



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL CASE NO. 1 OF 2015

REPUBLIC..... PROSECUTOR

-VERSUS-

HUSSEIN MARENGO MAGOIGA.....ACCUSED

JUDGMENT

1. **RABIA RIOBA MARENGO** (hereinafter referred to as '**the first deceased**') and **CECILIA BOKE MAGOIGA** (hereinafter referred to as '**the second deceased**') were butchered in the afternoon of 20/01/2015 at their home in Nyamtiro village in Kuria East Sub-County within Migori County. Upon conclusion of investigations by the police the accused person herein **HUSSEIN MARENGO MAGOIGA** was charged with two counts of murder of the two deceased. He denied the charge and the case was set for hearing.

2. Six witnesses testified in support of the information facing the accused person. **J W M**, aged 17 years old testified as **PW1**. **DANIEL MAGOIGA MARENGO** testified as **PW2**. **PW3** was **DOMINIC CHACHA**. **Dr. K'OGUTU VITALIS** testified as **PW4**. **EMILY KWAMBOKA OKWORO** testified as **PW5** and the investigating officer **No. 46482 PC JOSHUA ADENYA** testified as **PW6**. For the purposes of this judgment I will refer to the said witnesses according to the sequence in numbers in which they testified. The second deceased was the wife of **PW2** and their children included the accused person, **PW1** and **PW3**. **PW5** was one of the Government Analysts at the Government Chemist Laboratories in Nairobi.

3. On 20/01/2015 at around 06:00pm **PW1** was at their home with the two deceased and the accused person. **PW2** and **PW3** were then not at home. The second deceased had been visited by her friend one **Susan Mukuru** (not a witness) and they were preparing some yeast while the first deceased, then aged about one year, was just crawling and playing within the compound. The first deceased then slipped to the main gate to the homestead and attempted to hold it. Unfortunately the gate was temporarily fixed and it fell on the first deceased. She was slightly injured. The second deceased rushed and rescued the first deceased and went to the kitchen to prepare some tea for the first deceased.

4. The accused person who was reading the Holy Quoran witnessed what happened to her daughter. Likewise **PW1** saw what happened. The accused person raised from where he was and entered into his bedroom as **PW1** was preparing some cabbages. The accused person came out of his bedroom holding a very sharp panga and **PW1** asked him what he intended to do with it. The accused person responded that the stupid people at the home were not taking good care of her daughter, the first deceased. The accused person, while so armed, went into the kitchen which just next to the main gate to the homestead where the two deceased were.

5. Shortly thereafter **PW1** heard the second deceased screaming and asking the accused person why he was killing her without any reason. **PW1** readily raised alarm but no one responded. As **PW1** went to the kitchen, she did not believe what she saw. There was blood running on the floor of the kitchen and the two deceased were lying on the floor with very serious head injuries among others. To **PW1** the scene was horrifying. The first deceased had been cut on the head and the brain matter was out. She was already dead. Whereas the second deceased had *inter alia* serious head injuries which exposed the brain matter at least she was still alive. As **PW1** continued calling for help neighbours started flowing into the homestead as well as the police from the nearby Nyamtiro Police Post. The police took charge of the scene.

6. **PW2** had just left his wife, the second deceased, with the visitor and rushed to Nyamtiro centre which was just within the neighbourhood. After a short while he heard screams from the direction of his home and rushed to find out what the matter was. As **PW2** was on the way home he met some school-going children who told him that the second deceased had died. When **PW2** reached home he found many people gathered there. There was yelling and confusion all over. He managed to find his way to the kitchen where he saw the two deceased lying in a pool of blood with serious head injuries. The first deceased was already dead while the second deceased was still alive. The second deceased was holding the first deceased by her side. **PW2** also saw a gown commonly worn by muslims known as 'kanzu' lying at the scene. He took it and covered the first deceased. The police from the Police Post asked **PW2** to rush the second deceased to hospital. **PW2** obliged and rushed her to Pastor Machage Memorial Hospital where she was pronounced dead on arrival. **PW2** took the body to Migori County Referral Hospital Mortuary for preservation and further police action.

7. **PW3** was also not at home when the incident took place. He rushed back home when he heard screams from the direction of their home and found the two deceased seriously injured. He witnessed some more police officers visit the scene. **PW3** entered inside the room where he slept with the accused person and retrieved a sharp panga which had fresh blood on it. He handed over the same to the police. **PW3** was left

at home when PW2 rushed the second deceased to hospital.

