



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL (MURDER) NO. 87 OF 2010

REPUBLICPROSECUTOR

VERSUS

JOSIAH OCHENGO MANDEREACCUSED

JUDGMENT

1. The accused, **Josiah Ochengo Mandere**, is charged with murder, contrary to S. 203 as read with S. 204 of the Penal Code, in that on the 29th August 2010, at West Mugirango, Bokiambori, Nyamira County, murdered Benard Moracha Masira.

2. The case for the prosecution was that on the 27th August 2010, the deceased arrived home with an injury on the head. Some blood was oozing from the injury. He asked his father, **Anderson Masira Saboke (PW 1)**, to take a look at the injury. He then informed his father that the injury was inflicted on him by the accused using a stone. The accused was his cousin.

3. The incident was reported to a village elder **Samuel Ondoro (PW 5)**, who referred the deceased and his parents to the area Assistant Chief, **Julius Ongira Munteli (PW 6)**, who in turn referred them to the hospital and to the police at Nyamira. They proceeded to Nyamaiya Health Centre where the deceased was treated. This was on a Saturday.

4. All along, the deceased was in the company of his father (PW 1) and mother, **Hellen Moraa Masira (PW 2)**, as well as his wife, **Rachael Silani (PW 3)**. His sister, **Edna Sabina Bosire (PW 4)**, also came to learn of the incident on the date it occurred which was a Friday.

5. The sister (PW 4) indicated that the deceased told her that he was hit with a stone by the accused after he (accused) suspected him (deceased) of having abused him.

On the Sunday that followed, the deceased had taken the family livestock for herding at the family farm at about 4.30 am or 5.00 am and was expected back home in the evening. However, he did not return home even though the livestock found their way there. He was later found dead at the family farm.

6. The matter was reported to the CID at Nyamira and **P.C Martin Langat (PW 8)**, conducted necessary investigations. He arranged for the post mortem examination of the body of the deceased and this was conducted by a DR. Maranga who thereafter compiled the necessary report (P.Ex 1) which was produced in Court by **DR. Kevin Makori (PW 7) of Nyamira District Hospital**.

The report indicated that the cause of death was cardiopulmonary arrest due to severe head injury.

7. After investigations, P.C Langat (PW 8) concluded that the accused attacked the deceased for reason that the deceased had hurt him. He (PW 8) said that there was a slight land dispute between the families of the deceased and the accused about the size of land that each of the families possessed but the motive of the attack was never detected.

He (PW 8) nevertheless, caused the arrest and arraignment of the accused in court.

8. In his defence, the accused denied the offence. He stated that on the material date (27th August 2010) he went to a church where he undertook his normal carpentry chores. He remained there the whole day before returning home for the night. He proceeded to work on the following day and was later surprised to receive information that the deceased was found dead while herding cattle. He was called by the police to record a statement but was shocked when it was alleged that he killed the deceased. The present charge was then preferred against him.

9. At the end of the trial, the accused through his learned counsel, **MR. Soire**, submitted that none of the witnesses saw him fight with or kill the deceased and that the alleged dying declaration made by the deceased was insufficient.

In response, the learned Prosecution Counsel, **MR. Otieno**, relied on the prosecution evidence and contended that it was sufficient for a verdict of guilt against the accused.

10. This court having carefully considered the evidence and the submissions holds the opinion that there was no dispute with regard to the fact that the deceased died as a result of the injury on his head which was apparently inflicted by an individual through a criminal act of assault. It was however, doubtful whether the act was committed with the sole intention to kill the deceased.

11. The fact that the deceased did not die immediately after the assault but three or so days thereafter was a clear pointer that the assailant's intention was not to kill but to inflict bodily harm.

It was stated by the relatives of the deceased (i.e. PW 1, 2, 3 and 4) that the deceased was even taken to the hospital for treatment a day after the incident and was discharged thereafter.

