



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL (MURDER) NO. 4 OF 2010

REPUBLICPROSECUTOR

VERSUS

BOAZ AMISI ANDREWACCUSED

JUDGMENT

1. The charge facing the accused is that of murder, contrary to S. 203 read with S. 204 of the Penal Code, in that on the 26th December 2009 at Ekwere-North Masaba Location of South Masaba District, the accused, Boaz Amisi Andrew, murdered Douglas Momanyi Mogaka.

2. It was the prosecution's case that the deceased was an uncle to the accused and on the material date at about 3.30pm; a report was received by the assistant chief of Moremo Sub-location to the effect that the deceased had been killed by the accused after a quarrel and fight between them. Consequently, the chief together with members of the area's community policing committee arrested the accused and handed him over to the police at Ramasha Police Station.

3. Necessary investigations were carried out by the police and in the process an autopsy was conducted on the body of the deceased. The necessary report indicated that the deceased died from severe head injury due to blunt trauma.

Statements were obtained from the witnesses and they led to the conclusion that the deceased was hit with a stone by the accused and killed. The accused was therefore charged with the present offence.

4. The case for the defence was that the accused did not commit the offence as alleged and was a school pupil at the material time aged fourteen (14) years only. He proceeded to church on the material date and later returned home only to find nobody there. He was on his way back to the church at about 2.00pm when he met a group of people who alleged that he was a chicken thief and together with a person named Cyrus Momanyi, they stole a hen. Despite his denial, those people forced him to them to the police station after passing through the local AP Camp. He was eventually taken to Ramasha Police Station where he was charged with theft but after appearing in court on several occasions the charge was never read to him. Ultimately, he was charged with the present offence which he contended that he never committed.

5. The prosecution called a total of six (6) witnesses in support of its case. They included the wife of the deceased who is the accused's step-mother, **Elizabeth Kerubo Momanyi (PW 1)**, the father of the accused, **Andrew Nyakundi Nyabuto (PW 2)**, the father of the deceased, **Andrew Mogaka Amisi (PW 3)**, the Ass. Chief, **Evans Atika Ghuto (PW 4)**, the brother of the accused, **Ezron Munga Amisi (PW 5)**, and the police officer who partly investigated the case, **PC Gideon Mutua (PW 6)**.

6. In his defence, the accused made an unsworn statement without calling any witness. At the end of the trial, the learned defence counsel, **MR. Nyagwencha**, presented his final submissions in writing. The rejoinder by the learned Prosecution Counsel, **MR. Ochieng'**, was made orally.

Having considered the rival submissions and the evidence in its totality, it is apparent that the basic issue for determination is whether the deceased was killed after being hit with a stone by the accused and if so, whether the accused acted with necessary intention to kill the deceased.

7. The defence raised by the accused was a contention that he was suspected for another offence (i.e theft of a hen) but was improperly and maliciously charged with the present offence. He implied that he was not at the material scene at the material time and did not even come across the deceased on the material date. He also implied that he was an innocent school going pupil aged fourteen (14) years at the material time.

8. However, the accused's step mother and wife to the deceased, Elizabeth (PW 1) displaced the accused's alibi and pretence of innocence when she stated that she actually saw him used a stone to hit the deceased who then fell down. This was after they had disagreed on family issues.

Elizabeth (PW 1) confirmed that the deceased was hit on the head with a stone. Indeed, the post mortem report (P.Ex 2) established that the deceased died from head injury.

9. Elizabeth (PW 1) however, indicated that the deceased may have suffered the fatal injuries in a fight with the accused. This was quite clear when she stated that she warned them against fighting during the Christmas period. The incident occurred on 26th December 2009, which was within the Christmas period.

In effect, the evidence by Elizabeth (PW 1) destroyed the accused's denial of having fatally assaulted the deceased and rendered his defence lacking in merit and an afterthought.

10. The rest of the prosecution witnesses did not witness the actual assault of the deceased by the accused. They only relied on what they were told by others as their evidence.

The evidence by Elizabeth (PW 1) was the sole evidence against the accused. It was however, reasonably sufficient and credible enough as to create no doubt that the deceased was assaulted with a stone by the accused and suffered fatal injuries as a result. This court must therefore find as much and hold the accused criminally liable for the death of the deceased.

11. On whether the accused acted with malice afterthought, the finding of this court is that he did not going by the evidence of Elizabeth (PW 1) which implied that the accused used a stone to hit the deceased while they were fighting. Indeed, the information given to the chief (PW 4) was that the accused hit the deceased with a stone after a fight ensued between them.

9. In the upshot, the accused is hereby found guilty of manslaughter contrary to section 202 of the Penal Code and is convicted accordingly.

J.R. KARANJAH

JUDGE

[Delivered and signed this 27th day of June 2016]

27/6/2016

Before J.R. Karanjah – J

Njoroge CC

Mr. Otieno State Counsel

Accused – Present

Mr. Nyagencha for accused

J.R. Karanjah , J

State Counsel: Accused may be treated as a first offender.

Mr. Nyagwencha in mitigation: Accused is remorseful. He is now aged 23 years. He has since reformed.