



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL CASE 13 OF 2009

REPUBLIC ----- PROSECUTOR

-VERSUS-

ZADOCK OTIENO NYAMHORE ----- ACCUSED

JUDGMENT

Zadock Otieno Nyamhore the accused herein is faced with the offence of Murder contrary to Sections 203 as read with 204 of the Penal Code. The prosecution case is that on the 8th of February, 2009 in East Yimbo Location, Bondo District within Nyanza Province the accused attacked his mother **Prisca Ogollah Nyamhore** and fatally injured her. The accused had asked his deceased mother to open for him to get water at about 11 pm. She declined at which point the accused broke open the door and hit her on the head 3 times. The accused pleaded not guilty and the matter went for full trial.

The prosecution called a total of 7 witnesses and the defence had only the accused who gave a sworn statement.

PW1 was **Seline Oochieng** a daughter in-law of the deceased and sister in-law of the accused. She informed the court that on the 8th of February, 2009 at about 11 pm while asleep in her house the accused broke the door to her house jumped on her and attempted to strangle her, she screamed attracting neighbours where he was arrested and escorted to their home where they found her mother in-law dead with blood oozing. The deceased was found lying by the door, part of her body in and part out. The deceased had a cut on the head with the brain pouring out, and another cut on the ear. The witness rang her husband, the chief was also called in the meanwhile the accused was tied to a tree by the neighbours. It was also her testimony that the deceased stayed with her grandchildren one of whom was **Macrean Akinyi** a witness in this case who then told them that the accused killed the deceased.

In cross examination although she first denied that the accused was naked when he entered her house she admitted that he was and indeed that he left his trouser in her home.

PW2 Charles Osonga Omondi said he was a neighbour of the deceased and known to her. He testified that on the material night he heard screams from his neighbour, he woke up took his torch but when he heard the grandchild of the deceased ask for help, he returned and armed himself with a panga

and rungu. He met the said grandchild on the way who informed him that the accused had killed her grandmother. While on his way he heard fresh screams and he went to the direction of the fresh screams where he found **PW1** struggling with the accused. Neighbours came to **PW1**'s assistance and tied the accused with a rope. They walked him to his mother's home where they found his mother lying dead, with her legs inside the house while her chest and the rest of the body were out.

PW3 Mackrene Akinyi aged 18 years is a grandchild of the deceased. She recalled that in February, 2009 she stayed with the deceased and that the accused was also at home but slept in the boys' house (simba) within the same compound.

She recalled that on the material night the accused came to where she shared a room with the deceased and other children asking to be opened for to get water. The deceased refused and the accused hit open the door with a jembe entered and he hit the mother with the jembe. The deceased was ahead of the others, she fell down and the accused hit her 2 more times, thereafter he came for the witness who pushed him and escaped to the neighbours.

PW4 Caleb Ochieng Nyamhore a step son of the deceased and husband to **PW1**. He recalled receiving a call on 8th June, 2009 while in his younger wife's home that the accused had hit his mother. On reaching near a school he received news from one of the children that the deceased had been killed. He went to the house and found the deceased lying dead. The deceased had a jembe cut.

PW5 George Matema Nyamhore recalled that while resting in the house on the 8th of February, 2009 between 10 – 11 pm he received news of his mother's death from **Vitalis Muga** and **Charles Wesonga**. He accompanied them to his mother's home and found her dead. The legs were in the house and head out. He also found that neighbours had arrested his brother. The assistant chief and the O.C.S of Usenge arrived, did some investigation and moved the deceased's body to Siaya District Hospital as they took the accused with them.

PW6 was **Dr. Kennedy Rapenda** a medical officer from Siaya who produced the postmortem report on behalf of his colleague **Dr. Esiaba**. He informed the court he had worked with **Dr. Esiaba** before, who has since left the public service. Further that he knew handwriting of the said doctor and can recognize his signature. He informed the court that the report was filled on 13th February, 2009 by the said Doctor 5 days after death. The findings were that blood oozed from the nostrils, there were bruises on the left side of the face and deep cut in the left aspect of the scalp through the skull borne. That the conclusion formed was that the cause of death was severe head injury. The witness produced the post mortem report as **Exhibit P1**.

PW7 Cpl. Joseph Kigen who in February, 2009 was attached to Bondo District recalled that on 9th of February, 2009 in the company of Chief inspector **Juma, P.C. Soi, Kassim** and **Nderitu** they went to a scene of murder about 25 km away from the Station. They found the body of a deceased person lying at the doorstep. They interrogated those at the scene and learnt that the accused had killed his mother. They also learnt that the accused had been kept in a house where they proceeded to and found him naked and tied with a rope. They took him to the car with his colleague **P.C Soi** and they later took him to the Station later he was charged.

PW8 Chief Inspector **Juma Kwoba** the investigating officer gave an account similar to **PW7**. He further informed the court that he gathered from **PW3** that on the material day as they slept the accused knocked asking for water but they refused to open. Whereupon the accused hit the door forcing it open and he thereafter cut the deceased, that the accused almost cut **PW3** who managed to escape; further that the accused also went to his brother's home and almost cut a lady **PW1** who was saved by neighbours who answered to her call of distress. The witness recorded statements and later charged the accused. He produced the murder weapon as **exhibit P2**.

