



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL (MURDER) NO. 137 OF 2013

REPUBLICPROSECUTOR

VERSUS

ABEL MORANGA NCHORE ACCUSED

JUDGMENT

1. The accused, **Abel Moranga Nchore**, alias **Richard Ocharo Nchore**, is charged with murder, contrary to S. 203 as read with S. 204 of the Penal Code, in that on the 7th November 2013, at Mwangare Village, Nyamache, Kisii County, murdered Vanis Barongo Nchore.
2. The case for the prosecution was that the deceased and the accused are sister and brother respectively and on the material date they were both at home together with their mother, **Jemimah Kerubo Nchore (PW 1)**, and the accused's wife, **Ziphora Teresa Maraga (PW 3)**, when they (deceased and accused) allegedly quarreled over blankets and beds and in the process the accused assaulted the deceased after which he was restrained by a friend. He allegedly left the scene and went to the market at Keroka.
3. His sister, **Ruth Kwamboka Osongo (PW 2)**, called him on phone at about 8.00 am on the material date and apologized to him over a previous incident involving him, their mother and deceased sister. He then allegedly informed her (PW 2) that he would kill the deceased by cutting her breasts. Shortly thereafter, she (PW 2) was informed that the deceased was dead. She rushed to her mother's home and found the dead body of the deceased in a kneeling position and a rope on her head. She then concluded that the accused did what he said he would do.
4. The accused's mother (PW 1) was not at the scene when the deceased died. She had left home to go to the chief's office to report the assault of the deceased by the accused. She later returned home only to find a crowd of people and to learn of the death of the deceased. She found the deceased's body inside the house of the accused with a swollen abdomen and chest. She could not tell what had happened to the deceased apart from being assaulted by the accused.
5. The accused's wife (PW 3) indicated that after quarrelling with the deceased the accused left for the market at Keroka while she remained at home with her mother in law (PW 1) and the deceased. She also left and proceeded to their farm from where she was called by her son, Ondieki, and followed him to their house where she found the body of the deceased with a rope on the neck. She screamed for help and alerted people to the scene. She could not tell how the deceased died.
6. **Joshua Birundu Nchore (PW 4)**, received a telephone call on the material date and was informed that his sister (deceased) had committed suicide inside the house of their brother, the accused. He later identified the body of the deceased for purposes of post mortem.

DR. Okenye David (PW 5), performed the post mortem and compiled a report (P.Ex 1) indicating that the cause of death was suffocation which led to cardiopulmonary arrest secondary to strangulation rather than suicide.

7. **PC Sammy Gitwanja (PW 6)**, proceeded to the scene after the necessary report was made on the material date. He found the body of the deceased inside the house of the accused hanging on a rope with the knees on the ground. The rope was hanging from the roof of the house. He arranged for the scene to be photographed before removing the body to the mortuary. He obtained statements from the witnesses and concluded that the deceased and the accused quarreled and fought over tea sales bonus. Thereafter, the deceased was found hanging on the rope.

6. It was further the conclusion of the investigating officer (PW 6) that the deceased died from strangulation as per the post mortem report and could not therefore have killed herself by hanging while her knees were on the ground. He (PW 6) therefore preferred the present charge against the accused.

9. In his defence, the accused denied the offence and stated that he was at the material scene on the material date to visit his deceased sister who lived with his children and their mother. He visited to find the reason behind the constant quarrels between the deceased and his children. He conversed with the deceased after which he accompanied a step brother to the market. He left behind the deceased and their mother.

10. While at the market, he (accused) was told that visitors were at home. On his way there, he sensed that something was wrong. He eventually arrived home and found people crying. He entered his house and found the deceased hanging by a rope and was dead. The police were called. They arrived at the scene and removed the body to the mortuary. He was later called upon to record a statement and after the burial of the deceased, his brothers descended on his homestead and set it on fire. His banana plantations were also destroyed. He was then arrested when the police arrived at the scene and later charged with the present offence.

11. At the end of the trial, **MR. Ondari**, submitted that the prosecution was under a duty to prove its case beyond reasonable doubt but they failed to do so as the cause of death was not established.

Learned counsel implied that the prosecution was unable to state with certainty whether the deceased died from suicide or strangulation. Learned counsel submitted further that the evidence of PW 1 and PW 3 was contradictory and in fact, PW 3 corroborated the alibi defence raised by the accused. That, the circumstances leading to the death of the deceased were not clearly explained.

12. Learned counsel submitted that the circumstantial evidence against the accused was not watertight since the deceased could have died from suicide rather than being killed by the accused before being hanged.

