



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL CASE NO. 12 OF 2015

REPUBLICPROSECUTOR

VERSUS

FRANCIS OCHIENG NYAMBORI.....ACCUSED

JUDGMENT

1. **Francis Ochieng Nyambori**, the Accused person herein, was charged with the murder of his wife **Quinter Anyango** (hereinafter referred to as '**the deceased**') on the 11/03/2015 at Kajulu II Village, West Kanyamkago Location within Migori County in the Republic of Kenya.

2. The accused person denied committing the offence and the case was set for hearing. A total of four witnesses testified in support of the information. **PW1** was **Onindo Charles Otieno**, the Assistant Chief for Kajulu II Sub-Location. **PW2** was **Alloyce Omollo Achola** a villager in Sibuoche village and working under PW1. **PW3** was **No. 219294 C. I. Raphael Kipkoech Rono** attached at Uriri Divisional Headquarters and he was the investigating officer. **Dr. Vitalis Owuor K'Ogutu** testified as **PW4** and produced a Post Mortem Report which had been prepared by his colleague one **Dr. Ndege**. For the purposes of this judgment I will refer to the said witnesses according to the sequence in numbers in which they testified.

3. The prosecution's case was based on circumstantial evidence for the reason that there was no eye-witness. PW1 stated that he was called by the accused person on 11/03/2015 at around 04:00pm who informed him of the death of the deceased. PW1 readily informed his Area Chief and called PW2 to rush to the homestead of the accused person and confirm what the accused person had told him and to further apprehend the accused person. He also called the OCS Uriri Police Station.

4. As PW2 proceeded to the home of the accused person, he found the accused person seated at the Sibuoche Trading Centre and asked him to accompany him to the Chief's Office. The accused person obliged. While at the Chief's Office the police and PW1 arrived and the accused person was arrested. The police, PW1, PW2 and the accused person then proceeded to the homestead of the accused person. The accused person however had await for the police along the way for fear of possible revenge by members of public. They proceeded to the homestead of the accused person and hurriedly collected the body of the deceased amid animosity from the members of public who bayed for the blood of the accused person. PW3 observed the body of the deceased which lay near the main door. It had no visible injuries neither was it bleeding. The body was taken to Migori County Referral Hospital for preservation and post mortem examination.

5. It was Dr. Ndege who conducted the autopsy on the body of the deceased on 15/03/2015. He observed multiple bruises on both lower limbs and right supra-orbital area. The deceased was 3 months' pregnant and died from a severe head injury. On cross-examination, PW4 confirmed that the injuries found on the body of the deceased could be commensurate to a fall.

6. At the close of the prosecution's case, the accused person was placed on his defence and opted to give an unsworn testimony. He explained that on 11/03/2015, while operating a spares business at the Sibuoche Centre, he sent the deceased to buy some parts. He gave her some money, but later realized that the deceased had not bought the spares. On enquiry, the deceased fearfully ran away, slipped, fell and was injured. To the accused person the incident was purely accidental and that even all his in-laws took part in the burial of the deceased as it was obvious that the accused person had no hand in the death of the deceased.

7. At the close of the defence case, the matter was left for judgment.

8. As the accused person is charged with the offence of murder, the prosecution must prove the following three ingredients: -

(a) Proof of the fact and the cause of death of the deceased;

(b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the Accused which constitutes the 'actus reus' of the offence;

(c) Proof that the said unlawful act or omission was committed with malice afterthought which constitutes the 'mens rea' of the offence.

9. There is no doubt that the deceased died. PW1, PW2 and PW3 so confirmed. As to the cause of death, PW4 took this Court through the Post Mortem Report prepared by Dr. Ndege and opined that the cause of death was due to a severe head injury. There being no other evidence contradicting the medical finding on the cause of death this Court concurs with that medical evidence.

10. On the second ingredient as to whether the accused person caused the death of the deceased, since there is no eye-witness account on how the deceased died, reliance is now on the circumstantial evidence. In such a scenario, this Court is called upon to closely examine the evidence on record, not only as its normal calling as the trial Court, but also to ascertain whether the evidence satisfies the following requirements: -

(i) The circumstances from which an inference of guilt is sought to be drawn, must be congenitally and firmly established;

(ii) The 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.

11. The foregone principles were set out in the *locus classicus* case of **R -vs- Kipkering arap Koske & Another (supra)** and have repeatedly been used in subsequent cases including the Court of Appeal cases of **GMI -vs- Republic (2013) eKLR**, **Musii Tulo vs. Republic (2014) eKLR** among many others.

12. The Court of Appeal in the case of **Musii Tulo (supra)** in expounding the above principles expressed itself as follows:-

“ 4. In order to ascertain whether or not the inculpatory facts put forward by the prosecution are incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of guilty, we must also consider a further principle set out in the case of Musoke v. R (1958) EA 715 citing with approval Teper v. R (1952) AL 480 thus:

'It is also necessary before drawing the inference of accused's guilty from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.'

13. The chain of events leading to the arrest and arraignment of the accused person before this Court came from the the four witnesses who testified in this case. The accused person vehemently denied the information. PW1 was only called by the accused person and informed of the death of the deceased.

14. In the course of the trial PW1 and PW3 stated that the accused person informed them that he had hit and injured the deceased. However, no confession was extracted from the accused person thereby rendering that line of evidence as purely hearsay. Therefore, the only evidence which stood out to explain what happened leading to the death of the deceased was that of the accused person. The evidence of the accused person was further corroborated by PW4 who confirmed that the injuries found on the body of the deceased could have been caused by a fall.

15. In view of the defence by the accused person and the evidence of the prosecution there is no way this Court can confirm that indeed that accused person killed the deceased. The defence raises serious doubts on the prosecution's case. I must say that in this case the legal standard required to sustain a conviction based on circumstantial evidence has not been attained. That is because the death of the deceased can reasonably and logically be explained by another hypothesis than that of the guilty of the accused person.

16. Having said so, it is now the finding of this Court that the prosecution has failed to prove that the accused person caused the death of the deceased. I come to the conclusion that the information of murder facing the accused person has not been proved. The accused person herein, **Francis Ochieng Nyambori** is hereby found **NOT GUILTY** of the murder of **Quinter Anyango** and he is hereby set at liberty unless otherwise lawfully held.

DELIVERED, DATED and SIGNED at MIGORI this 23rd day of November, 2018

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of:

Miss. Opiyo, Counsel for the Accused person.

Mr. Kimanthi, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the State.

Evelyne Nyauke – Court Assistant