



**REPUBLIC OF KENYA**

**High Court at Mombasa**

**Criminal Case 38 of 2009**

**REPUBLIC .....PROSECUTOR**  
**- Versus -**

**MARY NALIAKA alias ESTHER ATIENO ..... ACCUSED**

**R U L I N G**

**MERCY KANANA** (the Deceased) met her untimely and violent death on 8<sup>th</sup> September 2009 at Mwenza, Kidunguni Village of the Likoni Location, of the then Mombasa District. It is the case of the State that **MARY NALIAKA** alias **ESTHER ATIENO** (the Accused) was criminally culpable for this death and preferred a charge of Murder against her. The Accused is charged with murder contrary to Section 203 as read with Section 204 of The Penal Code.

Although this matter was partly heard by Judge Odera, the trial commenced *de novo* before me on 1<sup>st</sup> December 2011. The prosecution called four witnesses. Amongst them was **Dena Bezua Maua** (PW3) who took the witness stand very briefly. The prosecution then withdrew him because he was the husband of the accused person and would therefore not be a competent witness under Section 127(2) of The Evidence Act (Cap 80).

**NICHOLAS MUNGIRA** (PW1) is a resident of Kitongoni within the Mombasa County. The death of the Deceased was a tragedy for him as she was his girlfriend. When PW1 got home from work on 8<sup>th</sup> September 2009 he found a crowd in the compound in which he lived. He was informed by a friend that Mary had been killed. He uncovered a body that was covered by a 'leso'. It was indeed that of Mary. A friend of PW1 by the name Chris told him that Esther (the Accused) had stabbed the Deceased. He noticed a stab wound on the Deceased's neck.

The wound on Deceased's neck was described in some detail by **Dr. K. N. Mandaliya** (PW2) who performed an autopsy on the body of the Deceased. This was on 28<sup>th</sup> October 2009 about fifty (50) days after her death. This is report of the internal appearance of the body-

**“The stab wound is traced into the neck going towards the (L) side of the trachea. It has lacerated the great vessels and muscles and connective tissue around the neck. There is laceration of the left lobe of the thyroid. There is mediastinal hemorrhage.”**

In the end he formed the opinion that the cause of death was a hemorrhagic shock due to a stab wound to the interior neck. On cross examination he stated that a sharp object would have caused the injury.

The last witness was **Cpl Fredrick Muyodi** (PW4) who at the time of the death of the Deceased served at Likoni Police Station. Acting on information from his colleague P.C. Wanjohi, PW4 visited a home at

Kidunguni accompanied by Inspector Alima and P.C. Okido. On arrival they found a dead girl's body lying at a doorstep to a Swahili house. She had a stab wound to her left neck.

Some bystanders informed the police that the Deceased was last seen with the accused making their way towards a shop. They interviewed the shopkeeper and later were directed to where the Deceased may have been attacked. They saw blood on the ground between the shop and a rental house said to belong to the Accused. This was about 10 meters away from where the body of the Deceased lay.

There was then this further evidence of PW4. On 10<sup>th</sup> September 2009, 2 days after the death of Mercy, the accused person led him and Cpl Walucho to a bush within Kidunguni where she hid herself after committing the offence. But no murder weapon was recovered.

This is the evidence I must evaluate.

I need to start with the evidence of PW4 on the lead to the accuseds hideout. This would seem to implicate her. Yet it is not admissible evidence. This is because, if true, the conduct of the accused would amount to a confession in terms of Section 25 of The Evidence Act. This is what that Section defines as a confession-

**“A confession comprises words or conduct, or a combination of words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence.” (my emphasis)**

To be admitted in evidence, that confession would have to be made as contemplated by Section 25(A) of The Evidence Act and The Evidence (out of Court Confessions) Rules, 2009. This includes that the confession, if made to a police officer, must be to an officer not below the rank of a Chief Inspector of Police (and who is not the Investigating Officer) and in the presence of a third party of the accused's choice.

Neither PW1 nor Cpl Walucho is of the required rank. Also, we are not told that the accused elected or was allowed to elect a person of her choice in the visit to the alleged hide-out. That evidence must be shut out as required by Section 25(A) of The Evidence Act.

That leaves the evidence of PW1, PW2 and the rest of what PW4 said. What PW1 and PW4 told this court about who may have committed the offence were hearsay accounts. For instance PW1 was told by someone called Chris that it is the accused who stabbed the Deceased. This Chris was not called by the prosecution to testify. While PW4 was told by some bystanders that the Deceased was last seen with the accused on their way towards a shop. Although PW4 interviewed the shopkeeper, neither the shopkeeper nor the bystanders were called to give evidence at all. The hearsay accounts of PW1 and PW4 are not admissible in evidence. So in truth nothing of what they said implicates the accused person.

As for the medical evidence of PW2, it confirms that the cause of death may have been a hemorrhagic shock caused by a stab wound to the interior neck of the accused. That evidence would be consistent to a blow inflicted by a murderer. What is missing, and cannot be linked to the accused, is that she is the one who inflicted that blow.

For the reasons given above I do not find sufficient evidence that the accused committed the offence she faces. For this reason I do hereby return a verdict of not guilty under Section 306 of The Criminal Procedure Code and acquit the Accused. She is hereby set at liberty at once unless she is detained for some other lawful reason.

I close by saying that we may never know who killed **MERCY KANANA**. This Court is appalled that a case that does not appear to be particularly intricate to crack could only yield two witnesses who gave evidence of little probative value. This Court is aware that the Kenya Police often work under extremely difficult circumstances and would be slow to criticize them. But PW4, the Investigating Officer, never told Court that he encountered any difficulties or non-cooperation during the

investigations. On this occasion I would not be reluctant to say that the investigations were deplorable. The death of one of us must never be treated so casually!

**Dated and delivered at Mombasa this 21<sup>st</sup> day of November, 2012.**

**F. TUIYOTT  
JUDGE**

**Dated and delivered in open court in the presence of:-  
Jamii for State**

**Omondi for Accused person**

**Court clerk - Moriasi**

**F. TUIYOTT  
JUDGE**