



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL CASE NO 43 OF 2013

REPUBLIC.....PROSECUTION

VERSUS

SAMUEL MONANKA MABERE.....ACCUSED

JUDGMENT

1. By an information dated the 31<sup>st</sup> December 2018 **Samuel Monanka Mabere** ('the accused') is charged with murder contrary to **section 203**, as read with **section 204**, of the **Penal Code, Cap 63, Laws of Kenya**. The particulars of the offence allege that the accused on 30<sup>th</sup> November 2018 at Enteya village in Transmara West Sub County within Narok County murdered **Joseph Rahoya**.

2. Briefly the prosecution case is that the accused killed the deceased, dumped the body in a ditch and covered the body with twigs and leaves. Though there was no direct witness to the killing, the accused was the last person seen with the deceased. The prosecution called 7 witnesses to prove its case.

3. **Jane Kerubo Monanka** (Pw2) testified that the accused is her husband and the deceased was their immediate neighbour and a person from their home area. She recalled that on 30<sup>th</sup> November 2018 the accused and the deceased left together for the forest at around 9:00 p.m. to get charcoal which they had burnt. The accused returned home at 4.00a.m. She heard him pour water and he started washing clothes. She immediately woke up to use the toilet and saw the water used by the accused was bloody. She testified that she did all the laundry at home and asked the accused why he had decided to clean his clothes. The accused told her to shut up and go back to bed. The following day she asked the accused why the deceased had not returned and the accused told her that the deceased had gone to split wood. After 3 days she went to the deceased's house and found his gumboots which he had worn on the night he went to get charcoal from the forest. She questioned the accused why the deceased boots were there and the accused informed her that may be the deceased had bought another pair. She recalled that after about 5 days the accused gave her a battery of a mobile phone and asked her to go sell it to "Waingo" who bought it at Kshs 300/=. She recognized that the battery was of the deceased's phone, the deceased used to give her the phone to go charge it. After one week the accused asked her to water their nursery which had tomatoes, she went to the shamba and there a bad smell. She returned home and told the accused of the smell. The accused then asked her to find out what was causing the smell. She went back to the shamba she found the deceased's T-shirt in the ditch and covered it. When the accused returned home he inquired from her whether she found out what was causing the smell and she remained silent as was afraid that the accused could do the same to her. She was troubled and after 3 weeks she ran to the neighbor's and told them that she had seen the deceased clothes at their shamba and also told them about the bad smell. The owner of the shamba was called. Thereafter the police collected the body. She recognized the deceased by his red T-shirt, the gap in his teeth and a missing toe on his feet.

4. **Selina Matushoi Karika Nasiti** (Pw3) recalled that on 20<sup>th</sup> December 2018 Pw2 went to her home while she was with her sister, Evans and the herdsman. Pw2 then led them to her shamba where they used to dig. As they approached the shamba there was a bad odour coming from the ditch. When the ditch was uncovered she ran away and called Pw4. She did not return to the place.

5. **Wilson Kerika Masiti** (Pw4) testified that the accused was working for him and staying in his shamba. He recalled that on 20<sup>th</sup> December 2018 he received a call from Pw3 informing him that Pw2 had told them the accused killed the deceased. Pw4 testified that he reported the matter to the police who accompanied him to the place. As they approached they saw the accused working at a place with charcoal. When the accused saw the police he began running away. They ran after him. The accused had a panga. He threatened the one who got near him. They continued to ran after him. The accused got into a neighbour's house and only threw his panga and surrendered when the police coked their guns. He testified that the accused led them to a ditch in the shamba. Pw4 saw something covered with twigs and when the police removed the twigs he saw a red cloth on a body. The body had decomposed and the head was separated from the body.

6. **Geoffrey Osebe Motanya** (Pw5) No.20050091656 recalled that on 20<sup>th</sup> December he got a report from Ole Moi that someone had been killed and buried in his shamba. Pw5 called the O.C.S. of Longorian division who sent 2 officers as back up and together proceeded to the scene. Pw2 informed them that the accused was burning charcoal and immediately went to where the accused was. He testified that when the

accused saw them he began running away. The accused threatened to cut them with a panga but once he saw that the police were armed he surrendered. Pw5 testified that **Pw2** led them to a ditch where the deceased's body was. They uncovered the ditch and found the body of the deceased which had decomposed. The head of the deceased was separate from the body.

**7. P.C Benson Chirchir** (Pw6) testified that on 20<sup>th</sup> December 2018 at around 5.00p.m he received instructions from the OCPD Transmara West Mr. Wambua that he should drive to Enteya village. Upon arrival he found officers from Longorian Police Station who arrested a suspect for murder. At the scene was the decomposing body of the deceased covered in twigs. The suspect was taken to Transmara Police station Kilgoris. He testified that during their investigations they realized that the accused and deceased were friends; both were working in Pw4's farm and were also selling charcoal together. He testified that after selling charcoal a purchaser of their charcoal sent money through Mpesa to the deceased's phone. The accused then killed the deceased and took his phone. He testified that he had a postmortem done by Pw1. After his investigations he brought the accused to court with charges of murder.

