



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL CASE NO. 14 OF 2018

REPUBLIC.....PROSECUTOR

=VRS=

1. JAMES OKARA KARAYA.....1ST ACCUSED

2. MERCY MORAA OKARA.....2ND ACCUSED

3. MELLEN KWAMBOKA GISEMBA.....3RD ACCUSED

JUDGEMENT

The accused persons are charged with Murder contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars of the charge are that on 4th October 2018 at Rikenye village within Masaba North Sub-county in Nyamira County they jointly killed Zablon Mose Bosire.

The facts of the case are that on 4th October 2018 at about 1pm the deceased and his nephew Edward Ogongo Bosire (Pw1) went to the house of the 1st accused, a chang'aa brewer, to partake of the brew. They found the 1st accused's wife (the 2nd accused in this case) and she served them with a drink. Since it was hot outside they sat inside the house but there were other people sitting outside. A short while later the 2nd accused asked them to pay and would not hear their plea to wait. When she persisted the deceased gave her a Kshs. 500/= note. It was as they were waiting for their change that the 1st accused came home and standing at the door asked the 2nd accused to give him food but she retorted that she too had not eaten and went on busying herself with what she was doing. This allegedly incensed the 1st accused who accused her of entertaining men in the house while neglecting him. He was holding a slasher and he immediately attacked Edward (Pw1) and the deceased with it. He hit Edward (Pw1) on the legs, back and hands. According to Edward it was however the deceased who got the brunt of the wrath. The deceased was hit all over the body by the 1st accused before the 2nd accused took a plank of wood and hit him on the legs. When the customers who were drinking outside saw this they ran away and hid in the maize crop nearby. The 3rd accused who is the mother of the 1st accused is said to have come from her house and joined in the fray. She is said to have screamed and accused Edward (Pw1) and the deceased of ruining her family. Then she kicked the deceased on the back. Then a blow by the 1st accused propelled Edward out of the house but the deceased was left inside the house. On seeing Edward (Pw1) being beaten by the 1st accused, Francis Ongaro Nyakina (Pw2) and one Jackson Omosa went to his rescue. They walked him to a safe distance and left him to walk the rest of the way to his home.

Pw3 testified that Edward (Pw1) had injuries on the face and the back and that he was drunk. After escorting Edward, they went back to the house of the 1st accused and this time found villagers who told them that Edward (Pw1) had been in the house with the deceased. Immediately after that they saw the deceased being carried by three of his brothers who took him to hospital. Pw3 stated that the deceased had injuries on the legs one of which was almost decapitated. Later at about 8pm while in his home about one kilometre away he heard people at the deceased's home wailing and shouting that he had died. Pw3 stated that he did not personally see the 1st accused at his (1st accused's home) at the point at which the deceased's brothers came out carrying the deceased.

Paul Bosire Gwaro (Pw3) testified that he was the deceased's cousin and that when word reached him that the deceased had been beaten he went and found him lying on his belly somewhere. He stated that the deceased was in a lot of pain and when he inquired what had happened the deceased told him that accused persons had assaulted him. He stated that the deceased looked weak, that his left cheek was swollen, left leg broken and he had a wound on the nape of his neck which was bleeding. He also had bruises on his back and he appeared to have been dragged along some surface as his shirt was stained. Pw3 testified that the deceased succumbed on the way to hospital.

A post mortem done at the hospital revealed that his death was due to severe head injury secondary to blunt force to the head.

The accused persons gave unsworn evidence. The 1st accused stated that he was a stone mason and had gone to work very early on that day. On his way back home he met his wife going to Keroka. She told him she had been attacked by a man she had identified. He accompanied her to Keroka Police Station. Shortly afterwards the probox that was taking the deceased to hospital arrived. When the police officers went to attend to those people his name was mentioned. He stated that his wife told the police officers that he had not been at home. The men in the probox changed their story and said the deceased was beaten in his house. It was then that him and his wife were locked up. The next day his mother was also brought to the station and they were charged with this offence. The 1st accused stated that he was not in the habit of standing at the door and demanding good and that he never suspected his wife was unfaithful. He pointed out that the witnesses gave contradictory evidence. He contended that the police did not find liquor in his house. He wondered at the allegation that there were preparations to burn the deceased. He urged this court to consider the evidence carefully.

The 2nd accused stated that at about 4pm she went to collect vegetables from the house of a woman called Sabina but on going back she found her house open but thinking it was her husband she went inside only to find another man. She went out screaming. Three men she found on the road went and apprehended the man and said they would take him to hospital. Afterwards she met her husband and they went to the police station. As they were waiting some people went to the station who were given priority. She and her husband were then locked up in the cells. She stated that they were later told that the man who had been attacked in their house had died. The next day the 3rd accused was taken to the station and she told them she had been asked to explain what had transpired in her home.

