at Kenyerere village in Masaba North Sub-county within Nyamira County, jointly with others not before court they murdered Christopher Maina Muma.

This court heard that on the material day at about 7.30pm a scream rent the silence at the home of the deceased. His nephew Felix Ogaro Momanyi (Pw2) whose home was just about 50 metres away, the deceased's brother Lawrence Osoro (Pw1) and Thaddeus Omwenga (Pw5) another of the deceased's nephews who also lived nearby rushed there to find out what had happened only to meet the deceased coming from the homestead. He had injuries on the face and was bleeding and upon asking him what had happened he told them that he had been assaulted by his wife (the 2<sup>nd</sup> accused) and son (the 1<sup>st</sup> accused). They got a motor cycle which took him to Keroka Hospital but he was referred to Kisii Teaching and Referral Hospital. He was eventually admitted at Nyamira County Hospital. A week later on 27<sup>th</sup> January 2015 a decision was made to transfer him to a hospital in Nakuru for specialized eye treatment and it was there that he died on 30<sup>th</sup> January 2015.

Thomas Momanyi (Pw3) the Chief of the area the deceased hailed from and Henry Maina Muma (Pw4) another of the deceased's brothers testified that they visited the deceased in Nyamira Hospital and that he told them he had been assaulted by the accused persons. Pw4 stated that the deceased told him that the physical assault was executed by the 1<sup>st</sup> accused but it had been planned by the 2<sup>nd</sup> accused. The Chief (Pw3) stated that the day before the attack the deceased had reported threats to kill him by the accused persons. Pw3 stated that the deceased told him the accused persons wanted to kill him because he had told them to stop drinking. Pw3 stated that he advised the deceased to report the threats to Keroka Police Station. The court heard that after the incident the 1<sup>st</sup> accused fled to his aunt's (a sister to the deceased) home where he was apprehended the same night. He was handed over to the Chief (Pw3) who took him to Keroka Police Station. The next day Pw3 went and arrested the 2<sup>nd</sup> accused and took her to the police station.

The deceased's nephew (Pw2) testified that they found a bloodstained jembe and panga which they suspected to have been used to assault the deceased in an adjoining farm. He stated that the same were handed over to the police.

Thaddeus Omwenga Rosana (Pw5) testified that he had seen the deceased sometimes between 5pm to 6.30pm and upon their parting the deceased went to his house. He stated that the deceased did not have any injury at that time. He also claimed that on the day of the attack the deceased told him that the weapons used to assault him were a jembe and a panga.

Angela (Pw6), the deceased's sister testified that the 1<sup>st</sup> accused used to stay at her home but that at the time the incident is alleged to have occurred he was not at her home; that he only arrived after she had received a call from her nephew Thaddeus (Pw5) inquiring if he was home. She confirmed that the 1<sup>st</sup> accused had been at home (hers) that morning and that he was apprehended at her home. She further testified that when she went to the deceased's house she found the 1<sup>st</sup> accused and asked her what had happened. The 2<sup>nd</sup> accused allegedly told her that she was taking a bath/cooking at the material time and she did not know. Pw6 stated that as they spoke she noticed the 2<sup>nd</sup> accused had blood on the leg and informed the area Chief about it. She stated that when she visited the deceased in hospital he was not able to tell her what had happened although she asked him. She stated that the deceased had a cordial relationship with his family. In cross examination she stated that the 2<sup>nd</sup> accused wore a scarf which had blood.

Daniel Toya (Pw7) a police constable then attached to Keroka Police Station confirmed that the 1<sup>st</sup> accused was taken to the police station at

11.30pm on the day of the incident while the 2<sup>nd</sup> accused was taken the next day. They were taken there for allegedly assaulting the deceased. He stated that he charged the accused persons with assault in Keroka PMCCR No. 106 of 2015 but when the deceased died the charge was substituted with murder. Pw7 stated that when he went to the scene he recovered a pair of trousers belonging to the deceased and a lesa belonging to the 2<sup>nd</sup> accused and the items were blood stained. The exhibits were produced in evidence by Corporal Jonathan Chepkong (Pw8) who testified that he was the investigator. He stated that blood samples of the accused persons in this case were taken and sent to the Government Chemist together with the exhibits. He stated that he also took a jembe and a panga found at the scene for analysis.

Elizabeth Waithera (Pw9) a Government Analyst testified that when she analysed the blood on the jembe, trouser and lesa, she came to the conclusion that they matched the DNA sample of the 1<sup>st</sup> accused. She asserted that no one else has a DNA like that of the accused. It was her evidence however that the panga did not generate a DNA profile. She stated that the blood stain on the panga was not visible to the naked eye but that on the lesa was.

Dr. Titus Ngulungulu (Pw10), a Government Pathologist based in Nakuru told the court that on 2<sup>nd</sup> February 2015 he performed an autopsy on the body of the deceased and came to the conclusion that the cause of death was massive blood loss with features of heart failure as a result of multiple blunt trauma to the head and chest. He stated that the deceased had multiple (7) tears on the scalp which had been stitched and were healing. He stated that the deceased also had a bruise beneath the skin of the nose, a laceration on the upper left chest, bruises on the lower left leg, blood clots beneath the skin of the head, a swollen and congested brain and his lungs were collapsed and logged with fluids. He contended that the above injuries were in keeping with a fatal assault or homicide. He confirmed that the deceased was undergoing medical treatment when he died.

