



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 14 OF 2015**

**REPUBLIC.....PROSECUTOR**

**=VRS=**

**1. LIDYA MWANGO MOSETI.....1<sup>ST</sup> ACCUSED**

**2. DOUGLAS NYAKUNDI OBIERO.....2<sup>ND</sup> ACCUSED (ACQUITTED)**

**3. ELIJAH OKARO OGEICHE.....3<sup>RD</sup> ACCUSED (ACQUITTED)**

**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 the night of **9<sup>th</sup> and 10<sup>th</sup> May 2011** at Rikenye Village, Rikenye Sub-location, East Kitutu Location, Masaba North District within Nyamira County in the Republic of Kenya jointly murdered **Charles Moseti Migori**.

The accused persons pleaded not guilty to the charge whereupon the prosecution called twelve witnesses to prove its case.

Briefly the prosecution's case is that on **10<sup>th</sup> May 2011** at about 7am Okaro Ogenche (Pw8) was awakened by his fourteen-year-old grandson (Pw10) who had stumbled upon a body on his way to school. Pw8 immediately called his son E (3<sup>rd</sup> accused) and also sent the boy to call the area village elder (Pw2). He then went to the scene and found the body lying on its belly. When the villager elder (Pw2) arrived at the scene the body was turned and Pw8 recognized it was the deceased in this case. Pw8 testified that the body was found close to his late son's deserted homestead about 1km from that of the deceased. Soon police officers were called to the scene and investigations commenced.

The court heard that a bloodstained sack which was suspected to have been used to move the body of the deceased to the scene was found in a toilet on a path leading to the home of the deceased and that there was blood on the ground between his house and the kitchen. The sack and soil sample collected from the scene were taken to the government chemist together with a blood sample taken from the body of the deceased. Lawrence Kinyua Muthuri (Pw4) told the court that upon analysis the DNA profiles generated from the blood stains on the gunny bag matched the DNA profile generated from the blood sample of the deceased. However, the bloodstains on the soil sample did not generate a DNA profile.

A post mortem conducted on the deceased's body about two days after his death revealed a deep cut on the back of his body, a cut on the temporal bone, a bruise on the left side of the face, a fracture of the temporal bone on the right side, blood in the thoracic cavity, and a subdural haematoma approximately 5 x 6cm on the left side. The cause of death was opined to be cardiopulmonary arrest secondary to severe head injury both blunt and penetrating.

Joseph Kepha Mokaya (Pw1) testified that the deceased was his brother and that he began to suspect that the 1<sup>st</sup> accused who was the wife of the deceased had something to do with his death when he saw blood stains on the door and on the ground of the house she shared with the deceased. He started making his own inquiries and soon learnt that she had in fact approached a certain boy with a request to contract him to kill her husband. He (Pw1) relayed this information to the police who instituted investigations into the claim. That boy B Otestified as Pw5. He stated that on 30<sup>th</sup> April 2011 at about 6.30am the 1<sup>st</sup> accused went to his home and told him that she had a job for him which could earn him Kshs. 1,000/=. He stated that he asked her what kind of job it was and her response was that it was to kill her husband. Pw5 stated that he was in the same school with the son of the 1<sup>st</sup> accused and he knew her well. He stated that he had not been contracted to kill anyone before and so after she left his first reaction was to talk to his mother (Pw6) about it. His mother advised him not to take up the offer and went further and called his uncle one Nyangaresi who accompanied her to the 1<sup>st</sup> accused's house. Pw5's mother (Pw6) testified that when she confronted the 1<sup>st</sup> accused she apologized for approaching her son and beseeched her (Pw6) not to tell anybody about it. Pw6 testified that she too knew the 1<sup>st</sup> accused as they would meet at their tea buying centre. She stated that Pw5 was then only fourteen years old and in class 8 at the time and she was disturbed as to why the 1<sup>st</sup> accused would involve him in such a matter. A few days later the deceased was

found dead and Pw5 was picked by the area chief, who had heard what had transpired between him and the 1<sup>st</sup> accused. He was handed over to the police to record a statement. After that the 1<sup>st</sup> accused was arrested. The 2<sup>nd</sup> and 3<sup>rd</sup> accused were subsequently arrested by the area chief who handed them over to the police. Pw5's statement was tendered in evidence as a defence exhibit (Exhibit D.3). The investigating officer (Pw9) told the court that the 2<sup>nd</sup> accused recorded a confession in which he implicated the 3<sup>rd</sup> accused. Initially they were charged separately from the 1<sup>st</sup> accused but the charges were later consolidated.

After the close of the prosecution's this court considered the evidence of the ten prosecution witnesses and found that the prosecution had not established a prima facie case against the 2<sup>nd</sup> and 3<sup>rd</sup> accused and acquitted them under Section 306 (1) of the Criminal Procedure Code. The reason for this is that there was no evidence that they committed the offence. There was no evidence either direct or circumstantial to incriminate them apart from that of the investigating officer (Pw9). Even then that evidence was just hearsay as the alleged confession by the 2<sup>nd</sup> accused was rejected by this court as it was not taken in accordance with the **Evidence (Out of Court Confession) Rules**.

