



**REPUBLIC OF KENYA**

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

**CRIMINAL (MURDER) NO. 14 OF 2014**

**REPUBLIC ..... PROSECUTOR**

**VERSUS**

**ENOCK NYANDIEKA BEBENI**

**GEOFFREY BIRUNDU MONARI ..... ACCUSED**

**JUDGMENT**

[1] **Enock Nyandieka Bebeni** and **Geoffrey Birundu Monari**, were separately charged with the murder of Dennis Ogechi Mogata (deceased) contrary to S.203 read with S.204 of the Penal Code.

It was alleged that on the 20<sup>th</sup> January 2014, at Nyacheki Market Nyamache District Kisii County, they jointly murdered the deceased.

[2] The case for the prosecution was grounded on the facts presented by a total of six (6) prosecution witnesses who included a brother of the deceased, **Mogata Nyamari Vincent (PW 1)**, a sister of the deceased, **Alice Mogata (PW 2)**, a former senior chief, **Alex Omachi (PW 3)**, another brother of the deceased, **Jared Mogata (PW 4)**, a pathologist, **DR. Dickson Gichana (PW 5)** and the police officer from Nyangusu Police Station, **Cpl. Julius Tiana (PW 6)**.

[3] Presentation of the facts by the prosecution followed the consolidation of the two relevant court files (i.e **Criminal Cases No. 14 of 2014 and No. 22 of 2014**) for hearing as one, with Enock being the first accused and Geoffrey, the second accused. The two are said to have assaulted and fatally injured the deceased on the material date at about 8.00p.m after he (deceased) had been fetched from his hotel by the first accused.

[4] After being assaulted the deceased lay on the ground and the first accused was found standing near him. The blood stains seen on the first accused's clothes aroused suspicion that he may have been involved in assaulting the deceased together with the second accused who allegedly disappeared from the scene until much later when he surrendered to the police and was arrested. Accused one was arrested on the material date.

[5] The defence by both accused is a denial of any involvement in the death of the deceased. They indicated that they were with the deceased on the material date from the afternoon hours. In the process, they gathered at a bar called stage bar where they engaged in partaking alcohol. The three were friends. They later left the bar and proceeded to a nearby hotel said to belong to the deceased's sister.

[6] They returned to the bar after leaving the hotel but then, the second accused being a motor cycle operator dropped some customers at a certain place before rejoining the group. It was at that point that the deceased borrowed or took the second accused's motor cycle and rode off. The second accused had at the time proceeded to another bar with his customers and when he rejoined the first accused, the deceased had just left the scene. Minutes thereafter, they heard screams and the name of the deceased being mentioned by villagers who were angry and asking for the whereabouts of the second accused.

[7] Fearing for his life, the second accused fled from the scene and took refuge in a nearby church from where he left for Nakuru on the following day. He returned to the area after two weeks and reported at the chief's office as the villagers were still after him.

The first accused on hearing the screams rushed towards the scene where they emanated. He was with other people and they found a group of villagers carrying the deceased who appeared to have been assaulted and injured.

[8] He (first accused) assisted in the carrying of the deceased to the nearby Nyacheki hospital.

Thereafter, a brother of the deceased called Nyamogosa asked him to accompany him to the police station to record a statement. However, he was arrested on allegations of having killed the deceased who passed away while undergoing treatment in hospital. He contended that his

clothes were blood stained because he assisted in carrying the deceased to hospital.

[9] After due consideration of the evidence in its totality as well as the submissions by both the prosecution and the defence, it became apparent to this court that the death of the deceased from the injuries suffered by himself was not a disputed factor. Indeed, DR. Gichana (PW 5) produced the autopsy report (P. Ex 1) showing that the cause of death was severe head injury due to sharp force trauma following assault.

[10] The severity of the injuries clearly indicated that the assailant or assailants had the necessary intention to cause grievous harm to the deceased and/or kill him. So, what happened to the deceased was a clear case of murder.

[11] The crucial question arising herein was whether the deceased was assaulted and killed by the two accused or any one of them.

They have both denied such criminal responsibility and implied that they were suspected simply because they were with the deceased just prior to the fatal injury being inflicted on him and his eventual death from the injury while undergoing treatment in hospital.

[12] Undoubtedly, the two accused were under no obligation to prove their innocence. The obligation lay on the prosecution to prove their joint or separate guilt beyond reasonable doubt. None of the prosecution witnesses saw them assaulting and injuring the deceased. Their alleged culpability was essentially based on suspicion and an oral statement allegedly made by the deceased to his brother (**PW 1**) to the effect that he had been assaulted by the two accused.

[13] The suspicion was cast at the first accused rather than the second accused and was based on the fact that the first accused was the person who fetched the deceased from the hotel just before he was assaulted and the fact that his clothes were bloodstained at the time the deceased was being carried to hospital by a group of villagers. These suspicions were raised by the deceased's brother (PW 1) and sister (PW 2) but were not confirmed by any tangible evidence. They therefore remained mere suspicions without any probative value.

[14] In any event, the deceased's brother (PW 1) said that he heard screams and shouts one hour after the deceased had left the hotel with the first accused. Anything could have happened to the deceased independent of the first accused within that one hour. There was no certainty that the two were expected to be together within that one hour.

[15] With regard to the bloodstains on the first accused's clothes, it was evident that he was found at the scene where the deceased was found lying on the ground with injuries. This was confirmed by the chief (PW 3) and the deceased's sister (PW 2). The deceased's sister (PW 2) confirmed that the first accused was at the scene among the crowd of villagers who had gathered there and that he also assisted taking the injured deceased to the hospital. His explanation that his clothes were stained by the blood of the injured deceased while he was assisting in taking him to hospital was corroborated by the defence witness (DW 1) and was more than likely quite credible to overrule any suspicion arising from his clothes.

[16] As regards the seemingly dying declaration allegedly made by the deceased to his brother (PW 1), it remained uncorroborated notwithstanding the fact that it was allegedly made in the presence of other people. It is unbelievable as stated by the brother (PW 1) that other people did not hear the deceased implicate the two accused yet he was surrounded by a mob of people while talking.

[17] The deceased's brother (PW 1) may not have been a truthful witness and may have just picked the names of the accused simply because it may have come to his knowledge that they were having a drink with the deceased some few minutes before he was fatally assaulted. His (PW 1's) evidence in relation to the dying declaration and the identification of the two accused as the culprits is thus not reliable.

[18] In sum, the prosecution did not have credible evidence of identification against any of the accused. It cannot therefore be said without a shadow of doubt that they were responsible for the murder of the deceased. They were simply suspected of the same, but suspicion no matter how strong cannot stand alone as evidence of commission of an offence.

The two accused are not guilty as charged and are hereby acquitted and set free "to fly like a blue bird in the sky".

**[Delivered and signed this 22<sup>nd</sup> day of May 2018**

In the presence of State Counsel –

Mr. Otieno and Mr. Okenye for accused]

**J.R. KARANJAH**

**JUDGE**