



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL (MURDER) NO. 40 OF 2006

REPUBLIC.....PROSECUTOR

VERSUS

RAPHAEL AMIANDA..... ACCUSED

JUDGMENT

Introduction

1. This is a case of murder wherein the accused person, Raphael Amianda is before court on one count of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars are that on the 25th day of April, 2006 at Mwiliba Village Esunga Sub-Location Central Bunyore Location, he murdered BOKETO AMIANDA. The accused denied the charge and the case has been going on since then. The case has been handled by 6 judges, the reason being that the accused had to undergo several medical examinations to determine whether or not he was fit to stand trial. There was also a dispute over his name, which led to the amendment of the charge sheet to read Raphael Omongo Nasoni, instead of Raphael Amianda. After the amendment the plea was taken again on 05/11/2009. A fresh plea was taken again on 11.10.2010 before the hearing commenced. The accused maintained his plea of not guilty.

The prosecution case

2. The prosecution called 4 witnesses. Pw1 was Dismus Olukoye who stated he was a farmer and resident of Mwilaba Village. He testified that on 25/06/2006 at about 10.00 am, while he was at work in his shamba which was adjacent to that of the deceased, he heard noises and screams. He heard a male voice but he was unable to decipher any words. He rushed to where the noises were coming from and on arrival thereat he found Raphael beating his mother. They were both in their shamba but close to the homestead.

3. PW1 stated that he could not intervene because he was afraid of the accused who had a mental illness from his youth. PW1 therefore ran away from the scene and went to hide in his own shamba. He did not scream for help.

4. During cross examination, PW1 stated that he had known the accused from his (accused's) childhood and knew him as a mentally sick person. He also testified that though the accused generally lived with his mother, there was a time when he went to Kisumu for 2 years. He also testified that when he ran away he left the accused and his mother (deceased) struggling.

5. PW2 was Moses Obora of Mwilaba village and a brother-in-law of the deceased. His testimony was that at about 10.00am on 25.04.2006, while he was at his home, he got information that his sister-in-law, the deceased herein had been murdered by the accused. He rushed to the scene but on the way found the

accused seated on the road side, naked. He tried to talk to the accused, but the accused did not answer. He also stated that though a crowd had gathered around, everyone was afraid of the accused. He (PW2) then called Hezron Muyi (PW3) and together they tied the accused with ropes and took him to the home. They also found the deceased's body near her shamba. The deceased was bleeding in the mouth and nose. PW2 also stated that when he and Hezron Moyi apprehended the accused, the accused was armed with a stick. Later the accused was taken to Luanda Police Station. PW2 also stated that he knew the accused person as someone with a mental illness and suffered many lapses in lucidity, a problem that seemed to have occurred after the accused's father died in 2005. PW2 also stated that the accused was the only person who lived with the deceased in the home and that before her death, the deceased had mentioned to him that the accused was behaving strangely. He also stated that the accused was generally hostile and that he himself knew him to be so.

6. Hezron Moyi testified as PW3. Briefly he stated that he was a former village elder of Mwilaba village and that on 25/04/2006 at about 11.00am, while he was at his home he received a report from one Rose Muyela (not called as a witness) to the effect that the accused had killed his mother. He went to the scene and saw the deceased's body near the shamba. He also saw the accused who was half naked and looking insane. Pw3 also stated that on looking at the deceased's body he saw she had injuries to the head.

7. During cross examination, PW3 told the court that he knew the accused person before the incident and that the accused looked abnormal and was slow mentally. That the accused did not stay at home for long periods of time at any one time.

8. PW4 was Dr. JAIRUS AMUNGA of Vihiga District Hospital. Dr. Amunga testified on behalf of Dr. Oyako who did post mortem examination on the body of the deceased on 14.06.2006 at the Vihiga District Hospital. From the report which was produced as PExhibit 1 the deceased was about 55 years old and had been dead for more than a month. Externally there was evidence of trauma to the head with blood clots and a compound fracture of left temporal region. Internally the lungs had collapsed. The head had a compound fracture on the left temporal region which exposed brain tissue. In Doctor Oyoko's opinion the cause of death was cardiopulmonary arrest secondary to head injury as a direct result of the trauma to the head.

9. The state was unable to avail the investigating officer after several adjournments were granted. No submissions were made at the close of the prosecution case but after due consideration of the evidence on record, the court ruled that the accused had a case to answer and put him on his defence.

The Defence case

10. The accused gave sworn evidence. He called no witnesses. He stated that on 25/04/2006, he got up in the morning as usual, took breakfast then swept the compound. He stated that he had come from Kisumu some 2 weeks before. At about 10.00 am some 6 people came to the home among them Olukoye, Wesimaya, Ayub and Dismus, and asked him for his mother's whereabouts. He told them she had gone on duty in the neighbourhood where she used to work as a house help between 5.00 am and 6.00pm each day. That after half an hour, the people returned as promised and told him that his mother had died and that her body was along the footpath. On hearing the information, he rushed to where his mother's body lay. He found many people at the scene and some of them started alleging that he was the one who had killed the deceased. That it was Olukoye who alleged that he saw him (accused) with a cane with which he beat the deceased.

