



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL CASE NO. 17 OF 2011

REPUBLIC PROSECUTOR

VERSUS

FRANCIS EKICHOLONG EMUKURA alias FRANCIS EMURU EYAPAN ... ACCUSED

JUDGMENT

The accused **FRANCIS EKICHOLONG EMUKURA alias FRANCIS EMURU EYAPAN** has been charged with the offence of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE**. The particulars of the charge were that:

“On the 13th February 2011 at Katorongot Village in Mogotio District within the Rift Valley Province murdered NAUSEI ESEKOW EYAPAN”

The accused entered a plea of ‘**Not Guilty**’ to the charge and his trial commenced on 29/2/2012 before **Hon. Justice Anyara Emukule**, who took the evidence of the first two (2) witnesses. Following the transfer of the Honourable Judge to the Mombasa High Court, I took over the case and heard the evidence of the remaining three (3) witnesses. **MS KERUBO** Advocate appeared for the accused.

The brief facts of the prosecution case were narrated by **PW3 KADOGO EMUKURA** who was a sister to the accused. **PW3** told the court that the deceased was the biological mother of the accused. On 13/2/2011 the family were all in their home in Mogotio. The accused then left to go to check on his farm by the river. **PW3** went inside the house. Their mother (the deceased) remained outside seated on a stone. Suddenly **PW3** heard a neighbor shout that their mother has been killed. She rushed out of the house to find the deceased lying on the ground with deep cuts to the back of skull and neck. Next to the body lay a blood stained axe. The deceased sat calmly next to the body of his dead mother. Members of the public apprehended the accused and tied him to a tree. The police were called. They came and arrested the accused. Upon completion of police investigations, the accused was taken to court and charged with murder of the deceased.

At the close of the prosecution case this court ruled that the accused had a case to answer and he was placed onto his defence. The accused opted to make an unsworn statement in which he denied any and all involvement in the killing of the deceased. This court must now consider the evidence and make a determination whether the charge has been proved beyond reasonable doubt.

Section 203 of the Penal Code defined murder thus-

“Any person who of malice aforethought causes death of another person by an unlawful act or

omission is guilty of murder”

Therefore in order to establish the offence of murder the prosecution must prove beyond reasonable doubt each of the following ingredients of the offence –

- (1) The fact and cause of death of the deceased
- (2) Proof that the deceased met her death as the result of an unlawful act or omission on the part of the accused.
- (3) Proof that said unlawful act or omission was committed with malice aforethought.

On the fact and cause of death of the deceased there can be no controversy. **PW2 ACHIYA EYAPAN** a brother to the deceased told the court that he did identify the body of the deceased at Naivasha Hospital Mortuary. Both **PW2** and **PW1** a daughter to the deceased identifies the deceased as ‘**Nausei Eyapan**’.

Evidence regarding the cause of death was tendered by **PW4 DR. TITUS NGULUNGU** a consultant pathologist attached to Nakuru PGH Hospital. **PW4** told the court that autopsy was conducted on the body of the deceased on 22/2/2011. The doctor noted a deep cut on the back of the head which exposed the brain matter. There was also a skull fracture and laceration of the brain. The cause of death was opined to be **“Cardiopulmonary and cerebral arrest due to brain damage following a sharp force trauma to the head”**. **PW4** produced in court the duly filled post mortem form as an exhibit **P. Exb 2**. This was expert medical evidence and was neither challenged nor controverted by the defence. The deep cuts to the deceased head was clearly visible even to the court in the photographs taken of the deceased by **PW1 SAMUEL WAFULA** a gazetted Scenes of Crime Officer. The photographs were produced as exhibits **P. Exb 1**. From the evidence on record I do find as a fact that the deceased met her untimely death as a result of being cut on the back of the head with a sharp object wielded with much force.

