



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 49 OF 2015**

**THE REPUBLIC.....PROSECUTOR**

**=VRS=**

**1. JOYCE KEMUMA MOCHERE.....1<sup>ST</sup> ACCUSED**

**2. EUNICE MOKEIRA OTETE.....2<sup>ND</sup> ACCUSED**

**3. STELLA MORAA.....3<sup>RD</sup> ACCUSED**

**JUDGEMENT**

The accused persons are charged with Murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the charge are that on 6<sup>th</sup> November 2010 at Rigena Sub-location in Masaba District within Nyamira County they murdered Maria Bisieri Opondo. They all pleaded not guilty to the charge.

To prove its case, the prosecution called six (6) witnesses the star witness being James Nyameiyo (Pw4) who testified that on the fateful day he had accompanied the deceased, who was his grandmother, on a visit to her maternal home. After a meeting with her brothers, the duo started their journey back to her matrimonial home but decided to pass via the 1<sup>st</sup> accused's homestead as it was a short cut. Pw4 testified that the 1<sup>st</sup> accused was his grandmother's friend and that he knew her as she used to visit her, the deceased. Pw4 stated that when the 1<sup>st</sup> accused saw them she called the deceased; that the 1<sup>st</sup> accused was in the company of her co-accused, the 2<sup>nd</sup> and 3<sup>rd</sup> accused who the witness (pw4) had not met before. He stated that the accused persons were drinking chang'aa and the 1<sup>st</sup> accused asked the deceased to buy them some. The deceased however told her that she did not have money. The 1<sup>st</sup> accused was drunk and so she became rude towards the deceased and a quarrel ensued. It was then that the 1<sup>st</sup> accused took a club and hit the deceased on the thigh. The 2<sup>nd</sup> and 3<sup>rd</sup> accused cheered her on and incited her (1<sup>st</sup> accused) to continue beating her. At that juncture Pw5 ran home to tell his grandfather, Opondo Nyameiyo (Pw2) leaving his grandmother at the mercy of the accused persons. It is not clear how or who took the deceased to hospital but her husband Pw2 testified that when he arrived at the scene she had been taken to Rigoma Hospital and later to Keroka District Hospital where she was referred to Kisii Level 5 Hospital (now Kisii Teaching and Referral Hospital). Pw2 stated that she was admitted for two weeks and then discharged to recuperate at home. On 11<sup>th</sup> November 2010 she was taken back to the hospital but after one week she died.

The court heard that on 12<sup>th</sup> November 2010 the three accused persons were arrested by their Assistant Chief (Pw1) following an arrest order from the police and were taken to Keroka Police Station which arraigned them at Keroka Senior Resident Magistrate's Court for the assault. They were however released on bond pending the trial but after the death of the deceased, they were arrested again and charged with this offence.

According to the post mortem report produced in this case as Exhibit P 1, the cause of the deceased's death was: -

**“Cardiopulmonary arrest secondary to septic shock septicaemia resulting from long standing osteomyelitis extensive bedsores and decomposed tissue.”**

Dr. Peter Momanyi Morebi (Pw5) testified that the body of the deceased was wasted and there were massive bed sores in the gluttal region. The cause of the bed sores/wounds was however not indicated in the report which he produced on behalf of his colleague who had left the hospital for South Africa.

When this court put the accused persons on their defence they all elected to make unsworn statements.

The 1<sup>st</sup> accused stated that on the material day while at home she went to her farm and harvested some vegetables to sell in the market. The 2<sup>nd</sup> and 3<sup>rd</sup> accused found her at home and she gave them some vegetables and they left. She too left for the market. She did not hear

anything about the incident giving rise to this case until a week later when their chief arrested her and took her to Keroka Police Station where she was charged with an assault which she had not committed. She stated that she was released on bond and the assault charge proceeded until the victim died and her bond was cancelled and since then she has been in custody yet she does not know how the deceased met her death.

The 2<sup>nd</sup> accused stated that when she went to the 1<sup>st</sup> accused's house for the vegetables it was between 11am and noon and that after the 1<sup>st</sup> accused gave the vegetables to her she went home. One week later she was arrested and charged with assault but after the death of the deceased, she was re-arrested and charged with murder. She told this court that initially this case was at Kisii but it was transferred to this court.

The 3<sup>rd</sup> accused told this court that on the material day she went to the 1<sup>st</sup> accused's house to buy vegetables and after that went home. One week later the 1<sup>st</sup> and 2<sup>nd</sup> accused were arrested and when she went to court to see them she too was arrested. She stated that a man said she had been with the 1<sup>st</sup> and 2<sup>nd</sup> accused. She was however released on bond only to be rearrested later and charged with murder. She contended that she does not know anything about the murder.

At the close of the case for the defence, Mr. Nyagwencha Advocate for the 1<sup>st</sup> accused and Mr. Bwonwong'a, Advocate for the 2<sup>nd</sup> and 3<sup>rd</sup> accused submitted that the prosecution had not proved the case against the accused persons beyond reasonable doubt. Mr. Nyagwencha submitted that whereas this offence was allegedly committed on 12<sup>th</sup> November 2010, the deceased died on 24<sup>th</sup> June 2011. He submitted that malice aforethought had not been proved and that the chief (Pw1) recorded his statement in July 2011 long after the alleged assault took place. He contended that the only eye witness clearly told this court that the 1<sup>st</sup> accused was intoxicated. He also contended that there could have been negligence on the part of the hospital as the cause of death was septic wounds. He beseeched this court to acquit the accused.

