



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL CASE NO. 18 OF 2015

THE REPUBLIC.....PROSECUTOR

=VRS=

JARED ONDIMO.....ACCUSED

RULING

The accused is charged with Murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the charge are that on 5th November 2013 at Kiongongi village in Nyamira North District within Nyamira County he murdered Moses Ombori Onduko.

The accused pleaded not guilty and the prosecution then called six (6) witnesses to prove its case. Briefly the evidence of the prosecution's case is that at about 8 pm on 4th November 2013 Agnes Kemunto (Pw1) the accused's sister-in-law and the mother of the deceased (not called as a witness) heard the deceased calling for help not very far from their houses. Agnes Kemunto (Pw1) testified that the deceased was saying "*ui mama nauliwa*" meaning "*mother I am being killed*". She went to the scene and found the deceased lying on the ground. He had a cut on the neck and was bleeding. He could not speak but was writhing in pain. It was her shouts for help that attracted other people to the scene. George Nyaberi (Pw2), the deceased's father, testified that he was called to the scene by his wife (not a witness). He quickly got a vehicle to bring the deceased to hospital (Nyamira District Hospital) but he was pronounced dead upon arrival. George Nyaberi (Pw2) testified that the deceased and his wife had been estranged for long but that she had returned and was in the deceased's house on the material night. Upon the death of the deceased, the 1st suspect to come to the minds of the deceased's family was the accused as he had been accusing the deceased of enticing his (accused's) wife. George Nyaberi (Pw2) told the court that in fact the deceased had told him that the accused had threatened to kill him. It is for that reason that following the incident when the matter was reported to the area Assistant Chief (Pw3) the first place they went to was the accused's house.

The Assistant Chief (Pw3) told the court that following the rumours that the accused had killed the deceased, she went to his house with police officers and the officers found a panga, a pair of gumboots and some clothes which appeared to have been cleaned. They suspected that the same must have been washed to conceal the crime. They arrested the accused and took possession of the gumboots, panga and clothes (1 jacket, a pair of trousers) and took them to Nyamira Police Station. The Exhibit Memo Form (Exhibit P3B) shows that a soil sample collected at the scene was also taken. All these items were taken to the Government Chemist for analysis. They were to be matched with blood on cotton wool indicated as that of the deceased (see Exhibit Memo Form Exhibit 3B). However, the analyst tasked with the examination found that the items recovered from the accused's house were not stained with blood.

Before the analysis, a post mortem had been conducted on the body of the deceased and in the opinion of the Doctor, death was due to massive haemorrhage due to penetrating neck wound caused by a sharp object. The accused who suffers a hearing disability is alleged to have been using sign language to threaten to kill the deceased. He was therefore charged with this offence.

At the close of the case for the prosecution, his Advocate, Mr. Bwonwong'a, submitted that the evidence of the prosecution witnesses was not sufficient to warrant this court to put him on his defence. Counsel for the prosecution did not submit but told the court that the prosecution would rely on the evidence adduced.

Section 306 (1) of the Criminal Procedure Code requires this court to consider whether or not there is evidence that the accused person committed the offence before it can put him on his defence.

I have considered the evidence of the prosecution witnesses and the submissions of Learned Counsel carefully and my finding is that the prosecution has not established a prima facie case against the accused person sufficiently to warrant this court to put him on his defence. The analysis of the gumboots and clothes found in his house having failed to bring forth any results, the only evidence we have against the accused is the rumour that the accused killed the deceased and the deceased's father's evidence that the accused threatened to kill the deceased. Rumours are just that unless the originator of the rumour is called to testify the rumour amounts to no more than hearsay which is not even admissible in the first place. As for the alleged threats, the deceased's father (Pw2) alleged that the deceased had told him that the accused had threatened to kill him. **Section 33 (a) of the Evidence Act** provides that a statement by a deceased person relating to the cause of his death are admissible. The section states: -

“33. Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead..... are themselves admissible in the following circumstances: -

(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 person’s 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.”

In **Aluta Vs. Republic [1985] KLR 543** the Court of Appeal stated: -

“1. It is generally speaking unsafe to base a conviction solely on the dying declaration of a deceased person made in the absence of the accused and not subject to cross examination, unless there is satisfactory corroboration.

2. The fact that the deceased in his dying declaration said that the appellant killed him was evidence of his belief and not a guarantee of accuracy.”

I do not think the law on dying declaration has changed. In the circumstances of this case we are faced with even more difficulty and need for greater caution because of two main reasons. First, the witness (Pw2) did not tell the court when or the circumstances under which the deceased told him of the threats. What for instance were the exact words used by the deceased or why did the deceased find it important to disclose the threats to his father? Secondly, the accused person in this case is deaf and communicates through sign language so what signs did he make that convinced the deceased that he was threatening him? These questions give rise to some reasonable doubt and this coupled with evidence that the exhibits collected from the accused’s house, on the very night the offence was committed, did not yield results connecting him to the crime gives rise to a finding that he may not have been the perpetrator of the offence.

Accordingly, I enter a finding of not guilty and acquit him under Section 306 (1) of the Criminal Procedure Code. He shall be set at liberty forthwith unless otherwise lawfully held.

Signed, dated and delivered in open court this 20th day of December 2018.

E. N. MAINA

JUDGE