8. PW6 visited the scene shortly after the incident had occurred. On arrival with a team of his colleague officers he met **Insp. Johanna** (not a witness) from the neighbouring Nyamtiro Police Post who briefed him what had happened as PW6 took over the scene. PW6 only saw the first deceased at the scene as the second deceased had already been rushed to hospital. While at the scene PW6 received information that the second deceased had also died and he directed that the body be preserved at the Migori County Referral Hospital Mortuary. PW6 also received information that the suspect had been spotted at trading centre. The police quickly collected the body of the first deceased and left together with PW3. They passed through the police post and picked more officers and quickly proceeded to the centre. It was around 07:00pm by then.

9. PW3 sighted the accused person who was walking on the road and informed the police. The accused person was stopped and arrested by the police. He was taken to the Police Post and placed in custody as the police took the body of the first deceased to the Migori County Referral Hospital Mortuary. PW6 managed to see and view the body of the second deceased at the mortuary. He then returned to Nyamtiro Police Post and picked the accused person and took him to Ntimaru Police Station for further investigations.

10. According to PW6 the accused person recorded a Statement under Inquiry where he revealed that upon completion of his Standard Primary education he moved to Tanzania where he changed faith and became a muslim and adopted the name Hussein on dropping his earlier name Joseph. PW6 arranged for and witnessed the autopsies for the deceased. He also organized and had photographs of the deceased taken at the mortuary. The post mortem examinations were conducted on 26/01/2015 by a Dr. Ndege. PW6 collected blood samples for both deceased and referred them to the Government Chemist laboratories in Nairobi for analysis alongside the panga vide an Exhibit Memo Form. He also escorted the accused person to the Migori County Referral Hospital where the accused person was examined and certified fit to stand trial. The accused person was eventually arraigned in court and charged. PW6 produced the photographs and the panga as exhibits.

11. PW5 produced an analysis report which had been prepared by her colleague who was held up in a Court in Nairobi. On analyzing the samples forwarded by PW6 it was revealed that the panga contained the first deceased's blood whereas the blood sample for the second deceased did not generate any DNA profile. PW5 explained that one of the reason for such failure to generate a DNA profile would be poor storage of the samples. PW5 produced the report and the Exhibit Memo Form as exhibits.

12. PW4 is the one who conducted the mental examination for the accused person on 23/01/2015. He certified him fit to stand trial. PW4 also produced the two Post Mortem Forms for the deceased whose examinations were conducted by Dr. Ndege whom they had worked together and had later on proceeded for further studies. The bodies of the two deceased were identified by PW2 and David Maroa Chacha. The first deceased had sustained two deep penetrating cuts on the head. One was at the middle measuring about 20 cm long and the other one on the right side of the head measuring 15 cm long. The injuries had caused a fracture of the skull and the brain matter was herniating with haematoma. The cause of death was opined to be penetrating skull fractures with intracerebral haemorrhage likely to have been caused by a sharp object.

13. The second deceased had multiple injuries. There was a penetrating skull fracture at the back of the head and the brain matter was herniating. Part of left ear was cut off, compounded fracture of the mid-radial ulna bones of the left hand, deep cut on right upper arm, blood vessels and nerves were deeply cut and destroyed and there was a deep cut on left lower arm. Internally, the skull fracture was confirmed and the brain matter was cut through. The cause of death was opined as severe head injury due to penetrating skull fracture with intercerebral haemorrhage. PW4 was of the view that the possible weapon used was a sharp object. The reports were signed and dated. PW4 produced the two Post Mortem Reports together with the mental assessment report for the accused person as exhibits.

14. At the close of the prosecution's case, the accused person was placed on his defence. He opted to give unsworn testimony without calling any witness. The accused person denied the offence and raised an *alibi*. He stated that he had accompanied other muslim leadres to Tanzania to offer prayers when he was called by a fellow muslim from his Nyamtiro village and informed that his mother and daughter had been seriously injured. He rushed home only to find many people gathered in their homestead. He saw his wife one **Florence** (not a witness) who told him that their daughter was dead and that both deceased had been taken to hospital. The accused person also stated that he saw PW1 who told him in Kiswahili that '*Mwaka huu mtakoma watoto wa Cecilia*' (loosely putting on notice all the children of Cecilia that they will face it rough that year). He went to the kitchen and found blood all over.