11. The accused flatly denied killing the deceased and said there was no reason why he could kill her. He stated that he lived peacefully with the deceased. The accused urged the court to carefully consider the evidence on record and help him find out who the deceased's killers were.

The law

12. The relevant provisions of the law in this case are sections 203 and 206 of the Penal Code. The said

provisions require the state to prove that the death of the deceased was as a result of the unlawful act or omission on the part of the accused and that such act of omission was accompanied by malice afterthought as set out under section 206 of the Penal Code.

13. It was submitted by Mr. Nandwa, counsel for the accused person, that the prosecution had not proved its case against the accused person beyond any reasonable doubt and urged the court to acquit the accused. Counsel also submitted prosecution had not established the motive for the killing. Finally, counsel submitted that in the absence of the evidence by the investigating officer, there is no way this Court can know where the deceased's body was found and that in the circumstances, it cannot be concluded or even inferred that it is the accused who caused the death of the deceased.

14. At the outset I must point out that it is not necessary to prove motive of the killing. What is important is for the prosecution to prove that the death of the deceased resulted from an unlawful act or omission on the part of the accused and that the accused also had malice afterthought.

15. Regarding the prosecutions failure to call the investigating officer, case law has it that it is not always mandatory for the prosecution to call such witness unless there was an allegation that he would have said something adverse to the prosecution case, see the case of **Kiriungi- Vrs – Republic (2009) KLR 638.**

Analysis and findings

16. After a careful analysis of the evidence that is on record, the only issue that arises for determination is whether the prosecution has established its case against the caused person beyond any reasonable doubt. The eye witness testimony is that of PW1 who testified that when he rushed to the deceased's home after hearing screams and noises, he found the accused herein beating his mother. I am satisfied from the testimony of PW1 as to where the struggle between the accused and the deceased took place. PW1's evidence is corroborated by that of both PW2 and PW3 and there is no doubt in my mind that the accused indeed assaulted the deceased. Though no weapon was produced as an exhibit it is clear from the evidence of Dr. Amunga that the deceased died as a result of trauma on her head on the left temporal side. I have carefully considered the defence offered by the accused but I do not accept the same. It is possible as testified to by PW1, PW2 and PW3 that the accused whom they knew as a mentally disturbed person cannot remember that it was him who beat his mother to death.

17. I am also alive to the fact that the eye witness account is only by one witness, PW1. I am under a duty to subject such evidence to careful scrutiny in order to ensure that the accused person is not prejudiced. In the case of **Abdalla Bin Wendo – Vrs – R (1953) 20 EACA 166**, the Court held that subject to certain exceptions, a fact may be proved by the testimony of a single witness, the only caution being that the court must test such evidence with the greatest care especially in a case where conditions for identification are difficult. In the instant case the incident took place at 10.00 am so the issue of mistaken identity does not arise as the conditions for identification were clear.

18. Further the testimony of PW1 is supported by the testimony of the other witnesses namely, PW2 and PW3. I have no doubt in my mind that the accused knew or ought to have known that beating the deceased on the head with a cane was likely to cause death or grievous harm to the deceased.

19. As regards the missing evidence of the investigating officer there was no allegation by the defence that the said witness was likely to give evidence that would have been adverse to the Prosecution.

20. Finally, I am satisfied from the testimony of PW1, PW2 and PW3 that the accused is a person who is mentally unstable. Everybody in Mwilaba Village was afraid of the accused because he was generally hostile. Pw2, Moses Obora said the following in part of his evidence in chief. **“I went with one Horinda to the scene. We found that a crowd had formed and my nephew was seated on the road side, naked. I went to my nephew tried to talk to him and he did not answer. The crowd was fearful and so I called Hezron Moyi and we tied him with ropes and took him to the home”** It is to be noted that persons who are adults and in their right frame of mind do not walk around naked. I am

therefore satisfied that the accused person herein is not a person of sound mind. And PW1 Dismus Olukoye, in answer to a question put to him in cross examination stated.

“I feared to help his mother that day because he was mentally ill..... I never called anyone to help the mother as Raphael was a feared man.”

Conclusion

21. In conclusion I find the accused person Raphael Nasoni Omongo guilty of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code, but he is insane.

It is so ordered.

Judgment delivered, dated and signed in open court at Kakamega this 26th day of October 2015

RUTH N.SITATI

JUDGE

In the presence of;-

Mr. Orwenga (present) for the state

Mr. Kundu for Mr. Khayumbi for Accused

Mr. Okoit - Court Assistant