



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

Criminal Case No. 19 Of 2014

(Formerly Kisii High Court Criminal Case No. 66 Of 2011)

REPUBLIC.....PROSECUTOR

-VERSUS-

JAMES NYAMOHANGA MICHAEL..... ACCUSED

JUDGMENT

1. The only evidence which tend to connect the accused person in this case, **JAMES NYAMOHANGA MICHAEL**, with the death of the deceased herein one **NORAH NYABOKE SAMWEL**, is a hand written note allegedly done by the accused person.
2. The deceased was found dead on a bed in the family kitchen house with several deep cuts on her head. That was in the morning of 07/07/2011 at Ngisim village in Kuria West District within Migori District. None of the family members knew how the deceased had been fatally wounded.
3. When the police from Isebania Police Station arrived at the scene of the killing which was in the deceased's homestead, they interrogated several people and in the process also recovered a possible weapon used in the attack and which was a blood-stained axe, and a hand written note on the deceased's death. There was word though going round generally that the deceased had been killed by the accused person.
4. The police recovered the axe and also took the hand written note. They also collected the body and later witnessed a post-mortem examination conducted where they collected blood samples for further scientific analysis. A Post Mortem Report was produced which confirmed that the deceased had died from massive loss of blood from the injuries sustained in the head which were caused by a probable sharp object.
5. Two days later the accused person surrendered himself to the G.K. Prison at Migori. He was arrested and taken to the Migori Police Station before he was handed over to the police from Isebania Police Station as investigations continued.
6. On examination by the Government Chemist, it was confirmed that the blood stains which were on the axe matched the deceased's blood hence confirming that the axe was the possible weapon used in the killing. A Report was duly produced in evidence. The hand written note was also taken for analysis to the Government Document Examiner with known samples of the accused person which were taken from the accused person in the presence of the investigating officer. The Examiner confirmed that the note recovered from the scene and the specimen notes were prepared under the same hand. A Report was also duly produced in evidence.

7. It was contended by the prosecution that there had been a love affair between the deceased and the accused person. It was revealed that the deceased was a wife to the accused person's brother who was mentally-challenged. According to the Kuria customs the accused person had stepped-in for his brother and had a son with the deceased out of the relationship. The deceased was therefore a wife to the accused person as well but in the name of his mentally-challenged brother.

8. One of the sons of the deceased testified in Court. He was one **OBADIAH MWITA MARWA**, then aged 18 years old. He was **PW1**. He confirmed that the relationship between the deceased and the accused person was not cordial and they differed many a times and that the accused person had on several occasions told the deceased that "*one day you will see*". According to PW6 his investigations further revealed that the accused person and the deceased had sharply differed the night before the deceased was found dead to an extent that the deceased left the bedroom she shared with the accused person and instead went to spend in her son's house which was in the homestead as the son was not around that night. The misunderstanding happened to have been on an alleged love affair the deceased had with another man called Osogo from Migori which relationship the accused person was totally opposed to but the deceased won't let it go. When the police visited the scene the accused person was not there and his whereabouts were not known.

9. Apart from PW1 testifying, **CONSOLATA NYASUBO**, also testified as **PW2**. She was the deceased's co-wife. **PW3** was the Assistant Chief for Ngisim Sub-location who called the police upon receiving the information that the deceased had been killed. **STEPHEN MATINDE JOEL** from the Government Chemist testified as **PW4** whereas **DR. DAVID ONGORO AKUKU** produced the Post Mortem Report as **PW5**. The Document Examiner testified as **PW7** one **IRANDA LAMECK MASIKO** while the Investigating Officer **No. 65331 PC FESTUS MOSEMBI** testified as **PW6**.

10. At the close of the prosecution's case the accused person was placed on his defence. He opted to remain silent hence this judgment.

11. I have carefully considered the evidence on record as well as the exhibits. 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.

I will therefore consider each of the issues independently.

12. As to the proof of the fact and cause of death of the deceased, it is not in dispute that the deceased in this matter died. That position was confirmed by PW1, PW2, PW3 and PW6. The first limb is hence answered in the affirmative.

13. As to the cause of the death of the deceased, PW5 produced a Post Mortem Report which he prepared upon conducting the examination himself. The said report gave the possible cause of death of the deceased to have been shock from excessive loss of blood and multiple fractures leading to cardiopulmonary arrest. Since there is no contrary evidence to that end this Court so concurs with that medical finding. The other limb is likewise answered in the affirmative.

14. I will now turn to the second ingredient as to ascertain whether the death of the deceased was the direct consequence of an unlawful act or omission on the part of the accused person,

15. As I indicated elsewhere in this judgment, the only thing that seems to connect the accused person with the death of the deceased person was the hand written note (hereinafter referred to as "**the note**"). I

have intently looked at the said note together with the other specimens which were extracted from the accused person and sent to the Document Examiner. The said note was scientifically and technically proved to have been authored by the accused person. But the accused person denied the offence!

16. That the accused person was the author of the note is not in doubt. The note was found inside the house where the body was and its contents gave an explanation that was consistent with what had happened to the deceased. PW1 had testified on the poor relationship between the deceased and the accused person and to the accused person's lamentations over the deceased. PW4 confirmed that the blood that was on the axe was the deceased's blood hence it was the possible weapon used in the attack. PW6 also gathered that indeed there had been longstanding problem between the deceased and the accused person due to the deceased's infidelity and that a heated exchange between the two prior to the death. Although most of the PW6's evidence was purely hearsay, the note corroborated the evidence of PW6 to the extent that all was not well between the two. Further the accused person surrendered himself to the prisons authorities in Migori where he was arrested.