Mr. Bwonwong'a whilst concurring with Mr. Nyagwencha submitted that it was clear from the eye witness that the 2<sup>nd</sup> and 3<sup>rd</sup> accused were drunk. He contended that the eye witness did not point to the 2<sup>nd</sup> and 3<sup>rd</sup> accused as assaulting the deceased. Mr. Bwonwong'a submitted that the close kinship between Pw4 and the deceased rendered his evidence unreliable. He contended that since only one wound was found on the body it must have been inflicted by one person. Mr. Bwonwong'a pointed out that the investigating officer did not testify and that the deceased having died after 7 months, intention to kill her was not there. He stated that the fact that accused persons met abruptly meant they could not have formed an intention to kill the deceased. Counsel further submitted that the statements concerning this case were recorded after the deceased died and it is likely that the witnesses could have forgotten some of the details. He urged this court to accord the accused persons the benefit of doubt and acquit them.

On his part Mr. Ochieng Counsel for the prosecution, urged this court to find that the ingredients of murder had been proved against the accused persons beyond reasonable doubt and convict them.

I have evaluated the evidence by both sides very carefully. I have also considered the submissions of the Advocates.

**Section 203 of the Penal Code** states that a person commits Murder who **“of malice aforethought causes death of another person by an unlawful act or omission.”**

Therefore, to prove Murder it must be proved and this beyond reasonable doubt, that the death of the deceased was as a result of an unlawful act or omission of the deceased and that it was of malice aforethought. Instances of malice aforethought are provided under **Section 206 of the Penal Code** which states: -

***“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances -***

***(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;***

***(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;***

***(c) an intent to commit a felony;***

***(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”***

In this case I am satisfied that the accused persons – all 3 of them – assaulted the deceased. The assault which occurred in broad daylight was witnessed by Pw4, a grandson of the deceased who had accompanied her on a visit to her kin. Pw4 testified that he knew the 1<sup>st</sup> accused person. He even identified her by name. He had seen her visit his grandmother at their home several times and I am satisfied that he positively identified her. Pw4 testified that although the 2<sup>nd</sup> and 3<sup>rd</sup> accused did not strike the deceased, they cheered the 1<sup>st</sup> accused and incited her to continue beating the deceased. The 1<sup>st</sup> accused was beating the deceased because she had declined her request to buy them liquor as she had no money. The offence occurred in broad daylight and I am satisfied the three accused persons were positively identified

by Pw4. The three accused persons gave statements that placed them at the scene of the crime and thereby confirmed Pw4 was a truthful, trustworthy and reliable witness. No doubt this assault was unlawful and I am convinced that the accused persons would have been found guilty and convicted had the case of assault preferred in the lower court continued.

The said charge was dropped when the accused died seven months later. Contrary to Mr. Bwonwong's submission the accused persons would still be considered to have killed the deceased under Section 215 (1) of the Penal Code. **Section 215 (1) and (2) of the Penal Code** states: -

***“(1) A person is not deemed to have killed another if the death of that person does not take place within a year and a day of the cause of death.***

***(2) Such period is reckoned inclusive of the day on which the last unlawful act contributing to the cause of death was done.”***

The death of the deceased occurred within a year of the assault and the accused persons are deemed to have killed her. As for the submission that there was no evidence that the assault was the direct cause of the death **Section 213 of the Penal Code** becomes relevant. In this case the more relevant provision is subsection (b) which states: -

***“213. Causing death defined***

***A person is deemed to have caused the death of another person although his act is not the immediate or the sole cause of death in any of the following cases –***

***(b) if he inflicts bodily injury on another which would not have caused death if the injured person had submitted to proper surgical or medical treatment or had observed proper precautions as to his mode of living.”***

The court heard that the deceased died as a result of **“Cardiopulmonary arrest secondary to septic shock septicaemia resulting from long standing osteomyelitis extensive bedsores and decomposed tissue.”** Dr. Peter Momanyi Morebi (Pw5) explained that in simple terms what killed the deceased was septic shock as a result of bed sores. I am satisfied that there was a direct co-relation between these bed sores and the injury sustained by the deceased after the assault as the bed sores occurred while she was admitted in hospital after the assault. It is also my finding that whereas the 2<sup>nd</sup> and 3<sup>rd</sup> accused did not strike the deceased, they were parties to this offence and were deemed to have committed the offence under Section 20 (1) of the Penal Code just as the 1<sup>st</sup> accused who was the principal offender. **Section 20 (1) of the Penal Code** states:-

***“20. Principal offenders***

***(1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say –***

***(a) every person who actually does the act or makes the omission which constitutes the offence;***

***(b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;***

***(c) every person who aids or abets another person in committing the offence;***

***(d) any person who counsels or procures any other person to commit the offence;***

***and in the last-mentioned case he may be charged either with committing the offence or with counselling or procuring its commission.”***

I further find that whereas intoxication is a defence under Section 13 (2) of the Penal Code the accused persons did not raise it and the submissions by their advocates cannot with due respect amount to a defence. Moreover, the defence did not establish the conditions set out in Section 13 (2) (a) and (b) of the Penal Code.

I have already found that the accused persons unlawfully assaulted the deceased. It is also my finding that although she did not die immediately her death arose within a year and a day of the assault and hence they are deemed to have killed her. I find also that they have no defence to the offence and that they killed her unlawfully. However, the prosecution did not prove that they had formed the intention to kill her. None of the circumstances provided under Section 206 of the Penal Code were established so as to prove malice aforethought. In the premises this court finds them guilty of Manslaughter contrary to Section 202 as read with Section 205 of the Penal Code.

**Signed, dated and delivered in open court this 20<sup>th</sup> day of December 2018.**

**E. N. MAINA**

**JUDGE**