That, there was no direct evidence against the accused and he was suspected merely because of the quarrel between him and the deceased. That, the opinion of the doctor (PW 5) may either be accepted or rejected by the court.

Learned counsel urged the court to acquit the accused and relied on the decision in **Jane Muthoni Muriuki Vs Republic [2006]e KLR**, to support his submissions.

In his rejoinder, the learned Prosecution Counsel, **MR. Ochieng'**, reiterated the evidence on record and urged this court to find the accused guilty.

13. Under S.203 of the Penal Code, any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder. The issue for determination is therefore whether the death of the deceased was as a result of an unlawful act committed against her by the accused.

The defence raised by the accused was a denial and a suggestion that the accused was not at the scene at the time the deceased died. He however, indicated that he had earlier on the material date been with the deceased at their home.

14. The fact was confirmed by their mother (PW 1), accused's wife (PW 3) and to an extent their sister (PW 2).

There was also indication from the mother (PW 1) and the wife (PW 3) that the meeting of the accused and the deceased earlier on the material date was laced with animosity such that the two quarreled and probably went physical. According to the mother (PW 1), the accused assaulted the deceased and according to the wife (PW 3), the two merely quarreled, but according to the investigating officer (PW 6) the two quarreled and fought.

15. Apparently, the quarrel or the fight or the assault did not result in the death of the deceased from injuries sustained if any. Indeed, the mother (PW 1) said that the accused after being restrained from assaulting the deceased left the scene. She also later left the scene to report the matter to the chief. The accused's wife (PW 3) also confirmed that the accused left the scene and went to a market. She also left later leaving behind the deceased and the accused's mother.

16. It would appear that the deceased met her death after she was left at home most probably on her own and after the accused, her mother (PW 1) and sister-in-law (PW 3) had left home. Although the mother (PW 1) stated that she heard that the accused returned to the scene after she had left she did not identify or mention the name of the person who gave her the information. Her evidence in that regard was hearsay devoid of any probative value.

17. Indeed, the accused's mother (PW 1) affirmed that she saw the accused assaulting the deceased but did not see him killing her.

As shown in the evidence by both the prosecution and defence, the accused was not present at the scene at the time the deceased died. Yes, he may have quarreled with the deceased or assaulted her or fought with her, but nobody saw him at the scene when the deceased died. His alibi was thus left intact thereby indicating that the deceased did not die as a result of an unlawful act by himself against her.

18. It is clear from the evidence of the accused's sister (PW 2) that the accused was suspected of having killed the deceased because he had earlier on the same date allegedly threatened to do so. The threat was seemingly made in a telephone conversation between her (PW 2) and the accused. However, there was no other evidence to support the alleged threat against the deceased by the accused.

19. Suspicion was also cast upon the accused because his relationship with the deceased was not cordial. They often engaged in quarrels pertaining to the welfare of the accused's children who lived with the deceased or pertaining to bonuses arising from the sale of tea. Nonetheless, there was no evidence to show that the bad relationship resulted in the accused killing the deceased.

20. In the absence of any other evidence, suspicion no matter how strong would not be sufficient evidence to prove commission of an offence (see, **Faith Lucas Vs Republic Msa Criminal Appeal No. 274 of 2006 (C/A)**).

So, even if the accused was the prime suspect in the death of the deceased, there was no credible and cogent evidence against him in that regard.

21. In this case, the death of the deceased was rather peculiar because it was not established beyond reasonable doubt whether she was strangled to death by an individual or whether she committed suicide by hanging herself with a rope. The information given by the accused's wife (PW 3) and brother (PW 4) suggested that the deceased committed suicide. This theory was not clearly displaced by the post mortem report (P.Ex 1) in which the doctor (PW 5) stated that the cause of death was suffocation which led to cardiopulmonary arrest secondary to strangulation and not suicide.

The doctor somehow overruled the suicide theory but he stated in court that the mechanism used in strangulation also applies in suicide cases but in such cases there would also be abrasion marks on the neck.

22. Even if it were accepted that the deceased did not commit suicide by hanging herself with a rope and that she was suffocated to death through strangulation, there was no evidence direct or indirect proving that the accused was responsible for such strangulation.

It is without doubt that the deceased was killed or driven to her death probably due to disagreements and/or quarrels over family issues but there was insufficient evidence to establish beyond reasonable doubt that the accused was responsible for her death.

In the end result, the accused must and is hereby found not guilty as charged and is acquitted accordingly.

J.R. KARANJAH

JUDGE

[Delivered and signed this 21st day of June 2016]