



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CRIMINAL CASE NO. 42 OF 2015

THE REPUBLIC.....PROSECUTOR

VERSUS

GEOFFREY AKUNGA KERORO.....ACCUSED

JUDGEMENT

The accused is charged with the murder of his step-mother Yunia Nyakerario Keroro contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars of the charge are that on **5th July 2010** at Itibo Location, Boisanga II Sub-location in Nyamira North District within Nyanza Province the accused murdered **Yunia Nyakerario Keroro**.

The accused pleaded not guilty to the charge following which the prosecution called seven (7) witnesses to prove its case and the accused made an unsworn statement in his defence. The accused was represented by Mr. Moracha Advocate for part of the trial and Mr. Nyamwange Advocate for the rest of the trial. His allegation that an unqualified person in the name of Arumba, who was in fact arrested for holding himself out as an Advocate, is not true.

The prosecution's star witness was Job Maina Keroro (Pw1), a son of the deceased and step-brother of the accused. He testified that on the material day at about 7pm he, his mother (deceased) and his father James Keroro Obanyi (Pw2) went to a bar at Bonyunyu market. They drunk until 9pm when he noticed that his mother was drunk and called the rider of his boda boda (motor cycle) to take her home. Shortly afterwards the rider returned and took him (Pw1) and his father home. He stated that when they got home he saw his brother, the accused, standing at the gate with a panga. They passed him and they each went to their separate rooms, his father going to the room he shared with the deceased and him going to the room in which he lived with his wife. He woke up his wife and she served him and his rider dinner. As they were eating his mother went to their room and asked to be given salt. Pw1 testified that he heard her saying that Geoffrey, the accused, had stolen 1500/= from her. He stated that he could clearly see her as the lantern lamp in the house was on and he was sitting close to the door. He described the room as measuring 10' x 12' and stated that the deceased was so near that he could have touched her had he stretched his hand. Pw1 testified that as the deceased turned to go back to her room, he heard the accused tell her "today I will finish you." Then he saw her fall and thinking it was because she was drunk he asked Ontibo (the rider) to go pick her up but Ontibo rushed back and told him she was in a pool of blood. Pw1 went there and found she was dead. In the meantime, the accused had gone and bolted the door of the room their father was in, from the outside, and fled. Pw1 opened his parents room and then raised the alarm and soon neighbours started streaming to the scene.

Richard Nyambane Obanyi (Pw3), Pw1 and the accused's uncle, testified that he rushed to his brother's (Pw2) house upon hearing the wailing. As he did so he heard two people who were headed to the ancestral home (Pw1, Pw2 and the deceased were staying at a shop) saying "**nimemaliza kabisa**" meaning "**I have finished completely.**" He shone his torch and identified one of them as the accused. The accused however got into the tea bushes and outran him and fled. Pw3 went to his brother's house and found his sister-in-law lying in a pool of blood.

Pw1 stated that he ran to Bonyunyu Administration Police Camp and reported the matter and the officers accompanied him to the scene. They looked for the accused everywhere but they did not find him. The Administration Police Officers called the Kenya Police from Geratu Mokomoni who went and confirmed the deceased was dead. They contacted Nyamira Police Station who went and carried the body to Nyamira Hospital Mortuary. The next day Pw1 made a formal report concerning the murder at Nyamira Police Station and the investigation was assigned to Police Constable Martin Langat (Pw7) of Nyamira CID. On 10th July the accused is said to have been apprehended in his hideout in some tea bushes and beaten senseless and left unconscious before he surrendered to the area chief and was then taken to hospital and later to Nyamira Police Station. He is alleged to have made a "confession" to Chief Inspector Samuel Yagan (not a witness) on 19th July 2010. The court also heard that a post mortem conducted at Nyamira Hospital Mortuary on 15th July 2010 revealed that the deceased died as a result of cardiopulmonary arrest due to haemorrhage as a result of a penetrating injury. The report which was produced first by Dr. Nyambati (Pw4) and later by Dr. Ruth Nanjala (Pw6) although it was done by one Dr. Bosire states that the deceased had a cut wound

around the neck measuring 8cm and another cut on the palmer aspect of the right hand 5cm long. It also states that the head was dangling and that in the spinal column there was decapitation at C₁ and C₂ while in the spinal cord there was decapitation at C₁ and C₂.

In his defence, the accused stated that at the material time he was a class seven (7) pupil and that he was arrested on 9th July 2010. He stated that he was picked from his late grandmother's home by Job Maina and other relatives and told to accompany them as his own mother (now also deceased) needed him. He stated that he was the third born in his family. He stated that he agreed to go with them and they used the route passing through the tea bushes but along the way they started beating him. Job asked him why he had killed his (Pw1's) mother but he did not say anything. After the beating police were called and he was taken to Bonyunyu and then to Nyamira Police Station. He stated that he was beaten so much so that he could explain how the deceased herein who was his aunt died. He denied that he killed her and contended that he could not have killed his benefactor.