**8. Annette Onyango** (Pw1) told court that she works Transmara District hospital. She performed the post mortem on the deceased Joseph Rahoya Chacha. Her general observations were that the deceased was a 30 year old male African and had a black pant on. His height could not be determined as the body was decomposed. The postmortem changes noted were mainly rigor mortis. The external appearance was decomposed and there were mostly skeleton tissue. The skull was detached from the rest of the body. The ribs and the spinal verbal were visible and skeletal tissue of upper limbs was visible. On the internal appearance on the respiratory system and the lung tissue was decomposed ribs No.8 to 12 had fractures due to decomposition. The cardio-vascular system, digestive system and genito-urinary system had no organs visible for assessment. She testified that the skull was detached from the body and it was decomposed. There were no abnormalities noted on the nervous system. Cervical Vertebrae was fractured at C3 and C4. There was brain tissue emanating from the skull found on the spinal code. As a result of her examination, her conclusion was that the cause of death was exvanguination from decapitation.

**9. Samuel Monanka Mabere** (Pw7) told court that he was the deceased's younger brother. He recalled that on 20<sup>th</sup> December 2018 was called to identify the deceased's body. He testified that the deceased's body had started to decompose and he identified him by his upper teeth which had a gap and a chipped tooth and by his last 2 toes on his right leg which were held together.

**10.** The prosecution closed its case and by a ruling of this Court, the accused person was placed on his defence. The accused gave sworn evidence. The accused denied any involvement in the death of the deceased. He recalled that he went with the deceased to sell charcoal and after selling charcoal they parted ways at 5.00 a.m. The deceased went to split wood and he went home. When he tried contacting the deceased his phone was 'mteja'. He told court that Pw2 was not truthful in her testimony. That the alleged clothes he was washing were not produced as evidence. He testified that they had squabbles with Pw2 as she wanted to change their children's birth certificates to have the name Mathias Masiko as the father. That at one time she had left their home and only returned when the family saw that the children were suffering. That Pw2 had once left their home to be with the said man. These are the birth certificates. She wanted to put the name of the man. He insisted that Pw2 was not being truthful and only framing him so that so that she can get a chance to go and live with Mathias Masiko. That they did not trust each other. He testified that he had given his wife the battery of his techno phone to sell and not the deceased's' battery. That this case has been planted on him and he does not know how the deceased died.

**11.** The State Counsel Mr. Otieno submitted that the evidence of Pw2 was not merely suspicion but strong circumstantial evidence. He submitted that on the date the deceased died he was seen leaving with the accused person and it is only the accused person who came back. That the deceased was found buried in the accused's shamba. He argued the accused's behavior or his action of running away when he saw the police pointed to the fact that he had something to do with the disappearance and death of the deceased person. He further submitted that the arresting officer testified that the accused person led them to the place the deceased was buried. He concluded that they had proved their case beyond reasonable doubt.

**12.** The accused's counsel Mr. Okenye filed written submissions. The defence submitted as follows; that the evidence of Pw2 could not be relied upon as they had marital friction and that the case against him was merely to frame him up. That the accused only ran away when he saw the police officers because the police found him burning charcoal which is illegal. That the postmortem did not approximate the time of death as the deceased was decomposed and it was therefore impossible to know the time the deceased died. It was further submitted that that the deceased was likely to have been killed by someone else as there are several homes from where the deceased body was found. That the entire prosecution case is based on suspicion and that suspicion alone however strong may not sustain a conviction.

**13.** The offence of murder is defined by **section 203** of the **Penal Code** as follows, "*Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.*" The prosecution must prove beyond reasonable doubt the following three ingredients; first, it must prove the death of the deceased and the cause of that death; second, that the accused committed the unlawful act that led to the death; and third, that the accused committed the unlawful act with malice aforethought.

**14.** The fact and cause of death was in dispute. Dr Annette Onyango who did the post mortem testified that the deceased's cervical vertebra was fractured at C3 and C4. She observed that there was brain tissue emanating from the skull which was found on the spinal code. She concluded that the cause of death was exvanguination from decapitation. This is consistent with the evidence of Pw2, Pw4 and Pw5 who testified that the head was separate from the body. Pw7 testified that the deceased's body had started to decompose and he identified him by his upper teeth which had a gap and a chipped tooth and by his last 2 toes on his right leg which were held together. Pw2 told court that she recognized the body found in the shamba was that of the deceased's by the deceased's red T-shirt, the gap in his teeth and a missing toe on his feet.