15. He then retreated to a place near home and later heard people calling for the arrest of one '**Joseph**'. He returned home where he saw PW1 with the police including PW6 where PW1 told the police to arrest him until Joseph surrendered. He was arrested and taken to Nyamtiro Police Post. His other family members pleaded with the police for his release but PW1 insisted to the contrary. While in custody Joseph called him and told him that it was him who had killed the second deceased who had attacked and seriously injured the first deceased. He then escaped to a place called Borega in Tanzania. According to the accused person, PW1 was not his sister but a cousin-sister and PW2 was only related to their family whereas PW3 was his brother.

16. At the close of the defence case the matter was left for judgment.

17. From the above evidence, this Court is now called to find if the ingredients of the offences of murder have been proved in this case. The offence of murder carries three ingredients which are: -

(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 consider each ingredient separately.

(a) Proof of the fact and the cause of death of the deceased: -

18. There is no doubt that the deceased died. That fact was attested to by PW1, PW2, PW3 and PW6. The first limb is hence answered in the affirmative.

19. As to the cause of the death of the deceased, PW4 produced a Post Mortem Reports which were filled in by Dr. Ndege after conducting the autopsies. The reports opined that the possible cause of the death of the first deceased was penetrating skull fractures with intracerebral haemorrhage likely to have been caused by a sharp object and that the second deceased had died out of a severe head injury due to penetrating skull fracture with intercerebral haemorrhage. Since there is no contrary evidence to that end this Court concurs with that medical finding. The other limb is likewise answered in the affirmative.

(b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the accused persons: -

20. The accused person denied taking part in the death of the deceased and raised an *alibi*. The evidence pointing to the accused person was mainly by PW1 who narrated how she witnessed the accused person attack and kill the deceased. The incident took place at around 06:00pm and apart from the deceased, PW1 was just with the accused person at home. PW1 saw what happened to the first deceased when she crawled to the gate and the temporary gate fell on her. That triggered the accused person to go inside the bedroom he shared with PW3 and take out his well sharpened panga. When asked by PW1 what he wanted to do with the panga the accused person expressed his dissatisfaction with the way the second deceased took care of the first deceased. As the accused person attacked the deceased PW1 raised alarm and the neighbours only came after the accused person had left. PW1 informed those who answered her call for help what had happened and that it was the accused person who had done so. She likewise did so to PW2 and PW3 when they returned home as well to the police officers including PW6. It was based on the information by PW1 that the accused person was arrested.

21. The accused person however raised an *alibi* that he was not at home at the time the incident occurred. PW2 testified that he had hardly left his home to the trading center when he heard the screams from the direction of his home. He had left behind the deceased, PW1 and the accused person.

22. I keenly watched PW1 and PW2 as they testified. I observed their demeanors. Both appeared very honest and straightforward. They withstood cross-examination as well. I believed them as truthful witnesses. Their evidence therefore places the accused person at the scene of crime at the time in issue and as such displaces the *alibi*. I do not agree that the accused person was not at home when the incident occurred. I also do not agree with the accused person that PW1 was his cousin-sister and that PW2 was just one of his relatives. It is surprising that the accused person denied PW2 as his father and that PW1 was only his cousin-sister. PW3 confirmed the contrary and corroborated the evidence of PW1 and PW2. He firmly confirmed that PW2 was the father of all the three; PW1, PW3 and the accused person and that PW1 was their sister and the second deceased was the mother of the three siblings.

23. Regardless of the fact that the *alibi* was not raised early in the proceedings, I have nevertheless carefully considered it alongside the prosecution evidence. That I have done with such greatest care and to satisfy myself that in all circumstances, it is safe to act on the evidence on identification by recognition. This is premised on the settled principle in law that evidence of visual identification/recognition in criminal cases can cause miscarriage of justice if not carefully tested. The Court of Appeal in the case of **Wamunga Vs Republic (1989) KLR 426** stated as under: -

“It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction.”

It was also held in **Nzaro vs Republic (1991) KAR 212** and **Kiarie vs Republic (1984) KLR 739** by the Court of Appeal that evidence of identification/recognition at night must be absolutely watertight to justify conviction.

24. In **R –vs- Turnbull & Others (1973) 3 ALL ER 549**, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court said:

“... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way....? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?... Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

25. The above does not mean that there cannot be safe recognition even at night. The Court of Appeal in **Douglas Muthanwa Ntoribi vs Republic (2014) eKLR** in upholding the evidence of recognition at night held as follows:-

“On the issue of recognition, the learned Judge evaluated the evidence on record and emphasized that PW1 testified:-

“I flashed my torch and I saw the accused he was 2 meters away from me. That the appellant was not only seen, but was positively and correctly identified or recognized by PW1, the complainant.”

