



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT KITALE.**

**CRIMINAL CASE NO. 38 OF 2009.**

**REUBLIC ::: PROSECUTOR.**

**VERSUS**

**JOSEPH KAMANDE MAINA ::: ACCUSED.**

**J U D G M E N T.**

The accused, **Joseph Kamande Maina**, was charged with murder contrary to section 203 read with section 204 of the penal code, in that on the night of 10th/11th October, 2009 at Matisi Estate in Trans Nzoia West District, with others not before court murdered Melab Nekesa Wanyama.

The case for the prosecution was that the chief of Icuani Division Trans Nzoia, **Monica Beatrice Mukuba (PW1)**, was in her house when two village elders went there and thereafter led her to a nearby pit which was at the time surrounded by members of the public. A bag had been retrieved from the pit and when it was opened by being cut with a razor blade, human body parts (legs) were retrieved. A dead body was in the bag and it was identified to be that of the deceased by her father, **Richard Wanyama Opicho (PW2)**.

The chief (PW1) while investigating the matter received a threatening telephone call allegedly from the accused. She (PW1) went to the house of the accused accompanied by members of Community Policing. They allegedly found the accused wearing blood stained clothes and his house had freshly smeared soil and a sofa set found therein had blood stains. An axe with blood stains was also found and so were a jacket and a pair of trousers. The accused was suspected and arrested.

**Dr. Edward Ng'ang'a (PW3)**, conducted a postmortem examination on the body of the deceased and formed the opinion that the cause of death was as a result of severe head injuries.

**Gladys Wanjala (PW4)**, indicated that the deceased was her niece and that she had seen her with another girl at a seminar at a place called Mitume. She (PW4) later on the following morning heard that a gunny bag had been thrown at a certain place. She went there and witnessed the bag being opened and the body of the deceased being discovered therein.

**Tabitha Wambui (PW6)**, indicated that the accused was her cousin and that she was at their home on 10th October, 2009 when she gave her money to buy food. On the following day, she left home in the morning and upon her return in the evening found a crowd gathered in their compound. The crowd alleged that the accused had killed somebody and he was arrested.

**CIP Bahari Galana (PW7)**, an administration police officer was at the time based in Kitale. At about 8.30 a.m. on the 11th October, he saw a crowd of people gathered at a place called Mitume. He went there and was told that a human body had been found in a sack. He tore the sack using a razor-blade and found the body of the deceased therein. He opined that the deceased had been assaulted on the head with a blunt object and may also have been sexually assaulted. He contacted the officer commanding Kitale police station and investigations started. He was later informed by the chief (PW1) that a suspect had been identified and was pointed out as being the accused. He arrested the accused and conducted a search in his house whereupon he found blood stained clothes under a bed and a blood stained mattress. He also found the suspected murder weapon i.e. an axe. He handed over the items to the police.

A Government Analyst, **Stephen Masinde Joel Waibe (PW8)**, examined the blood stained items and concluded that the stains were of blood group "B" yet the accused was of blood group "A". he said that the blood group of another suspect was "B".

**P.C. Thomas Marwa (PW9)**, investigated the case and thereafter preferred the present charge against the accused. He admitted that he was not involved in the recovery of the blood stained clothes from the house of the accused.

He also admitted that two other suspects called William Moinda and Samwel Kagiri had also been arrested in connection with the offence but were released after investigations.

In his defence, the accused denied the offence and completely disagreed with the evidence adduced against him. He said that he is a mental patient on treatment and that he lives with his cousin who was also arrested for the offence together with other suspects. He said that he had been grazing his sheep and upon his return home found a crowd of people gathered at a certain spot. He went there and witnessed the discovery of the body of the deceased in a sack. He did not know what had killed the deceased. Thereafter, he was confronted by the area chief who stopped and questioned him about some clothes found in his plot. It was alleged that the clothes had blood stains but had been washed. He denied anything to do with the clothes and an axe recovered by the police. He was however arrested for allegedly killing the deceased and later charged in court while the other suspects were released since they had money.

From all the foregoing evidence, there is no dispute that the circumstances under which the body of the deceased was discovered strongly indicated that she was murdered. Indeed, the post mortem examination revealed that she died from severe head injuries inflicted upon her by most probably a blunt object. This meant that the deceased was fatally assaulted by an individual or group of individuals. It was suspected that the deceased had also been sexually assaulted but this was overruled by the doctor's report as well as that of the Government Analyst.

There being no dispute that the deceased was indeed murdered, the basic issue for determination was whether the accused was the person responsible for the offence. The defence raised was a denial and therefore, as usual, the burden of proof lay with the prosecution. In that regard, no direct evidence was led against the accused. Nobody saw him in the act of killing the deceased. The prosecution relied on circumstantial evidence to charge the accused. The said evidence was in the form of recovery of blood stained clothes from the accused.

However, the accused denied anything to do with the said clothes and implied that they could have belonged to his cousin with whom they shared a house. Indeed, his cousin Tabitha (PW6), confirmed that he did not live alone. It was also undisputed that other suspects were also arrested in connection with the offence but were released by the police in circumstances which were not clearly explained.

It was incumbent upon the prosecution to establish that the blood stained items that were recovered from the accused and that they belonged to him.

However, the evidence pertaining to the recovery was not tangible and reliable. The ownership of the blood stained items was not established at all.

Added to the fact that the blood stains found in the suspect clothes did not match the accused's blood group but the blood group of another suspect who was released, it would follow that the circumstantial evidence against the accused was not watertight nor did it show that the offence must have been committed by the accused to the exclusion of any other person.

It was probable that the offence was committed by individuals other than the accused and that the arraignment in court of the accused was based on mere suspicion. It cannot therefore be said that the accused was the person responsible for the murder of the deceased.

In the end result, the prosecution has failed to prove its case to the required standard. The accused is hereby found not guilty as charged and is acquitted accordingly.

**[Delivered and signed this 26th day of September, 2013.]**

**J.R. KARANJA.**

**JUDGE**