Upon the close of the prosecution case the court found that the accused had a case to answer and therefore put the accused on his defence.

The accused opted to give a sworn statement. He gave his name as **Zadock Otieno Nyamhore** from Yimbo. He stated that the deceased **Prisca Ogolla** was his mother. He recalled that on the 8th of February, 2009 while at home, he remembered how some time back he broke his mother's hand and how he was canded at the Police Station. With that in mind he got hold of a jembe and went to his mother's house. He knocked and she refused to open he broke open the door and hit his mother with a jembe on the head. He recalled how she fell and how he hit her 2 more times killing her.

The court reminded the accused of his plea but he stood by his evidence at which point his counsel asked for a psychiatric report which application the court allowed. Accused was stepped down to allow the mental assessment. A medical report was filed on the 18th of April, 2012 declaring him fit and with no mental illness.

The accused took to the stand however, this was his version of defence on this day the 24th of April, 2012. He is **Zadock Otieno Nyamhore**, that on the date his mother died while he was in Nairobi. On why the defence changed he stated that on the 29th of February, 2012 he was under the influence of bhang'i. He further stated that he was arrested by the police when he came back to attend to his mother's burial, he did not know the prosecution witnesses and was not involved in the murder.

At the close of the case the prosecution submitted that the evidence before court pointed an accusing finger at the accused. Further that the ingredient of murder had been established. The prosecution also urged the court to consider the demeanor of the accused.

On the other hand the defence counsel submitted that the accused had raised an *alibi* which has not been challenged by the prosecution. The defence counsel further submitted that even if the court was to consider the incriminating evidence given by the accused when first put on his defence, the court should consider that the accused was provoked by the deceased and invoke Section 179(2) of the Penal Code and reduce the charge to that of manslaughter.

Having considered the evidence and submissions, the issue for consideration is whether the prosecution has proved the charge against the accused person beyond reasonable doubt, the court will also consider the defence of provocation as raised by the defence and the *alibi*.

PW3 Mackrine Akinyi testified that she was present and a sleep in the same house with the deceased when the accused attacked and fatally injured the deceased, she on her part escaped being cut raising an alarm that attracted neighbours. **PW3** was the only eye witness who testified in this case. I am cautious of the fact that she is the only eye witness and that I must carefully analyze this evidence and the need for me to consider other available evidence on record.

PW1 was attacked by the deceased the same night and immediately after the deceased and **PW3** had been attacked as they all lived nearby. **PW1** is the wife to the accused brother. She testified that the accused broke open her door and was armed with a jembe which **PW3** identified as the weapon of crime. The accused assaulted **PW1** who was rescued by the neighbours, the deceased was found naked. **PW1 & PW3** screamed after their respective attacks attracting neighbours who came to the scene immediately and found the accused. In my view I find that there is not only direct evidence but also circumstantial evidence pointing to the accused as the perpetrator of the heinous act of cutting and killing his own mother.

In his own evidence of the 29th of February, 2012 the accused gave a graphic account of how on the material night recalling how he had been tortured by police earlier for breaking his mother's hand, he armed himself with a jembe and went to her house broke open the door and cut her 3 times on the head.

The court allowed the defence counsel's application for the mental assessment of the accused and stepped him down to allow the same be undertaken. In the interest of fair play the court granted the application. The accused was declared fit and free from any mental illness. Without casting any aspersion on the defence counsel, as if couched when called upon to continue with his defence the accused changed

his defence. The accused at this point raised an *alibi* stating that on the material day he was away in Nairobi.

In **RORIA vrs REPUBLIC (1967) E.A.** the court stated in part:

“That danger is, of course greater when the only evidence against an accused person is identified by one witness and although no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all circumstances it is safe to act on such identification.”

In the above case, the case of **ABDALLA BIN WENDO & ANOTHER VRS REPUBLIC 20 E.A.C.A. at P. 168** was made reference to where the court stated:

“Subject to certain well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness, can safely be accepted as free from the possibility of error.”

The bottom line here is that this court has before it overwhelming evidence by both the prosecution and the defence against the accused person. It is clear that the accused had formed a clear intention to kill his own mother, he executed the intention by cutting the deceased 3 times.

As for the alibi this came as an afterthought with no notice to the prosecution. The same in my view, in any event did not dislodge the otherwise cogent evidence mounted by the prosecution.

The defence also raised the issue of provocation this defence does not hold any water. The accused knocked and kicked open his mother’s door at 11 pm ostensibly seeking for water. It is most unusual to knock on one mother’s door looking for water at 11 pm and armed with a jembe. The accused from his own evidence had an intention as he armed himself and went to the mother’s house; he indeed thereafter carried out his mission. The ingredients of the offence of murder was no doubt proven. I accordingly therefore convict the accused person for the murder of his biological mother **Prisca Ogolla**.

I will invite the defence as they mitigate to consider making submissions against the death sentence in accordance with S. 324 & 329 of the Criminal Procedure Act.

DATED AND DELIVERED THIS 29TH JUNE, 2012.

ALI-ARONI

JUDGE

In the presence of:

..... for State

..... Accused person(s) present