



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITALE**

**CRIMINAL CASE NO. 2 OF 2016**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**JUSTUS MURITHI NYANI.....1ST ACCUSED**

**EVANSON NYANUMBA ONDIEKI.....2ND ACCUSED**

**J U D G M E N T**

1. The accused persons were charged jointly with the **offence of Murder**. The particulars of the charge were that **on the 30<sup>th</sup> day of December 2015 at Makuyu Silent Bar at Taito within Trans Nzoia County jointly murdered Lameck Moyaka**.

2. The two denied the charge and the prosecution called a total of 4 witnesses to prove its case. Their evidence can be summarised as hereunder.

3. **PW1 Duke Ocharo Onsongo** the brother to the deceased testified that he was called from his shamba by Lameck Nyamwaro on the material day at around 6.30 pm and informed that the deceased was being assaulted. Using his motorcycle he rushed to the scene where he found the deceased injured and groaning. The deceased told him that he had been beaten by the two accused persons. Both accused persons were there. The 2<sup>nd</sup> accused told him that he had tried to save him as a brother. The 1<sup>st</sup> accused was equally present as well as other people.

4. He took him to the hospital but succumbed to the injuries while undergoing treatment. The deceased told him that he had been assaulted by the two accused persons.

5. **PW2 Dr. Okumu Moses** produced the post mortem form on behalf of Dr. Okanda who had carried out the post mortem exercise. He concluded that the cause of death was shock secondary to fluid loss and haemorrhage from the injury.

6. **PW3 Lameck Nyamwaro Ondabu** testified that he was in his house which was behind the shops when he heard children screaming. He rushed to the scene and found the deceased injured. Both accused persons were standing next to the deceased. He tried lifting him and he saw injuries on the head and the eye. The children told him that they had seen the two accused fighting the deceased. He called PW1 who came and took him to the house. The following day he was taken to the hospital.

7. **PW4 P.C. Laban Limo** booked the report in the O.B. as was brought by PW1. They went and arrested the first accused while the 2<sup>nd</sup> accused was arrested by the members of the public. He further testified that he went to the scene with scene of crime officers where he saw blood on the wall.

8. When put on their defence the first accused gave unsworn evidence where he admitted owning a bar. He said that he opened it at 5 PM on the material day and at around 8.00 pm PW1 came and said that the deceased had been beaten. He took him to his place. Later he heard that he had been taken to the hospital. He was picked by the police to go and record his statement at Sibanga and later taken to Kachibora.

9. The 2<sup>nd</sup> accused equally gave unsworn evidence. He said that after coming from the bar on 30/12/2015 he decided to go to the bar at 6.00 pm. At 8.00 PM he heard screams from outside the bar. Together with the bar owner, they found someone lying down whom they did not recognise. They went back to the bar and drunk till 10.00 pm. The following day he heard that he had died. He was required to then go and record his statement at Sibanga.

**Analysis and Determination**

10. The court has carefully read the proceedings as well as the written submissions by the Counsels for the parties herein. It is clear that there was no direct eye witness to the incident herein. In other words no person testified to have seen the accused fight or assault the deceased. What is evidently clear is that the deceased was assaulted outside the 1st accused's bar. He did not deny that he owned the bar.

11. This case is therefore based on circumstantial evidence as well as a dying declaration made by the deceased to PW1.

12. Dying declaration has been defined by Black Law Dictionary 10<sup>th</sup> Edition as;

***“ A statement by a person who believe that death is imminent, relating to the cause or circumstances of the persons impending death.”***

13. PW1 told the court that the deceased told him that he had been beaten by both accused persons who wanted money from him. When PW1 arrived at the scene he truly found the two standing and appeared unconcerned with the fate of the deceased. He took him to the hospital the following day.

14. It appears to me that the deceased though injured was in a position to explain to PW1 what had transpired. In fact at the hospital, he was still able to explain himself to the doctor when he said that he was unable to urinate. When the treatment was on, he passed away.

15. Can it be said that the deceased targeted the two for nothing? I do not think so. PW3 buttressed what he found at the scene. Although the children whose screams alerted PW3 were not called to testify it is apparently clear that he found the deceased injured and the two accused persons were present at the scene. PW3 and the accused lived not far from each other and I do not find any evidence of a mistaken identity.

16. The above finding that the dying declaration by the deceased is the backbone of this case is buttressed by the Provisions of Section 33 of the Evidence Act which state as follows;

***“ 33 “ Statements, written or oral electronically recorded, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following case -***

***a) When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that persons death comes into question and such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceedings in which the cause of his death comes into question.”***

17. It is obvious as found earlier above that the deceased had sustained serious injuries and was in excruciating pain. He told PW1 his brother what had happened. The whole scenario stemmed from the non payment of the bill which caused the accused persons to attack the deceased.

18. What is interesting though from the unsworn evidence by the accused is the don't care attitude they took when the deceased had been injured. In fact the 2<sup>nd</sup> accused stated that he simply drunk till 10.00 pm while the 1<sup>st</sup> accused simply heard PW1 saying outside the bar that the deceased had been beaten.

19. Needless to state that their unsworn evidence may not be of much probative value for lack of being cross-examined on them.

20. Circumstantially, the two were placed at the scene. None of them took any interest on the injured person.

21. I find that the accused directly or indirectly assaulted the deceased. I do not find any reason in his dying declaration why the deceased would zero in on the two accused persons.

22. The two accused person is each found guilty of assaulting the deceased which injuries as per the post mortem report caused his death. They are found guilty pursuant to the Provisions of Section 203 of the Penal Code.

**Judgment read, delivered , signed and dated at Kitale this 26<sup>th</sup> day of September, 2018.**

**H.K. CHEMITEI**

**JUDGE**

**27/09/18**

**In the presence of:**

**Mr Kakoi for the Respondent**

**Chebii holding brief for Barongo for accused**

**Accused 1 & 2 – present – present**

**Court Assistant – Kirong**

**Judgment read in open court.**