The 1<sup>st</sup> accused was however put on her defence this court having found there was evidence that she committed the offence. She elected to make an unsworn statement in which she denied that she killed her husband, the deceased. She stated that the deceased did not go home that day and the next morning she was on her way back home from informing her mother-in-law when she heard screams. On going to the place the screams emanated from she found her husband's body. She stated that the evidence given by the prosecution witnesses that she had a plan to kill her husband was not true. She stated that to the contrary they enjoyed a happy marriage and they would both go to work and back home together. She wondered why Pw5 did not inform the police about the alleged plan and also contended that she could not have discussed such a thing with a boy of that age. She further contended that her first time to see (Pw5) was in court. She called her son F O M (Dw1) who stated that the deceased did not return home the previous night, that they were at home with the 1<sup>st</sup> accused throughout and there were no strangers in their home. He stated that the next morning he went to school. He contended that he did not know if his mother killed his father. He also stated that he does not know the persons she had been charged with.

In summing up Mr. Ogari, Learned Counsel for the 1<sup>st</sup> accused submitted that whereas the prosecution has satisfactorily proved the ingredients of murder, they miserably failed to prove that the 1<sup>st</sup> accused was the murderer. Counsel submitted that the case against the 1<sup>st</sup> accused rests purely on circumstantial evidence based on evidence by Pw5 and Pw7 that she had a motive to kill her husband. Counsel submitted that the evidence of Pw5 was not credible as the 1<sup>st</sup> accused denied approaching him and because at his age there was no way the 1<sup>st</sup> accused would have contracted him to commit such an act. Counsel further submitted that although Pw7 incriminated the accused his testimony was that he did not know who killed the deceased and that moreover under Section 9 (3) of the Penal Code motive is immaterial.

On the DNA analysis, Counsel submitted that the government analyst's (Pw4) evidence was that his report did not capture whether the blood on the samples he analysed was human blood. Counsel contended that the evidence of Pw5 and Pw6 who are the deceased's kin was intended to fix the 1<sup>st</sup> accused. Counsel contended that the intention of recording the confession was also to fabricate evidence against the accused person. He urged this court to believe the defence, which he described as an alibi. He stated that the same was not challenged or discredited. Counsel further submitted that whereas the prosecution witnesses strongly suspect the 1<sup>st</sup> accused murdered her husband suspicion however strong is just that and cannot form the basis of a conviction. He urged this court to find that the prosecution did not prove its case beyond reasonable doubt and acquit the accused.

As submitted by Counsel for the accused the prosecution has established the ingredients of the offence of murder provided in Section 203 of the Penal Code. The evidence of the prosecution witnesses leave no doubt that the death of the deceased was by a human hand. The injuries inflicted upon the deceased by the killer(s) also leave no doubt that the killer(s) had an intention to either kill him or cause him grievous harm. The only issue for determination therefore is whether the 1<sup>st</sup> accused committed the offence or whether she participated in the commission of the offence.

Having considered the evidence of the prosecution witnesses, I am in agreement with defence Counsel's submission that there is no direct evidence that the accused murdered the deceased. I am however satisfied that there is circumstantial evidence to prove beyond reasonable doubt that she committed the offence. In the case of **Kariuki Karanja Vs. Republic [1986] KLR 190** the Court of Appeal restated the criteria which such evidence has to satisfy in order to sustain a conviction. The court stated: -

**“2. In order for circumstantial evidence to sustain a conviction, it must point irresistibly to the accused and in order to justify the inference of guilt on such evidence, the inculpatory facts must be incompatible with innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The burden of proving facts justifying the drawing of that inference is on the prosecution.”**

As submitted by defence Counsel the prosecution was not required to prove the motive for the murder (**see also Section 93 of the Penal Code**). I am satisfied that the evidence of Pw5 points irresistibly to the 1<sup>st</sup> accused person. Pw5 vividly narrated how the 1<sup>st</sup> accused approached him with an offer of Kshs. 1000/= if he agreed to kill her husband. Her husband, the deceased in this case was killed barely two weeks after the encounter between her and Pw5. Pw5's evidence was corroborated by his mother (Pw6) whose testimony was also corroborated by Pw7. It is for that reason that I found Pw5 a reliable and trustworthy witness and his evidence credible. The accused person may not have left her house on the day her husband was murdered but there are inculpatory facts that are incompatible with her innocence and which are incapable of explanation upon any other reasonable hypothesis than that of guilt. Those facts are that she attempted to hire Pw5 two weeks before her husband was killed. Pw5 readily admitted this to the police. It is my finding that there is nothing in the evidence to suggest that he was lying against the 1<sup>st</sup> accused, because of his young age he refused to heed the exhortation not to tell anybody about it and spoke to his mother (Pw6) who advised him not to agree to it. Pw6 on her part went and confronted the accused and demanded to know why she wanted her young son to do such a thing. Unlike the 1<sup>st</sup> accused's son (Dw1) who had a reason to lie to save his mother from going to jail Pw5 and Pw6 had no reason to fabricate evidence against the 1<sup>st</sup> accused and she herself did not allude to any. Perhaps the only reason the accused would have contracted such a young child to kill her husband was knowledge that he could not be jailed. Only she knows why she would have used such a young child. The long and short of it however is that she was so determined to see her husband dead that Pw5 having turned down the offer she nevertheless did so herself or got other contract killers to do it. **Section 20 of the Penal Code** makes any

person who **aids, abets, counsels or procures another to commit an offence as guilty as the one who commits it** and makes that person **liable to the same punishment as the actual offender**. I am therefore satisfied that the charge against the 1<sup>st</sup> accused person has been proved beyond reasonable doubt. I find her guilty of murder contrary to Section 203 as read with Section 204 of the Penal Code and convict her accordingly.

**Dated, signed and delivered in Nyamira this 27<sup>th</sup> day of August 2019.**

**E. N. MAINA**

**JUDGE**