The accused persons both preferred to give unsworn evidence. The 1<sup>st</sup> accused stated that on the material day he was at a place called Machururiati and had been there for 2 weeks. That when he went back to his house later in the evening people went and told him he was wanted in connection with something that had happened at home. His plea that he had not been there for a while fell on deaf ears and the people told him the Chief had sent them to get him. He stated that those same people relayed news of the assault of his father to him. Since they threatened to beat him if he refused to accompany them he obliged. He stated that at the police station he was told to say how the deceased died and what he said was written down but the officer refused to read the statement back to him. He stated that his uncle Henry Maina and the Chief said he was a bother and should be taken to court. He contended that he could not have killed his father as he had educated and done a lot for him and he was his role model. He regretted that the deceased had promised him many things which he has not accomplished to-date. He contended that he was still in mourning.

The 2<sup>nd</sup> accused also denied that she killed the deceased. She stated that on that evening the deceased told her to prepare dinner after which they had a conversation and he went to the main house. Shortly afterwards she heard him saying **“Agnes I have died.”** She rushed there and found him sweating. She wiped him with her lesa. Then he said he had been killed and sent her to call his brothers Lawrence, Osoro, Thaddeus and Ogaro. She went outside and made noise and the said persons went and took him to hospital. She stated that it was her who lit the path for them with a torch when they carried him to the road. She contended that she did not accompany them because she had a broken leg. She stated that the next day Angela, her sister-in-law, told her the deceased had been taken to Nyamira Hospital but before they left to visit him she was arrested by the Chief. She stated that the deceased may have been assaulted by people who wanted money for the timber and bricks he had sold. She stated that she found his coat outside and suspected the attackers had taken the money. She urged this court to consider her case as she has metal plates in her leg. She stated there was bad blood between the deceased and his brothers. She contended that she had no issues with the deceased and that he had educated their children and their daughter was in America.

There is no doubt that the deceased died as a result of injuries sustained in an assault that occurred in his home on the evening of 20<sup>th</sup> January 2015. The injuries are consistent with one who was hacked on the head with a sharp object(s). The issue for determination is **whether the death was caused by an unlawful act or omission of the accused persons and whether it was with malice aforethought.**

There is no direct evidence that the death of the deceased was caused by the accused. All the would have been eye witnesses testified that by the time they arrived at the deceased's homestead, upon hearing screams, the deceased was walking from his house towards the gate with injuries and blood all over his face. None of them stated that they saw the accused being assaulted. The case against the accused persons revolves around a dying declaration by the deceased. In the case of **Choge Vs. Republic [1985] KLR 1** the Court of Appeal stated the principles upon which a court can convict an accused person on a dying declaration: -

**“5. The general principle on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at the point of death and the mind is induced by the most powerful considerations to tell the truth. In Kenya, however, the admissibility of a dying declaration does not depend upon the declarant being, at the time of making it, in a hopeless expectation of imminent death.**

**6. There need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in the reception into evidence of such a declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person.....”**

The deceased in this case told several people both at the scene and in hospital that he was assaulted by the accused persons. These witnesses Lawrence (Pw1), Felix (Pw2), Thomas Ndege (Pw3), Henry (Pw4) and Thaddeus (Pw5) were cross examined at length by Counsel for the accused persons but their evidence remained firm. It is my finding therefore that the dying declaration which was consistently repeated to these witnesses coupled with the fact that the attack on the deceased took place in the home where he lived with the two persons, and indeed the 2<sup>nd</sup> accused admitted it was she who screamed to alert people, places the accused persons at the scene of the attack. The dying declaration is further corroborated by the evidence of the Government Analyst that blood found on a jembe and lesa found at the scene of the attack matched the DNA of the 1<sup>st</sup> accused person. Pw7 attributed ownership of the lesa to the 2<sup>nd</sup> accused. Angela (Pw6) also confirmed that she found the 2<sup>nd</sup> accused wearing a blood stained scarf. The Analyst's report that the lesa had blood matching that of the deceased was corroborated by the 2<sup>nd</sup> accused who claimed to have wiped the deceased with it (lesa). I am however satisfied that she too participated in the murder as there is evidence that the accused persons conspired to kill the deceased. The area Chief (Pw3) told this court that the day

prior to his death the deceased had reported threats to his life by the accused persons. He stated that following the report he advised the deceased to report the matter to the police. There is nothing in the evidence to suggest that the Chief had any reason to lie against the accused persons and the accused persons did not allude to any such reason during cross examination or in their statements. This court therefore believes the Chief. Stopping people from drinking is no excuse to kill someone and the accused persons therefore acted unlawfully. I am satisfied that it is safe to convict the accused persons on the dying declaration.

The 1<sup>st</sup> accused mounted an alibi defence. However, the same was dislodged by the evidence of his aunt Angela (Pw6) who stated that the 1<sup>st</sup> accused had left her home just that morning. His evidence that he had been away from home for two weeks is therefore not convincing. The evidence adduced by the prosecution has proved the charge against the accused persons beyond reasonable doubt. Malice aforethought can be deduced from the nature of the injuries inflicted upon the deceased as well as the report made earlier to the Chief by the deceased.

I find the accused persons guilty of murder contrary to Section 203 as read with Section 204 of the Penal Code and convict them accordingly.

**Dated, signed and delivered in Nyamira this 29<sup>th</sup> day of July 2019.**

**E. N. MAINA**

**JUDGE**