17. Taking the whole body of evidence together in this matter this Court is convinced that it was the accused person who caused the death of the deceased. The prosecution therefore managed to demonstrate the second ingredient of the offence of murder against the person in the affirmative.

18. I will now consider the third limb as to whether there was malice aforethought on the part of the accused in committing the offence at hand. The starting point is the law. **Section 206** of the Penal Code defines 'malice aforethought' as follows:

“206. 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 fight or escape from custody of any person who has committed or attempted to commit a felony.

The Court of Appeal has also dealt with this aspect on several occasions. In the case of **Joseph Kimani Njau vs R (2014) eKLR**, the Court of Appeal in concurring with an earlier finding of that Court (but differently constituted) in the case of **Nzuki vs R (1993) KLR 171**, held as follows: -

“Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused;-

i) The intention to cause death;

ii) The intention to cause grievous bodily harm;

iii) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.

It does not matter in such circumstances whether the accused desires those consequences to

ensue or not in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed”.

My Lordships in the above case went on to say that: -

“In the case of Isaac Kimathi Kanuachobi -vs- R (Nyeri) Criminal Appeal No. 96 of 2007(UR), the Court expressed itself on the issue of malice aforethought in terms of Section 206 of the Penal code: -

“There is express, implied and constructive malice. Express malice is proved when it is shown that an accused person intended to kill while implied malice is established when it is shown that he intended to cause grievous bodily harm. When it is proved that an accused killed in further course of a felony (for example rape, a robbery or when resisting or preventing lawful arrest) even though there was no intention to kill or cause grievous bodily harm, he is said to have had constructive malice aforethought. (See Republic vs Stephen Kiprotich Leting & 3 others (2009) eKLR...”

19. And in the case of **Mary Wanjiku Gitonga -vs- R (Nyeri) Criminal Appeal No. 83 of 2007 (UR)** the Court of Appeal in analyzing the evidence and on holding that there was indeed malice aforethought stated as follows:-

“We are told by counsel that there was no malice aforethought on the part of the appellant; there had been no previous tension between the two and their relationship had been cordial. For our part, we think and are satisfied that the appellant and the deceased must have had a dispute over some issue just before the deceased was killed....Taking into account all these circumstances, including the fact that the deceased was found lying on his back in the bed wearing only underwear, the logical inference to draw is that the appellant must have attacked the deceased while he was lying in bed. She attacked him using an axe and cut him on the head. Malice aforethought is proved where an intention “to do grievous harm to any person.....” is shown.

In using the axe to cut the deceased on the head, the appellant as a reasonable person must have known or ought to have known that she would at the very least cause grievous bodily harm to her husband, she ended up killing her.

In the circumstances we see no reason to interfere with the appellant’s conviction for murder. The conviction was fully justified by the evidence on record.”

20. In this case there is evidence that the relationship between the deceased and the accused person had not been cordial for some time. PW1 attested to that. Further the accused person used to tell the deceased that he will show her one day. Even if I am to lend an ear to what PW6 alluded to in terms of the allegation that the deceased had a relationship with one Osogo, still there is no evidence that the accused person caught the deceased in the act with the alleged lover or that the accused person met the deceased and the said Osogo engage in any provocative act towards him. There is equally no evidence that the accused person and the deceased had disagreed over anything the night before the deceased was dead.

21. Even if it is to be further taken that there was a disagreement between the deceased and the accused person, still evidence is lacking to show that the totality of the circumstances justified the accused person to act in a fit of rage. A look at the Post Mortem Report shows that the deceased sustained multiple deep cut wounds on the head. They were six in number. The accused person specifically dealt with the deceased's head with the axe. He definitely knew that he was going to kill her. That was the very message carried in the note. Whereas infidelity is an act which is to be abhorred in a marriage relationship, it makes all the difference how one handles such a matter. If all people who find themselves in such a marital problem end up committing such acts of aggression, I highly doubt if the society today would be a safe place to be in. It is important for one to exercise restraint even when the toughest times call for adverse actions unless such actions can be justified in law. In this case I am not convinced that the accused person was justified to visit the deceased in such a merciless manner.

22. It is therefore obvious that the accused was fully aware that there was a serious risk that death or

grievous bodily harm will ensue from his acts. Likewise the acts were very deliberate and without any lawful excuse and the accused remained well aware that he was exposing the deceased to the risk of death or grievous harm as a result of his uncalled for acts. I say so in taking into account the number of times the accused person cut the deceased on the head and with an axe and without any evidence of provocation or self defence. That was therefore a clear manifestation of malice. This Court hence finds that the prosecution likewise proved malice aforethought in this matter.

23. As the prosecution has proved all the ingredients of the offence of murder against the accused person, this Court now finds **JAMES NYAMOHANGA MICHAEL** guilty of the murder of **NORAH NYABOKE SAMWEL** and is hereby convicted under **Section 322(2)** of the Criminal Procedure Code, Chapter 75 of the Laws of Kenya.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 31st day of January 2017.

A. C. MRIMA

JUDGE