12. A day after treatment, the deceased appeared quite normal and went to undertake his usual chores of herding the family livestock. Unfortunately, he died from his injury while herding the cattle. It would appear that the injury inflicted on him was underestimated in seriousness such that proper medical attention was not accorded to him when he was taken to a local hospital for treatment.

13. Be that as it may, the basic issue for determination in this case was whether the fatal injury occasioned to the deceased was inflicted by the accused.

The defence raised was a total denial and a contention that the accused was not at the scene of the alleged offence on the material date as he was busy at his place of work.

14. Indeed, nobody saw the accused at the scene of the offence let alone assaulting the deceased in any manner. Therefore, the prosecution was unable to provide direct evidence against him.

Apparently, the prosecution relied on indirect evidence in the form of a dying declaration by the deceased to the effect that he was hit on the head with a stone by the accused.

15. The declaration was made by the deceased when he was alert and conscious and in his right or normal state of mind. He was not at the time under any impression or suspicion that he would die from his injury and because of also underestimating the seriousness of the injury the fact of dying was clearly the last thing on his mind.

16. The deceased discussed what befell him with his family members in a normal family discussion and in the process mentioned to them that his cousin, the accused, was the assailant.

The family members who included his parents (PW 1 and PW 2), his wife (PW 3) and his sister (PW 4), all confirmed as much in their respective testimonies in court.

17. The said testimonies were not discredited and/or substantially disputed such that their effect was to implicate the accused with the present offence despite his denial.

Statements made by a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death in cases in which the cause of that person's death comes into question are admissible in evidence by dint of S. 33(a) of the Evidence Act.

18. It matters not that the person who made a dying declaration was or was not at the time it was made under expectation of death.

Herein, the deceased informed his family members that he was assaulted by the accused with a stone. He thus indicated to them the circumstances which led to his death from the injury occasioned by the assault and they transmitted the information to the court via their testimonies.

19. 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 information given by the deceased to his family members (i.e PW 1, PW 2, PW 3 and PW 4) was so consistent as to leave no doubt as to its credibility.

20. A dying declaration is generally admissible as a matter of necessity. The lapse of time between the declaration and death is immaterial and the presence of the accused at the making of the declaration is unnecessary. However, it would be unsafe to base a conviction solely on the dying declaration of a deceased person, made in the absence of the accused and not subject to cross examination. But, it is not a rule of law that in order to support a conviction, there must be corroboration of a dying declaration (see, **Okale Vs. Republic (1965) EA 555**).

21. There was herein credible evidence by way of a dying declaration showing that the deceased was assaulted by the accused and that he suffered a serious head injury which led to his death. Other than the dying declaration, the area chief (PW 6) clearly indicated that the deceased was assaulted by the accused.

22. The chief in his testimony stated that after the incident was reported to him, the accused later called him on phone and informed him that he had fought with the deceased. This implied that the deceased was hit with a stone by the accused as they engaged in a fight. It also implied that the accused did not have the necessary malice aforethought to kill the deceased.

23. For all the foregoing reasons, it is the finding of this court that the deceased suffered a fatal injury after being assaulted by the accused but that, the accused did not have the intention to kill the deceased.

Accordingly, the accused is hereby found guilty of the offence of manslaughter contrary to S. 202 of the Penal Code and is convicted thereof.

J.R. KARANJAH

JUDGE

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

16/6/2016

Before J.R. Karanjah – J

CC Njoroge

SC – Mr. Otieno

Mr. Soire for accused

Accused – Present

J.R. KARANJAH , J

COURT: Judgment delivered to accused.

J.R. KARANJAH , J

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

J.R. KARANJAH , J

Mr. Soire in mitigation: The accused and deceased were relatives. The accused is remorseful. He was in custody for five (5) years before he was released on bond. He prays for leniency. The families have since reconciled.

J.R. KARANJAH , J

COURT: Accused is a first offender. Mitigation noted.

J.R. KARANJAH , J

SENTENCE: Accused to serve two years imprisonment which is suspended for an operational period of two (2) years.

J.R. KARANJAH , J