



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL CASE NO. 04 OF 2017

REPUBLIC.....PROSECUTOR

=VRS=

1. EDWIN GIKIRA OBERI.....1ST ACCUSED

2. JOSEPHINE NYAERA OBERI.....2ND ACCUSED

JUDGEMENT

The accused persons are charged with the murder of Isaak Onyinge Machora contrary to Section 203 as read with Section 204 of the Penal Code. It is alleged that on 26th January 2017 the accused persons jointly with others not before court murdered the deceased at a place called Bonyaigoba in Nyamira County.

Briefly the facts of the case are that on the material day at about 6pm the accused persons, who are a mother and son, together with one Joshua and one Oberi were hired to load some stones in a lorry. The deceased and his uncle one Samusi however had a dispute on the ownership of those stones and when the deceased who was on his way to work found the accused persons loading the stones into the lorry he told them to stop. Instead of stopping the 1st accused is said to have taken a stone and hit the deceased on the head. The 2nd accused is said to have also hit the deceased on the back with a stone because they could not take the deceased saying the stones were his. They then continued to hit the deceased with stones and only ran away when villagers started going to the scene.

Dennis Okweri Machora (Pw1), the deceased's brother, testified that he was not too far from the scene and when he heard the deceased screaming he rushed to the scene and found the deceased bleeding from the injuries the accused persons had inflicted on him. When other villagers started arriving at the scene the accused persons and their accomplices ran away. Family members rushed the deceased to hospital but he was declared dead on arrival. The matter was then reported to the police.

Joseph Machora (Pw2) told this court that it was not the first time the accused persons had assaulted the deceased; that they had done it before because they felt bad that the deceased had more chang'aa customers than the husband of the 2nd accused.

A post mortem report produced by Sergeant Rebecca Kabaka (Pw4) indicates that the deceased had a depressed skull fracture on the right parietal area, a deep wound about 3cm wide on the right parietal region and bruises on the left supra orbital region. According to the doctor who performed the post mortem the cause of death was cardiopulmonary arrest due to depressed skull fracture and intracranial and subdural haemorrhage following blunt trauma to the head.

On 27th January 2017 the 1st accused was apprehended by members of the public and handed over to the police. Sergeant Kabaka (Pw4) testified that the 2nd accused was apprehended on 7th February 2017 by village elders and also handed over to the police. The accused persons were initially charged separately but later their cases were consolidated. Sgt. Kabaka (Pw4) told this court that their accomplices were not arrested.

When this court put the accused persons on their defence they both elected to make unsworn statements. The 1st accused stated that on the material day as they were loading hard-core into a lorry a dispute arose over the ownership of the stones. He stated that when a fight broke out between the disputants he ran away only to be arrested later and taken to the police station for an offence he did not commit. He stated that the evidence of the witnesses was not true.

The 2nd accused stated that on that day at about 6pm her children came from school and she went home to prepare them a meal. As she was cooking she heard people who were headed towards her house making noise saying someone from her family had killed someone and had been arrested. The people said they were coming to kill them. She stated that she fled with her children and spent the night in the bush. She stated that she was apprehended when she took her children to her in-law's home. She stated that the deceased and her husband were chang'aa brewers and there was bad blood between them because the deceased suspected her husband had snitched on him to the police. She stated that on the material day there were many people loading stones and that the differences between her husband and the deceased was

only reason they were arrested. She contended that the stones belonged to one Monanda Samson who had an ownership dispute with the deceased and that she and her son the 1st accused had no interest in the stones.

Counsel for the accused persons made their closing arguments through written submissions. Both submitted that the prosecution did not prove their case beyond reasonable doubt. Counsel for the 1st accused contended that the quarrel and fight over the stones was between the deceased and his uncle. Counsel analysed the evidence of each witness and faulted the prosecution for failing to call the owner of the lorry who he described as an independent witness. He urged this court to acquit the 1st accused.

Counsel for the 2nd accused also analysed the evidence of each of the prosecution witnesses before submitting that none of it pointed to the 2nd accused. He contended that the deceased provoked his own death by disputing with Joshua Nyanumba Machora. Like Counsel for the 1st accused he submitted that the driver of the lorry was a crucial witness. Counsel stated that the post mortem report agreed with the evidence of Pw1. Referring to evidence by the deceased's father that the home of the accused person was 300 kilometres away, Counsel for the 2nd accused submitted that they could not have had any grudges with the deceased and they therefore had no good reason to kill him. Counsel contended that there was no evidence to prove the charge as against the 2nd accused.

Learned Prosecution Counsel did not make any closing arguments.

The evidence of the prosecution that the deceased was stoned to death is corroborated by the post mortem report which reveals that the cause of death was cardiopulmonary arrest secondary to depressed skull fracture and intracranial and subdural haemorrhage following blunt trauma to the head. The deceased is said to have suffered a deep cut wound on the right temporal region about 3cm in diameter. He also had bruises on the left supra orbital region and a depressed skull fracture on the right parietal area. These injuries are consistent with the evidence that the deceased was assaulted. My finding therefore is that the deceased met his death at the hands of assailants and by an unlawful act. I say it was by an unlawful act because he had not done anything to provoke the assault other than to lay claim to what he believed was his and instead of assaulting him the assailants ought to have stopped loading the stones pending determination of the dispute by the Chief to who the dispute had been reported. Having found that the deceased died by a human hand and by an unlawful act the next issue for determination is whether the killer(s) caused his death of malice aforethought.

Malice aforethought is proved by establishing any one or more of the circumstances set out in **Section 206** of the **Penal Code** which states:-

“206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances -

(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”

I am satisfied that the prosecution proved more than one of those circumstances. Pw1 and Pw3 saw the deceased being assaulted. They vividly narrated how the assailants used stones to assault the deceased mostly on the head. He bled profusely from the injuries sustained and did not even make it to hospital. The injuries he sustained are set out in the post mortem form. They were serious injuries which if classified would amount to maim which is the highest degree of injury. The prosecution has therefore proved beyond reasonable doubt that the assailants either intended to kill the deceased or to cause him grievous harm and if that was not the case then they probably had knowledge that their actions would probably cause death or grievous harm to the deceased. I find and hold therefore that all the ingredients of murder were proved beyond reasonable doubt and what is left is to determine whether or not the accused persons are the people who committed this offence.

Having evaluated the evidence and considered the submissions by both sides I am satisfied that the accused persons committed this offence. The offence occurred in broad daylight at 6pm as the deceased was going to work. Pw1 and Pw3 who were eye witnesses knew the accused persons well and I am satisfied that the circumstances favoured a positive recognition of the assailants. The unsworn statements of the accused persons place them squarely at the scene of crime. The 1st accused confirmed that he was loading stones and that there was a dispute concerning the ownership of the stones. He also admitted there was a fight. The 2nd accused told the court that she went home from the scene at 6pm. These statements confirm that Pw1, Pw2 and Pw3 were credible witnesses. The witnesses were consistent and they remained unshaken even after being put to the test by defence Counsel. The accused and the deceased lived in close proximity to each other and Pw2's evidence that the distance between their homes was 300km was clearly an error. The unsworn statements of the accused persons did not rebut the evidence of the prosecution witnesses.

The prosecution's case against the accused persons was proved beyond reasonable doubt. 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 25th day of July 2019.

E. N. MAINA

JUDGE