



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL (MURDER) NO. 16 OF 2013

REPUBLICPROSECUTOR

VERSUS

DENNIS NYABENGI MIRORO.....ACCUSED

JUDGMENT

1. The accused, **Dennis Nyabengi Miroro**, is charged with murder, contrary to S. 203 as read with S. 204 of the Penal Code, in that on the 16th February 2013, at Nyakumbati Sub-location, Masaba South, Kisii County murdered Mary Kemuma Nyakoni.

2. The case for the prosecution was that on the material date at about 11.00 am, the deceased was in a farm when suddenly her daughters in law, **Fridah Kwamboka Marucha (PW 1)** and **Beatrice Andeso Miroro (PW 2)**, were attracted by shouts coming from the direction of the farm where they had left the deceased. They rushed to the farm only to find the deceased on the ground having been assaulted on the head and fatally injured.

3. Due to the shock that engulfed her, Kwamboka (PW 1) lay on the body of the deceased while Beatrice (PW 2) noted that a group of villagers had arrived at the scene. They were later informed by a lady called Nyanchama, that the deceased had been killed by the accused who was their cousin.

4. The accused's father, **Joseph Miroro (PW 3)** was also informed by a neighbour that the accused had killed the deceased. He proceeded to the scene but did not find the accused who had reportedly fled. A group of villagers traced him (accused). They apprehended and attempted to lynch him but for the rapid arrival of police officers at the scene. A jembe (hoe) (P.Ex 1) was found in his possession.

5. The father (PW 3) indicated that the accused and him related very well but had warned him against excessive intake of alcohol. The deceased was his (PW 3's) sister-in-law. She was a wife to his brother.

A son of the deceased, **Eric Areba Nyakoni (PW 4)**, identified the body of the deceased for purposes of post mortem. He noted deep cut wounds on the back of the head. He was informed that the deceased had been fatally assaulted by the accused, his cousin.

6. IP Richard Kibor (PW 5) was on the material date informed that the deceased had been murdered. He proceeded to the scene with his team and found a large crowd of villagers surrounding the dead body of the deceased which was lying under a mango tree. The body had visible cuts on the back of the head.

7. He (PW 5) was informed that the deceased quarreled with the accused who then hit her on the head with a jembe. The accused had already been rescued from the wrath of the villagers and arrested.

He (PW 5) arranged for the removal of the body of the deceased to the mortuary. He later visited the accused at the hospital where he was taken after being injured by the villagers.

8. IP Kibor (PW 5) carried out the necessary investigations and in the process arranged for a post mortem examination on the body of the deceased and forwarded the samples of her blood for examination by a Government Analyst and for comparison with the stains of blood found on the suspected murder weapon (P.Ex 1).

He produced the necessary post mortem report (p.Ex 2) and the Government Chemist report (P.Ex 3 a-b). He preferred the present charge against the accused after completion of his investigations.

9. In his defence, the accused denied the offence and said that he was a “jua-kali” mechanic by occupation and that on the material date he left home at 6.00am for the bank in Kisii town. On his return home about forty (40) metres from their homestead he was confronted by a crowd of village people who pointed at him. He did not understand what was happening but the crowd set upon and assaulted him. He lost consciousness and later found himself at the Kisii Level 5 Hospital where he had been taken for treatment.

10. The accused contended that he was charged for an offence which he did not commit. That, the deceased was like a mother to him and they had never quarreled. They were friends and got along well. He was therefore in pain for her death.

11. At the end of the trial, the accused through his learned counsel, **MR. Momanyi**, submitted that none of the five (5) witnesses called by the prosecution saw him kill the deceased. That, PW 1, PW 2 and PW 3, were only called to the scene while PW 4, only identified the body of the deceased for post mortem purposes. That, PW 5, the investigating officer, only produced exhibits which created confusion in that the blood stains on the hoe (jembe) were not consistent with the evidence.

In response, the learned prosecution counsel, **M/s Mbelela**, indicated that the prosecution fully relied on the evidence adduced against the accused.

12. From the evidence and the submissions, it is apparent that the commission of the offence was not disputed. Indeed, the evidence by PW 1 and PW 2 clearly showed that the deceased was murdered. The two witnesses had been with her shortly before the incident happened but no sooner had they left the farm they heard shouts coming from there. They immediately rushed there and found that the deceased had been fatally assaulted by being hit on the back of the head with an object. They did not see or find the assailant at the scene to be able to identify him.

13. Apart from what they heard from a lady called Nyanchama, they could not tell whether or not the accused was the assailant.

Indeed, there was no eye witness to the assault as the father of the accused (PW 3) was also informed by an unnamed neighbor that the accused had killed the deceased.

14. There being no dispute as to the commission of the criminal act and the cause of death which as per the post mortem was severe head injury due to trauma by a sharp object, the only crucial issue for determination by this court was whether the accused was positively identified as the assailant responsible for the death of the deceased.

15. His (accused) defence was a denial and a clear indication that he was suspected by villagers who subjected him to severe beatings before he was rescued by police officers who arrested and took him to hospital.

It was thus incumbent upon the prosecution to prove beyond reasonable doubt that the assailant was none other than the accused.

16. However, the prosecution failed to provide direct evidence against the accused. There was no direct evidence of identification from any of the prosecution witnesses and therefore, the prosecution sought to rely on circumstantial evidence in the form of blood stains found in a hoe (jembe) allegedly used by the accused in assaulting the deceased.

17. It was alleged that the hoe was found with the accused when he was apprehended. However, the recovery of the hoe from the accused was not established. The investigating officer (PW 5) alleged that it was recovered from members of the public by one PC Mutua, who visited the scene. The father of the accused (PW 3) said that the hoe was found in possession of the accused but did not state by whom. He did not say that he recovered the hoe while in possession of the accused. It could not therefore be said that the accused was found in possession of the murder weapon linked to the offence by the blood stains of the deceased found thereon.

18. The report of the Government Chemist (P.Ex 3(a)) showed that the blood stains found on the hoe and a piece of cloth belonged to the deceased. This was clear proof that the hoe (jembe) (P.Ex 1) was the actual murder weapon. However, there was insufficient or no evidence at all to prove that it was found in possession of the accused as to link him to the murder of the deceased.

As there was no eye-witness to the offence and the murder weapon was not found in possession of the accused and recovered from him, it may be said that he was arrested and charged on mere suspicion as there was no evidence of positive identification against him.

19. It was a fatal omission for the prosecution to have failed to call as their witness the lady called Nyanchama who allegedly saw the accused assaulting and fatally injuring the deceased.

Nyanchama, was the peddler of the information to the effect that the deceased had been killed by the accused. She was a vital witness for the prosecution but for reasons unknown she was not called to testify.

20. In sum, the prosecution has failed to prove its case against the accused beyond any reasonable doubt. He is therefore found not guilty as charged and is acquitted accordingly.

J.R. KARANJAH

JUDGE

[Delivered and signed this 16th day of June 2016]