



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL CASE NO. 38 OF 2014

(Formerly Kisii High Court Criminal Case No. 12 of 2013)

REPUBLIC PROSECUTOR

VERSUS

JOSEPH MOHOCHI CHARLES alias LUCAS

WANGARI alias BROKER.....ACCUSED

JUDGMENT

1. The accused person herein, **JOSEPH MOHOCHI CHARLES alias LUCAS WANGARI alias BROKER**, was arraigned before the High Court of Kenya at Kisii on 12/02/2013 and faced an information on murder. The particulars of the offence were as follows;-

“On the 27th October 2012 at Ikerege Market Bukira Central Location in Kuria West District within Migori County in the Republic of Kenya murdered CHARLES NYAMOHANGA.

2. The Accused person denied committing the offence and the case was set for hearing. Before the trial began the case was transferred to this Court where the trial was conducted as from October 2014 upto November 2016. **Hon. Majanja, J.** recorded the evidence of PW1, PW2, PW3 and PW4 whereas I recorded the rest of the evidence upon compliance with **Section 200(3)** of the **Criminal Procedure Code**.

3. The prosecution availed six witnesses who testified in support of the information facing the accused person. **PW1** was **JOSEPH MURIMI NKORI**, a male adult who was a medical nurse working at the Ikerege Medical Clinic at Ikerege town. **PW2** was a lady one **ESTHER MASEKE MWITA** also known as **ESTHER RIMO**. PW2 knew the deceased as well as the accused person quite well as they all hailed from her neighbourhood. **SAMSON MWITA** testified as **PW3**. He was also a neighbour to the deceased and the accused person and as such also knew them well. **PW4** was a brother to the deceased. He was called **SAMUEL NYAMOHANGA**. **PW5** was called **JOHN MASIKO** who alleged to have been in the company of the deceased when the incident occurred and the arresting officer testified as **PW6**.

4. The prosecution's case was as follows: On the 27/10/2012 the deceased who was in the company of his brother one **MWITA NYAMOHANGA** (not a witness), the accused and an unknown lady who was identified as a Kisii lady (also not a witness) went for a drink at one **Mama Maseke's** place. As they partook the local brew, commonly known as '**chang'aa**', the said four persons were joined by **PW5** who was in the company of his friend one **JOHN MAISORI** (not a witness). PW5 and his friend however sat at a different table as they also took the chang'aa. That was around 06:00pm. Since the place had other

revellers, PW5 recalled witnessing the deceased and the accused exchanging bitter words over who was the rightful lover of the Kisii woman. At around 07:30pm the accused left the drinking place in the company of some other people. Around 30 minutes later, the deceased, his brother Mwita Nyamohanga, PW5, the PW5's friend and the Kisii lady also left the place together. By then it was dark but there was moonlight. After some distance the deceased's group was confronted by some two people who ordered them to sit down but they declined. Suddenly one of the persons who had ordered the group to sit down stabbed the deceased with a knife on the left thigh and left with the Kisii woman and his accomplice. As the deceased's group was drunk they only raised alarm as there was nothing much they could do.

5. There was however another angle to the prosecution's case. It related to the evidence of PW2 and PW3. PW2 stated that in the night of 27/10/2012 at around 07:00pm as she was brushing her teeth outside her house which stands on a parcel of land which adjoins a road, the deceased, his brother Mwita Nyamohanga and an unknown lady came to her home and asked her if she had ever seen the accused person that evening. As they turned to leave, PW2 so clearly saw Mwita Nyamohanga with a knife tucked into his trousers. As PW2 went inside her house she heard screams from the road by someone calling for help and mentioning his name 'Broker'. PW2 rushed to the road and found the accused person bleeding from his left shoulder. She also saw the deceased lying down by the roadside and also bleeding. PW2 also saw Mwita Nyamohanga holding a knife. PW2 raised alarm and people came to assist those injured who were taken to different health facilities.

6. At around 06:30pm on the said 27/10/2012, PW3 had met the accused person. That was on the road as PW3 alone was heading towards the Ikerege Centre to buy some cigarettes while the accused, who was also alone, was heading home. They exchanged greetings and left each other. After walking about 50 to 60 metres from where he had met the accused person, PW3 heard the accused person screaming for help and saying that he had been stabbed. PW3 turned back and rushed towards the accused person. On reaching there PW3 found that some people had already gathered. He saw PW2 holding the accused person who had been stabbed on the left hand side and was bleeding profusely. PW3 also saw the deceased lying down by the roadside equally injured as well as the deceased's brother one Mwita Nyamohanga. Whereas PW3 did not see Mwita Nyamohanga with a knife at the scene, he however felt a knife tucked into Mwita Nyamohanga's right hand side as they were carrying the deceased to hospital.