The next critical question is whether it was the accused who so assaulted the deceased and cut her on the back of the head. As stated earlier the deceased was the mother of the accused. There is no evidence that there was any bad blood between the two. Both **PW2** a brother to the deceased and **PW3** the deceased’s daughter told the court that mother and son were on good terms and related well. **PW3** in her evidence emphatically stated

“The accused and my mother had no problem”

PW3 also testified that on the material day the family were all together in their home in Mogotio. There was no quarrel, no disagreement and accused left the home to go and check on his farm.

There was no eyewitness who saw accused assault and/or cut the deceased. **PW3** was inside the house when her mother was attacked. She only heard a neighbor scream saying ‘**Mama ameuwawa’ ie ‘Mother has been killed’**. **PW3** did not name this neighbor (more on this later). **PW3** says that upon hearing these neighbours’ shouts she rushed out of the house and found the accused back from his farm seated next to the body of his mother. Most importantly **PW3** did not see the accused or anyone else attack the deceased. **PW3** stated under cross examination

“I cannot say with certainty that it was accused who killed the deceased”

PW5 PC ROBERT MWENDA was the investigating officer in this case. He told the court that he visited the scene of the incident and recovered a blood stained axe at the scene. **PW5** produced the axe in court **P. Exb 1**. Although **PW3** confirms that police did recover an axe lying next to the body of the deceased, her testimony raises doubts as to whether the axe produced by **PW5** was the very axe which was recovered at the scene. Whilst being cross-examined by **Ms Kerubo** for the accused **PW3** says

“The axe I saw (at the scene) had a new handle (wood). The axe in court today does not have a new handle” (my own emphasis)

Thus **PW5** fell short of positively identifying the axe produced in court.

PW5 told the court that it was on the basis of this axe that he linked the accused to the murder of the deceased. I am at a loss as to exactly how **PW5** linked this axe to the murder. The ownership of said axe was said to have had blood stains on it was not established. **PW5** did not bother to forward the axe to the government chemist for an analysis on the origin of the blood stains on that axe. In many rural homes in Kenya axes are used in the slaughter of livestock. The court cannot assume that the blood on this axe was of human origin. It is not proved that it was human blood or that the blood was that of the deceased. No blood was seen on accused or his clothing. If indeed accused had cut deceased causing her blood to spurt out I have no doubt that some of that blood would have splashed onto his clothes or his body. The fact that no blood stains were seen on the accused raises more doubts as to whether it was he who cut the deceased.

In his evidence **PW5** stated that there was an eye witness to the murder of the deceased whose name was '**Agnes Lowoi**'. This lady was never called to testify. **PW5** told the court that the police were unable to avail this witness as she had passed away. However in his defence the accused strongly disputes this allegation. He claims that the lady '**Agnes Lowoi**' is still alive. She is probably the neighbor whom **PW3** referred to in her evidence. Counsel for accused confirms that police did supply the defence with the statement of this witness. The claim by **PW5** that this witness is now dead has not been verified. No death certificate or burial permit was shown to the court. The prosecution did not even bother to call the local chief to confirm the demise. I find there exists no proof that this eyewitness is actually deceased. The court cannot rule out the possibility that the prosecution deliberately omitted to call this crucial eyewitness to the stand. If so an adverse inference could be drawn from the failure to call her to testify. If the prosecution had any difficulty in securing the attendance of this witness they ought have sought a court summon to compel her attendance. Their failure to seek such court summons speaks volumes.

On the whole I find that the prosecution's case raises more questions than answers. Several doubts remain regarding the guilt of the accused. These doubts must be resolved in favour of the accused. I find that the prosecution have failed to prove this charge of murder beyond reasonable doubt. As such I enter a verdict of '**Not Guilty**' and I do acquit the accused of this charge. The accused is to be set at liberty forthwith unless he is otherwise lawfully held.

Dated in Nakuru this 17th day of August 2016

Ms Kipruto holding brief for Ms Kerubo

Mr Chirchir for State

Maureen Odera

Judge