The 3rd accused stated that she returned home at 6pm on the material day and when she went to the house of her co-accused she found their children alone. She prepared dinner and they ate and slept. The next day after the children had gone to school police officers arrived and started looking for liquor but she told them there was no liquor. They took three pangas but returned them when she demanded to know where they were taking them. They then arrested her ostensibly because the incident had taken place in her home. She stated that Pw1 told her that the person who was attacked in her home died.

In summing up, Mr. Ondigo, Advocate submitted that the prosecution did not prove its case beyond reasonable doubt. Mr. Ondigo submitted there was no evidence of common intention and there was also no evidence of who caused the head injury that caused the death of the deceased. He urged this court to acquit the deceased.

I have evaluated the evidence before me carefully. I have also considered Counsel's arguments both at the close of the prosecution's case and in closing and I am satisfied there is proof that the accused persons killed the deceased. The offence was witnessed by Edward (Pw1) who had accompanied the deceased to drink chang'aa in the house of the 1st and 2nd accused. Edward (Pw1) vividly narrated what transpired in the house from the time they went there to the time a blow he got from the 1st accused propelled him outside the house where he was rescued and escorted home by Pw2. The incident occurred in broad daylight and Edward (Pw1) knew the accused persons well enough and there was therefore no possibility that he was mistaken. The accused persons themselves admitted that something happened in their house that day. The 2nd accused claimed that she found a stranger in her house and that when she raised the alarm the stranger was apprehended. They seemed to suggest that the stranger was then lynched in their home. However, this court believed the testimony of Edward. It was corroborated in all material particulars by Francis Ongaro Nyakina (Pw2). This witness testified that he was passing near the house of the accused on his way to the shop when he saw the 1st accused beating Edward (Pw1) with a slasher. He stated that the 1st accused struck Edward (Pw1) on the back and that he and Jackson Omosa went and stopped the 1st accused and escorted Pw1 away. Pw2 stated that it was at 5pm so it was still daytime and again I am satisfied that he could not have been mistaken as he knew that home and the 1st accused's family well. Pw2 also confirmed that he saw the deceased being carried out of the home of the accused persons. He stated that he saw that the deceased had injuries. It was during daytime and he could see properly. I believed him and I am satisfied that his evidence offers crucial corroboration for that of Edward (Pw1).

There was also evidence that before he was taken to hospital the deceased told his cousin (Pw3) that he had been assaulted by the three accused persons. That dying declaration goes further to corroborate the evidence of Edward (Pw1) and Francis (Pw2). I therefore find that there is no truth in the statements of the accused persons. The 1st accused was seen at the scene by Edward (pw1) and it cannot therefore be true that he was not at home. The 2nd and 3rd accused joined him in battering the deceased. As I have stated their statements only go to confirm that Edward (pw1) and Francis (pw2) are witnesses of truth and that their testimonies that the deceased was assaulted at the home of the accused persons is credible. Unlike the testimonies of Pw1 and Pw2 the statements of the accused persons were not tested through cross examination and do not therefore have much probative value compared to the testimonies of the two. Pw1 and Pw2 remained unshaken despite vigorous cross examination. I found their evidence credible. The cause of death may have been the head injury but the post mortem report indicates that the deceased had injuries in other parts of the body. The fact that he did not die as a result of being hit on the back or in the part of the body by the 2nd and 3rd accused does not absolve them from guilt. They too participated in the assault and the end result is that the deceased died and each of them is guilty. Moreover, it is my finding that a common intention was established. The 1st accused's demand for food had been ignored by the 2nd accused and this irked him and because she was attending to the deceased and Edward (Pw1). When the 3rd accused heard the commotion she went there and joined her son and daughter in-law in the assault. If food was not the real reason for the attack then it may have been an excuse to stop the deceased from demanding his change which the 2nd accused was yet to give him. Whether it was food or the money my finding is that the attack was unlawful. I do also find that malice aforethought was established. This from the weapon used (a slasher and plank of wood) and the injuries inflicted upon the deceased. The accused persons definitely either intended to kill or do grievous harm to the deceased and even if they did not, they had knowledge that that kind of assault would probably cause the death of or grievous harm to the deceased.

In the upshot I find that it was proved beyond reasonable doubt that the accused persons caused the death of the deceased by an unlawful act and of malice aforethought. I find them 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 29th day of July 2019.

E. N. MAINA

JUDGE