



No. 163/2014

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL CASE NO 25 OF 2011

REPUBLICPROSECUTOR

VERSUS

NYORO MWENGAACCUSED

JUDGMENT

1. **Nyoro Mwenga**, the accused is charged with **murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The Particulars of the offence are that on the **19th day of March 2011** at **Muvinge Village, Katse Location**, in **Mumoni District** within **Kitui County**, the accused murdered **Margaret Kisia Nyoro**,
2. The facts of the case are that on the **19th March, 2011**, PW1, **David Nyoro**, a son to the deceased and accused arrived home at about **12.30am**. He called out his mother who did not respond. **PW3, Kavutha Nyoro**, his sister told him that their mother had been called out purportedly by their father. He searched for her and found her in bed. He called out but she did not respond. They called their grandmother and confirmed that she was dead. The accused was notified. Apparently, the two always quarrelled. The accused was said to have assaulted the deceased on the **13th March, 2011**. The matter was reported to the police. They visited the home, investigated and believed the accused was to blame for the death of the deceased. He was arrested and charged.
3. When put on his defence the accused stated that he was called at midnight by PW1. He was at his second wife's home. He accompanied PW1 to the deceased's house. They found people having gathered. On confirming she was dead he reported the incident to the administration then the police. The body was taken to the mortuary by the police. While at the mortuary he was arrested. He denied having threatened to kill his wife. He also denied having gone to her house that night.
4. The death of the deceased per the post-mortem conducted on her body was caused by cardiopulmonary arrest secondary to asphyxia. On appearance, the doctor who performed the post-mortem found no evidence of obvious external injuries to the body.

The issue we therefore must determine is whether the said death was caused by the accused herein. If so, whether he had malice aforethought?

5. None of the witnesses who testified saw the accused kill the deceased. The last person who saw the deceased alive was PW3 an eleven year old child. Her evidence was that on the night of **18th**

- March, 2011** they were served food by their mother where after she put them to bed (sleep). In the night she heard her father call her mother out. Her mother went out and she slept. Later she was woken up by PW1 who asked about their mother's whereabouts.
6. PW6 **P.C. Nixon Kiprono** and PW7, **Inspector Joseph Ndone** who investigated the case opined that the deceased had been killed elsewhere because the scene where the body was found was not disturbed. PW7 said the body had bruises on the left leg. The doctor did not confirm this allegation.
 7. The accused was a prime suspect because according to PW1 and PW2, **Lena Nyoro** he had assaulted the deceased on **13th March, 2011** following a dispute over sale of a cow. The accused purportedly threatened to kill the deceased. Since per the evidence of PW2, the deceased told her that the cow would be sold once she was dead. These alleged threats were however not substantiated since there were no witnesses.
 8. The accused's defence was a denial of having seen the deceased on the material night as stated by PW3. It was his evidence that he saw the deceased on being called by PW1. The question begging is whether the court can rely on sole evidence of PW3.
 9. PW3's evidence was of a child. **Section 124** of the Evidence Act stipulates as follows:-

“Notwithstanding the provisions of Section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him”.

10. According to **Section 2** of the **Children's Act**, the witness cannot be said to be of tender age since a child of tender age is said to be one below **10 years**. However, in this case circumstances must be taken into consideration. PW3 said:-

“Thereafter our mother prepared our beds and we slept... in the night I heard my father call my mother out... I know father's voice. My mother came out. I then slept.”

11. This is a child who had slept. This court cannot tell for how long she was asleep prior to waking up. It can also not tell what her state of mind was like at that particular moment
12. In the case of **DPP versus Kilbourne [1973] 1 All ER 440 Lord Reid** asserted that:-

“There is nothing technical in the idea of corroboration. When in the ordinary affairs of life, one is doubtful or not to believe a particular statement, one naturally looks to see whether it fits in with other statements or circumstances relating to the statement. The better it fits in, the more one is inclined to believe it. The doubted statement is corroborated to a greater or lesser extent by the other statements or circumstances with which it fits in., the more one is inclined to believe it. The doubted statement is corroborated to a greater or lesser extent by the other statement or circumstances with which it fits in...”

Any risk of conviction of an innocent person is lessened if conviction is based upon the test of more than one acceptable witness.”

13. I have aforeposed questions that intimate that the statement of the child may have been made in dubious circumstances. That being the case, some other evidence was required to strengthen the evidence adduced by her.
14. It was the evidence of the child that she was familiar with her father's voice hence she was sure the person who called out her mother was her father. In the case of **Karani versus Republic [1985] KLR 290**, the Court of Appeal held thus:-

“Identification by voice nearly always amounts to identification by recognition.

Yet here as in any other cases care has to be taken to ensure that the voice was that of the appellant, that the complainant was familiar with the voice, that he recognized it and that there were conditions in-existence favouring safe identification”.

15. PW3 definitely was familiar with her father’s voice. But, considering conditions prevailing, could she have been in a position to tell with certainty that it was her father’s voice? Probably not.
16. Finally the investigation officer in charging the accused relied solely on the evidence of PW3. In his testimony he stated thus:-

“Later, I visited the scene and was able to get the young daughter of the deceased and accused. Upon interrogation I was convinced the accused had a hand in the death of the deceased. I therefore decided to charge the accused with the offence... the deceased had been killed elsewhere since there was no evidence of a struggle.”

17. There having been no evidence to corroborate that of the child the investigating officer simply acted on suspicion. In the case of ***Sawe versus Republic [2003] KLR 364*** the Court of Appeal held as follows:-

- i. ***In order to justify a conviction on circumstantial evidence the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than of guilt.***
- ii. ***Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.***
- iii. ***The burden of proving facts which justify the drawing of the inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.***
- iv. ***Suspicion however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt”.***

18. The inference drawn by PW7 that the deceased was killed elsewhere and dragged to the kitchen has no basis as there was no evidence adduced to support the allegation. Looking at the cause of death, generally speaking would mean the deceased was not able to get sufficient oxygen which made her fail to breathe. The post-mortem report having shown an absence of obvious external injuries to the body, exerting of pressure on her body making her lack oxygen is ruled out. It can therefore not be concluded that the accused is the one who caused the death of the deceased.

19. In the result, the case against the accused having not been proven beyond reasonable doubt I acquit him of the charge of murder. He shall be set at liberty forthwith unless otherwise lawfully held.

DATED, DELIVERED and SIGNED this 16th day of JANUARY, 2014.

L.N. MUTENDE

JUDGE