



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL (MURDER) NO. 57 OF 2013

REPUBLICPROSECUTOR

VERSUS

MARY NYABOKE ORARI

ERICK NYAMBEGA ORANGIACCUSED

JUDGMENT

1. The two accused, **Mary Nyaboke Orari**, and **Erick Nyambega Orangi**, are charged with murder, contrary to S. 203 as read with S. 204 of the Penal Code, in that on the 1st May 2013, at Maagonga Village, Marani District, Kisii County murdered Martha Nyangweso Mogaka.

2. It was the case for the prosecution that the deceased and the accused were related and lived in some area within the County of Kisii. On the 2nd May 2013, shouts were heard in their village at about 6.30 am. It was then that the first accused (Mary) alerted the villagers of the presence of the deceased at her (Mary's) home. The deceased was outside the accuseds' house and appeared to have been injured and in pain. She was taken to her home and thereafter to the hospital.

3. The matter was reported to the area chief and eventually to the police. However, on the 3rd May 2013, the deceased passed away while undergoing treatment in hospital.

The post mortem report indicated that she died from cardio pulmonary failure due to bleeding into the pleural cavity due to blunt force trauma.

The police investigated the matter and thereafter preferred the present charge against the accused.

4. The case for the defence was that the accused did not commit the offence. The first accused found the deceased lying down in pain in her home at about 6.00 am. She noted that the deceased was in pain and could not talk in a proper manner. She (accused one) proceeded to her (deceased's) house and informed her sons who removed her to their house before taking her to hospital where she passed away.

5. The second accused is a son to the first accused. He was not at home when the material events unfolded. He was at his place of work away from home at a place called Suneka. He arrived home on 4th May 2013, when a village elder went there and informed him and his mother that they were required by the area chief. They went to the chief and were in turn referred to the police to record statements regarding the death of the deceased. They were instead arrested and later charged in court with the present offence.

6. The prosecution called a total of three (3) witnesses in the attempt to prove the charge against the two accused beyond reasonable doubt. These included sons to the deceased, **James Ochwangi Gichana (PW 1)**, and **Shem Gichana (PW 2)**, as well as the police officer who investigated the case, **PC Gilbert Koech (PW 3)**.

7. Both accused made unsworn statements in defending themselves against the charge. They did not call any witnesses.

After the trial, the accused made their submissions through the learned defence counsel, **MR. Okemwa**.

The learned prosecution counsel, **MR. Ochieng'**, responded on behalf of the Republic.

8. From the evidence and the submissions it was apparent that the basic issue for determination was whether the deceased was murdered and if so, whether the two accused were responsible for the offence.

Basically, the fact of murder was not disputed. Indeed, evidence by the prosecution and the defence showed that the deceased was found early in the morning within the accused's homestead while injured and in pain. She was then taken to hospital where she died while undergoing treatment for the injuries suffered.

9. The post mortem report (P.Ex 1) indicated that the deceased died from internal bleeding occasioned by an assault with a blunt object.

Malice aforethought may be imputed where there is an intention to cause the death or to do grievous harm to any person (see, **S.206 Penal Code**). Therefore, in as much as the assailants of the deceased caused grievous bodily harm to her, their intention was to kill her.

The big question here is whether the two accused were the assailants or part thereof.

10. The burden to establish that the accused were criminally responsible for the death of the deceased lay with the prosecution and did not at any one moment shift to the accused. It may be noted that an accused person shoulders no obligation to prove his innocence (see, **Chemagong Vs. Republic (1984) KLR 611**).

The prosecution did not avail direct evidence against the accused. None of the witnesses saw the accused assault the deceased.

11. The first accused said that the deceased confirmed to her that she was assaulted but fell short of naming her assailants.

The second accused contended that he was not at the scene at the material time. It was for the prosecution to displace the alibi which it did not through the evidence of any of its witnesses. The second accused had no obligation to prove his alibi (see, **Seki Toleko Vs. Uganda (1967) EA 531** and **Kiarie Vs. Republic (1984) KLR 739**). His defence in that regard was not disproved by the prosecution.

12. The investigations carried out by the investigating officer (PW 3) were based on what he was informed by the sons of the deceased (i.e PW 1 and Pw 2). They are the ones who implicated the two accused and all that the investigations officer did was to carry forward the narrative instead of carrying out proper and independent investigations with a view to establish the real murderers of the deceased.

13. As for the evidence of James (PW 1), he alleged that the deceased told him that she was assaulted by the two accused and another person called Toto Orangi for allegedly being a witch.

Shem (PW 2) also indicated that the deceased told them that the first accused and her sons assaulted her on allegations of being a witch. These two witnesses (PW 1 and PW 2) based their evidence against the two accused on the alleged dying declaration by the deceased.

14. However, there was no independent corroboration of the dying declaration. Besides, whereas James (PW 1) indicated that the deceased mentioned the names of the assailants, Shem (PW 2) indicated that the deceased made a general declaration that she was assaulted by the first accused and her sons without disclosing any names.

Further, Shem (PW 2) indicated that the deceased might not have been in her right state of mind when she made the declaration. He (PW 2) stated that she was conscious at the time but in his statement to the police he said that she was unconscious.

15. The dying declaration was undoubtedly the only evidence relied upon by the prosecution to establish that the deceased was assaulted by the accused. It was indirect evidence against the accused which was however, insufficient for want of consistency and credibility and for want of independent corroboration. It would therefore be unsafe for this court to make a finding that the accused were or were part of those who assaulted and inflicted fatal injuries to the deceased.

For a dying declaration to be admitted as a matter of necessity in holding an accused person criminally culpable it must be credible and receive independent corroboration which must also be credible.

16. This is because, the person whose declaration is admitted is considered as standing in the same position as if he were sworn as a witness in court. Therefore, his credibility may be impeached or confirmed in the same manner as that of a witness.

Herein, the dying declaration cannot be said to have been credible and so is the evidence in that regard by the sons of the deceased (PW 1 and PW 2).

17. Consequently, it is the finding of this court that the prosecution failed to discharge its burden of proving that the two accused murdered the deceased. The defence raised by the two must therefore be sustained. They are accordingly found not guilty as charged and are hereby acquitted.

J.R. KARANJAH

JUDGE

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