



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MIGORI
CRIMINAL CASE NO. 35 OF 2015

REPUBLICPROSECUTOR

VERSUS

JONES CHACHA NYAMOHANGA.....ACCUSED

RULING

1. On 02/02/2016 the Accused person herein, **JONES CHACHA NYAMOHANGA** was formally charged with the murder of **CHARLES MOGAYA RIOBA** (hereinafter referred to as '*the deceased*'). The particulars of the information were to the effect that the Accused person murdered the deceased on 13/11/2015 at Nyabirongo Village in Kuria West Sub-County within Migori County.

2. The accused person who was represented by Learned Counsel Mr. Kiseru then pleaded to the information in Kiswahili language being the language which he had informed this Court that he understood well and wished to undertake the proceedings in. The accused person responded to the said information in the following words:-

“Ni Kweli”

3. This Court then entered a plea of guilty based on the admission and set the 15/02/2016 as the date when the facts of the case were to be presented by the prosecution.

4. Come 15/02/2016 this Court however directed that the plea be taken afresh and that was done. On being called to respond to the information for the second time, the accused person had the following to say:-

“Ni kweli niliwa Charles Mogaya Rioba.”

5. The plea of guilty was sustained and due to the lateness of the hour the presentation of the facts was deferred. On 30/03/2016 Ms. Owenga, Learned State Counsel then presented the facts. Counsel informed the Court that on 13/11/2015 the accused person went to seek his father's consent to be allowed to plant some trees at a site the Accused person had identified. His father, one CHACHA RIOBA NYANGETA, accompanied the Accused person to the site. The father to the Accused person however advised him against planting the trees at the said site since that was a road reserve. The Accused person was then advised to look for an alternative site. It seems that the Accused person did not take his father's direction well and suddenly became angry and began chasing his father who fled towards his house amid shouting for help. The Accused person's father luckily managed to reach his house and locked the door from inside.

6. The Accused person father's shouts caught the attention of his brother, the deceased, who answered the

call for help. The deceased hurriedly proceeded to his brother's house and sought to know what the matter was. The Accused person's father came out of his house and explained what had transpired. The two went back to the site which the Accused person had identified and found the Accused person preparing the same for the planting of the trees. The two further discouraged the Accused person from proceeding on with the preparations at that very site but the Accused person remained adamant. The Accused person then told the two to kill him if they wanted so and to that end he laid himself on the ground. The deceased who was the Accused person's uncle then slapped the Accused person in protest to what the Accused person was doing.

7. The slapping enraged the Accused person who suddenly rose from the ground and took the panga and jembe he was using in preparing the site and pursued his father. The deceased intervened and wrestled with the Accused person but unfortunately the Accused person overpowered the deceased. The Accused person then cut the deceased all over the body from the head, hands, neck using the panga. Those injuries led to the instant death of the deceased.

8. The police were then informed who visited the scene and removed the deceased's body to the Mortuary. Post Mortem examination on the deceased's body was conducted on 15/11/2015 which confirmed that the deceased's death was caused by severe hemorrhage. A Post Mortem Form was then filled in.

9. On the same day the accused person surrendered himself to the Isebania Police Station. He carried with him the panga and jembe he had used upon the deceased which he handed over to the police. The Accused person was then taken for mental assessment and was found to be in a stable mental state and capable of standing trial. A P3 Form was also filled. The panga, jembe, the Post Mortem Form and the P3 Form were all produced as exhibits.

10. The accused person was then asked if he had understood the facts as laid and he responded in the affirmative. He then stated in Kiswahili in answer to the facts as follows:-

“Nimesikia na kuelewa maelezo ya mashtaka. Hayo maelezo ni kweli kabisa. Ni kweli kabisa ilifanyika hivyo.”

11. The Defence Counsel then contended that the facts did not support the charge of murder but may be a lesser offence of manslaughter. The State Counsel also noted the aspect of provocation.

12. That being the background, I will now have a look at how Courts have generally dealt with the issue of taking of a plea of guilty. The procedure and steps to be taken in such instances were laid down in the case of **Adan -vs- R (1973) EA 445** and in the Court of Appeal case of **Kariuki -vs- Republic (1954) KLR 809** as follows:-

(i) the charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands.

(ii) the accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded.

(iii) the prosecution should then immediately take the facts and the accused should be given an opportunity to change or explain the facts or to add to any relevant facts.

(iv) If the accused does not agree to the fact or raises any question of his guilt in his reply must be recorded and change of plea entered.

(iv) If there is no change of plea, a conviction should be recorded as well as a statement of facts relevant to sentence and the accused's reply.

13. In the case of **Karuiki -vs- Republic (supra)** the Court of Appeal went on and stated that:-

“The narration and interpretation of the facts of the alleged offence before the entry of a conviction and asking the appellant if he agreed with the facts is evidence of the precaution which the trial magistrate adopted to ensure that the appellant fully understood the charge before pleading.”

14. In the case of Atito -vs- R (1975) EA 278 the Court held that the narration of facts supplemented the explanation by the trial magistrate of the ingredients of the offence. This Court has previously had an opportunity to deal with the issue of taking of pleas in several cases including the one of Dishon Malesia -vs- Republic, Criminal Appeal No. 46 of 2014 at Kakamega High Court (2015) eKLR where it stated that:

"Another equally important aspect relates to the taking of the facts of the case. The purpose of the facts is to establish the ingredients of the offence before Court. It is the duty of the Court to scrutinize and be sufficiently satisfied that indeed the facts, as presented, do establish the ingredients of the offence. It is not enough for a Court to proceed and enter a guilty plea simply because the accused has admitted the facts, the facts must establish the commission of the offence. The Court should therefore endeavour to be fully satisfied that the facts truly connect the accused to the commission of the offence and that there appears no cause to the contrary as so clearly provided under Section 207 of the Criminal Procedure Code."

15. I still hold that position. Having said so, I have carefully filtered through the facts of this case against the three ingredients of the charge of murder. The said ingredients are as follows:-

(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.

16. From the facts as presented before Court, the first ingredient was sufficiently proved for it remains a fact that the deceased died. Equally the cause of the deceased's death was proved. On the second ingredient, there is sufficient evidence that indeed it was the accused person who inflicted the injury on the deceased which injury led to his death. On the issue as to whether there was malice aforethought on the part of the accused person, this Court is of the considered view that the aspect needs to be interrogated further. That is because of the possibility of the defence of provocation on the part of the Accused person. However that is subject to the accused person justifying such.

17. The above interrogation can only be done in a trial and it is on that basis that this Court finds that the facts as presented do not sufficiently prove the information of murder to warrant a conviction at this point in time.

18. Consequently this Court makes the following orders:-

(a) A conviction is declined and instead a plea of not guilty is hereby entered;

(b) A hearing date to be fixed forthwith;

(c) The exhibits produced to be returned to the prosecution.

DELIVERED, DATED and SIGNED at MIGORI this 28TH day of APRIL 2016.

A. C. MRIMA

JUDGE