The defence summed up by way of written submissions drawn by the accused himself and which were adopted by Mr. Ondigo, Counsel holding brief for the accused. In the submissions (seventeen paragraphs long) the accused states that the prosecution did not prove its case beyond reasonable doubt; that the evidence of the witnesses for the prosecution was not credible; that crucial witnesses like Pw1's wife and the rider were left out and that the issue of the nature of the lighting at the scene was not consistent. He poked holes into the evidence of Pw1 which he submitted was inconsistent. He submitted that Pw1 had admitted he was drunk at the material time and he therefore could not have witnessed what he alleges. The accused also submitted that the evidence of Pw2 contradicted that of Pw1 pointing out that whereas Pw2 referred to an argument between him (accused) and the deceased, Pw1 did not allude to it. He discredited the evidence of Pw2 that he saw the deceased being cut as he was locked up in his room. He poked holes into the evidence of Pw2 as well as Pw3 and further pointed out that Pw5 – the investigating officer did not demonstrate the time they visited the scene and did not produce photographs. He contended that the investigation which was carried out in this case was totally casual and shoddy and he should be discharged under Section 215 of the Criminal Procedure Code.

What the prosecution required to prove in this case was the death of the deceased, that the death was as a result of an unlawful act which was committed by the accused and that he did so of malice aforethought – **(See Section 203 of the Penal Code)**.

The death of the deceased and the cause of that death which clearly points to an unlawful act are not in dispute. Job (Pw1), his father (Pw2) and uncle (Pw3) all attested to the death and this was confirmed by evidence by Pw7 (the investigating officer) that he found the body of the deceased lying at the scene when he went there with a team of police officers. As for the cause of death there is evidence that she died due to bleeding as a result of an injury on her neck.

I am satisfied from the evidence of Pw1 that this death was caused by the accused who cut the deceased on the neck with a panga. Pw1 impressed me as a very truthful witness unlike his father Pw2 whose evidence is discredited by his trying to hide that he was out drinking with his wife and son (Pw1). Pw1 gave a vivid account of all that transpired that night and contrary to the accused's submission he remained consistent throughout and remained unshaken even under very vigorous cross examination by the court and the defence Counsel. Pw1 knows the accused very well as they are brothers and I am satisfied that he positively recognized the accused first at the gate where he was standing with a panga and secondly at the time he struck their mother with a panga and she fell to the ground. Pw1 did not have qualms as to the suspect they searched for the whole night and this fortifies his evidence of recognition. He told the court that they looked for the accused everywhere but they could not find him. In his defence, the accused confirmed that he was picked from his grandmother's house by Pw1 and other people and that Pw1 demanded to know why he (accused) had killed his (Pw1's) mother. This goes to confirm that Pw1 had no doubt that it is the accused who had done it. I am not persuaded by the argument that on that night Pw1 was so drunk that he did not know what was happening. True, he may have been drinking but his narration of the events of that night convinces me that he was alert and that he knew what he saw. The lamp in his house was on and he was close to the door and he therefore clearly saw what was happening. He described the intensity of that light as bright. I do not consider the inconsistencies in his testimony pointed out by the accused fatal. My finding is that they are minor and do not in any way discredit his evidence which in any event was corroborated by his uncle (Pw3) who clearly heard the accused say **"nimemaliza kabisa"** as he fled through the tea bushes. Pw3 had a torch which he shone towards the person who had uttered the words and like Pw1 recognized that person as the accused person.

I am satisfied that the accused person acted unlawfully. This is because even though the deceased had accused him of stealing her money and they had had an altercation he had had enough time to cool off and at the time he attacked her she had not said or done anything that warranted him to assault her as he did. My finding therefore is that the accused unlawfully killed the deceased.

I further find that he did so with malice aforethought. From the evidence, it is clear that the accused had an intention to kill the deceased. Pw1 heard him say to the deceased words to the effect that he would kill her and Pw3 heard him gloating that he had finished her completely. The post mortem report shows that her head had almost been cut off. Mens rea as defined under **Section 206 (a) of the Penal Code** was proved beyond reasonable doubt and if his intention was not to kill her then he very well probably had knowledge that the blow he gave her would probably cause her death or grievous harm. It is my finding that the failure to call Pw1's wife and the rider does not lessen the credibility of his evidence as the evidence of the witnesses who were called was cogent, credible and reliable. The fact that the murder weapon was not produced is also not fatal. I am satisfied that the charge against the accused was proved beyond reasonable doubt.

The "confession" allegedly recorded by Chief Inspector Yagan and which was admitted as exhibit 2 was not recorded in accordance with the **Evidence (Out of Court Confessions) Rules 2009**. It does not indicate whether the accused was asked to state his preferred language of communication, whether he was informed of his right to have legal representation of his own choice or even whether the recorder asked the accused to nominate a third party to be present and it does not have the certificate of the accused required under **Rule 9** and that of the recorder under **Rule 14**. This court did not therefore rely on it.

I find the accused guilty of Murder contrary to Section 203 and Section 204 of the Penal Code and convict him accordingly.

It is so ordered.

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

E. N. MAINA

JUDGE