**15.** I now turn to whether the accused committed the unlawful act that led to the death of the deceased. In this case there is no direct evidence that the accused murdered the deceased hence the case is grounded on circumstantial evidence. The Court of Appeal in **Abanga alias Onyango v Republic CA CR. A NO. 32 of 1990 (UR)** observed that:

*It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken*

cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.

16. The prosecution case was that the accused was the last person to be seen with the deceased. The prosecution case is largely hinged on the evidence of Pw2 who testified that the accused left together with the deceased but returned home alone. She saw the deceased clean up his clothes and the water used was very bloody. Pw2 was the spouse of the accused.

17. I have also considered the capacity of a spouse as a witness in criminal proceedings as provided by **section 127 of the Evidence Act**. The relevant section provide as follows

*“127. Competency of parties and spouses*

*(1) ...*

*(2) In criminal proceedings every person charged with an offence, and the wife or husband of the person charged, shall be a competent witness for the defence at every stage of the proceedings, whether such person is charged alone or jointly with any other person:*

*Provided that—*

*(i) the person charged shall not be called as a witness except upon his own application;*

*(ii)(save as provided in subsection (3) of this section, the wife or husband of the person charged shall not be called as a witness except upon the application of the person charged;*

*(iii) the failure of the person charged (or of the wife or husband of that person) to give evidence shall not be made the subject of any comment by the prosecution.*

*(3)In criminal proceedings the wife or husband of the person charged shall be a competent and compellable witness for the prosecution or defence without the consent of such person, in any case where such person is charged—*

*(a) with the offence of bigamy; or*

*(b) with offences under the Sexual Offences Act (No. 3 of 2006);*

*(c) in respect of an act or omission affecting the person or property of the wife or husband of such person or the children of either of them, and not otherwise.*

*(4) In this section “husband” and “wife” mean respectively the husband and wife of a marriage, whether or not monogamous, which is by law binding during the lifetime of both parties unless dissolved according to law, and includes a marriage under native or tribal custom.”*

18. Pw2 referred to the accused as her husband and the accused also testified that Pw2 was his second wife. The accused did not lead evidence of a customary law marriage but produced into evidence birth certificates marked as Dexh1 (a), (b), (c) and (d) indicating that he had cohabited with Pw2 for several years and thus it could be presumed that a marriage had been created. No application was made by the accused to call Pw2 as a witness. The Court of Appeal in the case of Julius Mwita Range v Republic [2003] eKLR held that;

***“We are certain in our minds that the marriage between the appellant and Elizabeth Nyaitoto was a marriage covered under Section 127 (4) and thus Elizabeth Nyaitoto was in law still the wife of the appellant notwithstanding that they were living separately. She was a competent witness but could only be called as a witness upon the application of the appellant who was the person charged. She was called by the prosecution and this was not proper as that was making her a compellable witness.***

***The defence did not apply for her to be called nor did the defence apply for her to proceed with her evidence now that she had been called and was thus made available. We do feel the learned judge was plainly right in not allowing her to testify for the prosecution and we cannot fault the judge in his well-considered decision on that aspect.”[Emphasis mine]***

19. Similarly in the case of Joseph Munyoki Kimatu v Republic [2014] eKLR the Court of Appeal found that;

***“The fact of death or injury to one’s parent does not fall within the exceptions in section 127(3) of the evidence Act (supra). It was therefore necessary for the Court to obtain the consent of both the appellant and PW3 before putting PW3 into the witness stand to testify against the appellant, her husband. Failure to take this precautionary measures was fatal to the prosecution’s case.”[Emphasis added]***

20. From my analysis, I find that the evidence of Pw2 needed corroboration by an independent witness Pw2 was not a competent witness for the prosecution and that it would be unsafe to find the accused person guilty on her evidence alone.

21. Further looking at the postmortem form, the time of death of the deceased was never established by **Pw1** and therefore the prosecution

did not prove that the deceased died on 30<sup>th</sup> November 2018 as alleged.

22. It is the duty of the prosecution to prove their case beyond reasonable doubt. A death occurred but the evidence of record is though circumstantial is inadequate for the reasons stated to sustain a conviction.

23. In conclusion, I find that the prosecution failed to prove their case to the required standard, beyond reasonable doubt. Consequently, I acquit **all the accused person Samuel Monanka Mabere** and direct that they be set at liberty forthwith unless they are otherwise lawfully held.

**Dated, signed and delivered at KISII this 27<sup>th</sup> day of November, 2019.**

**R. E. OUGO**

**JUDGE**

**In the presence of;**

**Accused Person Present**

**Mr. Okenye For the Accused**

**Mr. Otieno Senior State Counsel Office of the DPP**

**Ms Rael Court clerk**