



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL (MURDER) NO. 5 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

ERICK NYAMOSI MOMANYI.....ACCUSED

ISACK NYAMOSI OKARI

JUDGMENT

1. The charge facing the two accused, **Eric Nyamosi Momanyi** and **Isack Nyamosi Okari**, is that of murder, contrary to S. 203 read with S. 204 of the Penal Code.

It was alleged that on the night of 14th /15th January 2013 at Riakworo Village, Masaba North District, Nyamira County, they murdered **Alex Mokua Momanyi**.

2. The case for the prosecution was that on the morning of the 15th January 2013 at 6.40 a.m, **Francis Ratungu Ondieki (PW 1)**, a chief based in the County of Nyamira was attracted by screams in his neighbourhood. He made enquiries and was told that a person had been murdered. He rushed to the scene and found a crowd of people and the dead body of the deceased under a tree.

3. A lady in the crowd informed the chief that the deceased had been called from his house at about 10.00 pm by the two accused who were also in the crowd at the scene. The two were arrested after the police were notified.

4. The said lady was **Elizabeth Kerubo (PW 4)**. She alleged that she was at her home on the material night when she was awakened by screams from a neighbouring house and rushed there only to find the deceased being pulled from his house by the two accused.

5. **Abel Agisa Momanyi (PW 3)**, aged 16 years old at the time, also heard the screams and rushed to the scene where he found the two accused and the wife of the deceased. The first accused was at the time assaulting the deceased and asking for a hoe. The group left the scene after the deceased offered to take them where the hoe was kept.

6. The dead body of the deceased was found on the following morning. The police were notified accordingly. They proceeded to the scene led by **AP Cpl. Philomen Erupe (PW 5)**, and found a chaotic group of villagers threatening to attack the chief who was protecting the place. They (police) also found the body of the deceased dangling from a tree as if he had committed suicide.

7. The body was removed to the mortuary where it was identified by **John Nyangau Nyamose (PW 2)**, before a post mortem was conducted. A report was thereafter compiled and signed by a doctor. It was produced in court (P.Ex 2) together with photographs taken at the scene (P.Ex 1) by **Cpl. Joseph Mogusu (PW 6)**. The two accused were arraigned in court on completion of police investigations.

8. The defence by both accused was a firm denial of their involvement in the offence. Accused one (**Eric**) indicated that he had been with the deceased during the day upto 3.00pm. Thereafter, they parted ways. He was also attracted by screams on the following day and learnt that a person had been killed. He went to the scene and found that the dead person was the deceased and it appeared that he had hanged himself.

9. The first accused contended that he was implicated by the wife of the deceased because he had earlier been with him.

The second accused on his part contended that the prosecution witnesses lied against him due to an existing grudge between them and his brother who sells traditional liquor. He further contended that PW 4 (Kerubo) had earlier threatened to teach him a lesson.

10. He (second accused) was also attracted by screams and learnt that the deceased had been killed. He proceeded to the scene and found the deceased having “hanged” himself. The deceased’s wife arrived at the scene and implicated him and his co-accused. They were later charged with the present offence.

11. From the foregoing evidential facts and the submissions presented herein by the two accused through the learned counsel, **Mr. Okenye**, the issues arising for determination are firstly, whether the deceased was murdered and secondly, if so, whether the two accused were positively identified as the murderers.

12. With regard to the first issue, the suggestion made by the defence was that the deceased may have committed suicide by hanging himself. However, Cpl. Mogusu (PW 6) indicated that where the body of the deceased was found it was positioned to appear as if he had committed suicide.

The photographs (P.Ex 1) showed that the body of the deceased was touching the ground and hanging by the neck with a piece of cloth on a tree.

13. The post mortem report (P.Ex 2) indicated that the cause of death was cardiopulmonary arrest due to strangulation. However, it was noted that the deceased had injuries on both upper and lower limbs as well as the lumbar region. This was a strong suggestion that he was assaulted before being strangled with a piece of cloth. The theory that he committed suicide was therefore overruled. Accordingly, it is this court’s finding that the deceased was indeed murdered.

14. With regard to the second issue, the evidence against the two accused was based on an earlier incident allegedly involving them and the deceased. It was alleged by Abel (PW 3) that the first accused assaulted the deceased during the incident. He did not mention the second accused in that regard. Kerubo (PW 4) alleged that she saw the two accused pulling the deceased from his house. He (deceased) appeared to have been assaulted.

15. The evidence by Abel and Kerubo somehow threw or cast suspicion at the two accused but it did not indicate what befell the deceased after the brawl between him and the two accused.

The first accused admitted that he was with the deceased on the alleged date but only during the daytime.

16. Abel and Kerubo indicated that the incident between the deceased and the two accused was in the night. However, they did not indicate the exact time. Neither did they indicate that the two accused were with the deceased throughout the night upto the time he was murdered. The exact time of death as per the post mortem report was unknown. The whereabouts of the deceased after the incident and how he died are facts which were unknown by the witnesses. They were then left to speculate that the two accused left with the deceased to murder him.

17. The post mortem report did not show that the deceased was fatally assaulted only that he was strangled. However, none of the witnesses implicated the two accused in that regard. The most important witness who would have unraveled the mystery surrounding the death of the deceased was his wife who was not called to testify yet she was the actual person who implicated the two accused at the scene of the discovery of the body.

18. The obligation to prove the guilt of the two accused lay with the prosecution such that even if the two in their defence concealed their brawl with the deceased at an earlier stage on the material date they had no obligation to prove their innocence.

19. Basically, the evidence against the two accused was circumstantial in the form of suspicion. Although the suspicion cast against them as a result of the earlier incident was seemingly strong, it did not amount to evidence of their alleged involvement in the offence especially in the absence of other credible and corroborating evidence.

20. It cannot therefore be said without doubt that the deceased was murdered by the two accused. Any other person could have killed the deceased by strangulation. It could also be that the accused were implicated due to an existing grudge between them and the families of the deceased.

21. Ultimately, the finding of this court is that the prosecution has failed to discharge its burden of proof against the two accused.

They are therefore found NOT GUILTY as charged and are accordingly acquitted.

[Delivered and signed this 12th day of April 2017]

J.R. KARANJAH

JUDGE

In the presence of

CC Mohe/Dorothy

State Counsel – Ms. Mbelete

Mr. Okenye for accused

Accused 1 – 2 present