7. PW4 was only told by his brother Mwita Nyamohanga that the accused person had stabbed their brother, the deceased, that night and PW4 rushed to where then deceased had been stabbed. He assisted in taking the deceased to hospital who unfortunately died as he was undergoing treatment. PW1 was however of the contrary view that by the time the deceased reached the facility he was already dead. The deceased's body was taken to Pastor Machage's Memorial Hospital Mortuary for preservation after which a post mortem examination was conducted. It was PW4 who identified the deceased's body before the autopsy. Thereafter the deceased's body was released for burial and the accused person later on arrested by PW6 and charged with the murder of the deceased.

8. At the close of the prosecution's case, the accused person was placed on his defence where he opted to give sworn testimony.

He stated that as he was walking home in the night of 27/10/2012 at around 07:30pm he was confronted by a group of four people who ordered him to sit down and as he resisted he was hit on the head and stabbed on the shoulder and consequently lost consciousness. On coming back to his senses, the accused person was at Mogaye Clinic where he was admitted and discharged two days later. The accused person called no witnesses.

9. At the close of the defence case Counsel for the Accused Mr. Omwenga made brief oral submissions in urging this Court to acquit the accused person stating *inter alia* that the cause of the deceased's death was unknown further to several other witnesses failing to testify without any justification. The prosecution through Miss Bosibori urged this Court to find a conviction against the accused person in the face of the overwhelming evidence.

10. It is now on the basis of the foregoing that this Court is called upon to decide on whether or not the

accused person is guilty of the offence of murder.

11. The offence facing the accused person is an information of murder contrary to Section 203 as read with Section 204 of the Penal Code, Chapter 63 of the Laws of Kenya. For the prosecution to secure a conviction in any charge of murder, it has to prove three ingredients against an accused person. Those ingredients are as follows: -

(a) Proof of the fact and the cause of death of the deceased;

(b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the Accused which constitutes the 'actus reus' of the offence;

(c) Proof that the said unlawful act or omission was committed with malice afterthought which constitutes the 'mens rea' of the offence.

13. I will first deal with the issue of proof of the fact and cause of death of the deceased. Evidence was led to the effect that the deceased died. That was confirmed by several witnesses. PW1 who was the nurse on duty in the night of 27/10/2012 at Ikerege Medical Clinic was the first medical expert to receive the deceased. PW1 observed that by the time the deceased was taken to the Clinic, he was already dead. PW1 however just stitched the body to avoid further loss of blood. The fact of the death of the deceased was further confirmed by PW4 who was one of the deceased's brothers who took the body to the mortuary and even attended the post mortem examination. PW3 equally vouched for the death of the deceased. There is therefore no doubt that the deceased herein, CHARLES NYAMOHANGA died in the night of 27/10/2012.

14. As to the cause of the deceased's death, PW1 who was the only medical personnel who testified in the case did not state any possible cause of the deceased's death. PW1 only confirmed that the deceased was bleeding from the left. A post mortem examination for the deceased was conducted. That fact was confirmed by PW4 who identified the body.

15. The purpose of a post mortem examination is to ascertain the possible cause of death of a deceased person. In the absence of such evidence the Court is only left to speculate on the possible cause of death. That is the position which this Court now finds itself in. I am however aware of some instances where Courts have been compelled to ascertain the cause of death without such an examination. Such instances may arise when the deceased's body is in such a state that no such examination can be possibly conducted.

16. That is however not the position in this case. The deceased's body was well preserved and indeed an autopsy conducted. No attempt was made by the prosecution towards the production of the Post Mortem Report neither was any justification laid for such failure. The upshot is therefore that this Court finds that the cause of death of the deceased herein, Charles Nyamohanga, was not established.

17. Having failed to ascertain the cause of the deceased's death, it will serve no purpose to deal with the other ingredients of the offence of murder since as matters stand now, the deceased could have died out of any other reason and not necessarily out of an act of another person.

18. I hence come to the conclusion that the information of murder facing the accused person has not been proved. The accused person is hereby found not guilty of the murder of CHARLES NYAMOHANGA and is hereby set at liberty unless otherwise lawfully held.

DELIVERED, DATED and SIGNED at MIGORI this 30th day of November 2016

A. C. MRIMA

JUDGE