The Learned Judge further noted that the complainant testified he used to see the appellant in town. It is our considered view that from the evidence on record, the identification of the appellant based on recognition was free from error...

26. Again the Court of Appeal in **Criminal Appeal No. 274 and 275 of 2009 at Eldoret in Peter Okee Omukaga & Another vs R (unreported)** had this to say on the evidence of recognition at night:-

“We have re-examined the evidence upon which that conclusion was made, and we find that it was well founded. We have no doubt whatsoever that Francis, John and Rose were familiar with the appellants; that Francis and John had known them by appearance as ‘neighbours from the village’, that they had played football with them long time ago, and that their voices were so familiar to them. Accordingly, we have no reason to disturb that finding and we dismiss that ground of Appeal. We also reject the argument that failure to hold an identification parade, and the non-recovery of the stolen articles made conviction unsafe. As this was a case of identification by recognition, an identification parade was unnecessary. The non-recovery of the stolen items did not in any way point to the innocence of the appellants.”

27. It is important to note that even in cases of uncorroborated single-witness-evidence there can still be a legal conviction. This issue has been a subject of consideration in various cases including one before the Court of Appeal of Uganda in **Obwana & Others v. Uganda (2009)2 EA 333** where the Court presented itself thus:

“It is now trite law that when visual identification of an accused person is made by a witness in difficult conditions like at night, such evidence should not ordinarily be acted upon to convict the accused in the absence of other evidence to corroborate it.This need for corroboration, however, does not mean that no conviction can be based on visual identification evidence of a sole identifying witness in the absence of corroboration. Courts have powers to act on such evidence in absence of corroboration. But visual identification evidence made under difficult conditions can only be acted on and form a basis of conviction in the absence of corroboration if the presiding judge warns himself/herself and the assessors of the dangers of acting on such evidence.”

28. PW1 knew the accused person well as his brother. They lived together in Nyamtiro village in Kenya and had previously lived together in Tanzania. There is nothing to suggest any bad blood between the accused person and PW1. I do not find it reasonable that PW1, being a minor, was in such a position to direct the police to arrest and detain the accused person until the alleged Joseph surrendered. The attack happened in daylight. The injuries which PW1 saw the accused person inflict on the deceased were confirmed by PW2, PW3, PW4 and PW6. It was PW5 who confirmed that the panga had the blood of the first deceased thereby placing it as the weapon used in the attack. PW6 explained why fingerprints could not be lifted from the panga being that the surface was not an ideal one. PW1 identified the panga in Court.

29. Going by the above evaluation of the evidence and on the strength of the case law, this Court finds that the accused person was positively identified as the one who attacked and killed the deceased. The accused person was hence properly placed as the assailant and his defence that he was not at the scene as alleged can only be deemed as afterthought. The identification by recognition was free from any error.

30. The second ingredient is also proved against the accused persons.

(c) Proof that the said unlawful act was committed with malice aforethought:

31. **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.

32. 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...”

33. 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.” (emphasis added).

34. The accused person used a panga in this case. The panga was produced as an exhibit. It was indeed a sharp one. The first deceased was cut on the head twice. The injuries were so deep that fractured the skull and the brain matter came out. The second deceased sustained so serious injuries as well. She had multiple injuries on the head and limbs. The head was split open and the brain was visible inside. The photographs captured the extent of the injuries. They are indeed very scary. Looking at the nature of the injuries and where they were inflicted the accused person as a reasonable person must have known or ought to have known that he would at the very least cause grievous bodily harm to the deceased. His intention to kill the deceased is eminently demonstrated. I find that the prosecution proved malice aforethought in this matter.

35. From the foregone discourse, the prosecution has proved all the ingredients of the offence of murder against the accused person on both counts.

36. Consequently, I find **HUSSEIN MARENGO MAGOIGA** guilty of the murder of **RABIA RIOBA MARENGO** as charged in Count 1 and do convict him under **Section 322(2)** of the Criminal Procedure Code, Chapter 75 of the Laws of Kenya. I also find **HUSSEIN MARENGO MAGOIGA** guilty of the murder of **CECILIA BOKE MAGOIGA** as charged in Count II and do convict him 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 27th day of July 2017.

A. C. MRIMA

JUDGE