



NO. 316

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII

CRIMINAL CASE NO. 59 OF 2009

REPUBLIC.....PROSECUTO
R

-VERSUS-

EVANS NYANGORO NYANGAU.....1ST
ACCUSED

GEORGE GICHANA OMBUI.....2ND
ACCUSED

RULING

The two accused were charged with murder of **Truphena Nyanchama Obaga** vide information dated 18th September, 2009 and filed in court on the same date. It was alleged that on 28th August, 2009 at Morako sublocation in Manga District within Nyanza province, they jointly with others not before court murdered; **Truphena Nyanchama Obaga**, deceased. They pleaded not guilty to the information and they were tried.

The facts of the case as presented by the prosecution reveal that on 28th August, 2009 at about 7.30 p.m **Jackline Nyaboke Otwobe** (PW1) was in her mother in laws house having dinner. Suddenly a person entered the house armed with an object and ordered her and the mother in law who is the deceased to lie down. That person was wearing a hat. That person covered her head with a sack and pushed her to the wall. He thereafter assaulted the deceased. He hit the deceased with an axe on the head repeatedly and she

fell down. There was light in the house provided by the tin lamp. Apparently as soon as that person entered the house he blew the tin lamp off but was left with a torch. PW1 recognised this person by voice as he used to work for the deceased. That person is the 1st accused. Though PW1 screamed, nobody came to her aid. When done, the 1st accused removed the sack on PW1's face and ran out. As PW1 pursued him, she encountered another person at the door who ordered her to keep quite. She recognized this person as well since he also ended up entering the house. PW1 had a small torch which he directed at him. That person is the 2nd accused. A neighbour by the name of **Ongudi** came to the homestead and assisted the deceased to be taken to Manga District Hospital. Later he was transferred to Kisii District Hospital where he passed on at about midnight. Apparently, the 1st accused had disagreed with the deceased over beans he had stolen. After stealing the beans, he ran away. The person to whom he had sold the stolen beans fingered the 1st accused to the deceased.

Other witnesses related substantially similar story but with additions which they saw and which were not captured by PW1. A total number of 6 witnesses were called by prosecution. However the prosecution was unable to call the investigating officer as well as the Doctor who performed the post mortem on the body of the deceased to testify. The court having denied the prosecution an adjournment to call these witnesses, the prosecution was compelled to close its case.

In his oral submissions on no case to answer, **Mr. Minda**, learned counsel for the accused stated that the prosecution had not established a case to warrant the accused being put on their defence. No witness saw the accused at the scene of crime or even kill the deceased. Evidence of voice identification was incredible. The witnesses never said what was so unique in the voices of the 2nd accused as to make it easily identifiable. Finally he submitted that no medical evidence was adduced to show that the deceased died or was murdered. The cause of death if at all is unknown. The evidence on record cannot sustain a conviction in the absence of any evidence in rebuttal.

Mr. Gitonga, learned state counsel in response submitted that the prosecution had established a prima facie case through the credible testimony of PW1. She saw and recognized the accused at the scene of crime. Conditions of identification were favourable. The accused had formed a common intention to attack the deceased which fact was supported by the evidence of PW5 and PW4. He conceded that he had not provided medical evidence to support the death of the deceased and the cause thereof. However, he hastened to add that the omission was not fatal because in essence such evidence is meant to establish the fact of death and cause. Those aspects can be established through other forms of evidence, for instance, direct evidence of a witness who saw the deceased being murdered. Such evidence was rendered by PW1. The state counsel relied on the case of **Republic –v- Cheya & Another (1973) E.A. 500.** for that proposition.

I have no doubt at all in my mind that the prosecution at this stage has failed to establish a prima facie case against the accused to warrant them being placed on their defence. Even if the case was to be left the way it is and no evidence in rebuttal, called by the accused it cannot find a conviction. I say so because it is trite law that in information of murder, the prosecution must not only prove that the accused killed the deceased but that they did so with malice aforethought. In the circumstances of this case, there is no prove that the deceased died and that he died as a result of the actions of the accused. No post mortem report, death certificate and or even a burial permit was tendered in evidence to establish the fact of the death of the deceased. In other words, no medical evidence was tendered to establish or confirm that a person known as **Truphena Nyanchama Obaga** was allegedly murdered by the accused on 28th August, 2009. It is trite law that the standard of proof in any criminal trial is beyond reasonable doubt. Thus it behoves the prosecution to prove beyond reasonable doubt and with evidence beyond pre adventure that the deceased infact died. That fact cannot be left to suppositions, speculation and assumptions. Nothing stopped the prosecution from tendering in evidence the aforesaid documents to establish the fact of the death of the deceased. It is not even apparent from the record whether they had such evidence. Ordinarily,

when a post-mortem is conducted on the deceased, the body of the deceased is normally identified to the doctor conducting the post mortem by a relative or even a friend of the deceased in the presence of a police officer. No witness was called by the prosecution to confirm that he or she ever identified the body of the deceased to the doctor who conducted the post mortem. Nor did the prosecution tender the evidence of a police officer who was present when the post mortem was conducted. Ordinarily, a dead person would be buried or cremated. As such there would be evidence of such burial or cremation. There would be a witness or witnesses who attended the burial or cremation. In this case no evidence was led by the prosecution as to the burial or cremation if at all of the deceased. There is no evidence at all that the body was released for burial or cremation and indeed such burial or cremation took place. The wife did not attest to that fact nor any other relative or friend. So that if indeed the deceased died remains speculative.

Besides lack of proof of such death, the prosecution is also required to place the accused at the scene of crime through watertight direct or circumstantial evidence. The cause of death must bear direct linkage to the activities of the accused. There must be a nexus between the actions of the accused and the death of the deceased. Such nexus can only be established by the doctor's opinion as to the cause of death in his post mortem report. In the absence of such evidence how can we be sure that the death of the deceased if at all had a direct relation to the actions of the accused. The deceased could as well have died of other causes unrelated to the assault allegedly administered on her by the 1st accused. There is no room for speculation in criminal proceedings. The doubts created as to the death of the deceased if at all and the cause of such death must in the end be resolved in favour of the accused.

Ofcourse, I am aware of the case of **Republic –vs- Cheya and Another (1973) E.A 500** in which the judge rendered himself on the above issues thus

“...However the absence of medical evidence as to death and the cause of it is not fatal because as I said at that stage post mortem reports primarily are evidence of two things; the fact of death and the cause of death. Therefore it was open to the prosecution to produce and rely on other evidence to establish these facts” I do not wholly agree with this position. Luckily it is a decision of the High court of Tanzania that is not binding on me. I must repeat that there was no medical evidence to support the contention by the state that the accused can be said to have caused the deceased's death within the meaning of section 203 of the **Penal Code** or that the specific injuries which they inflicted on the deceased in the course of this attack resulted in his death. But again even if I was to accept the above position, I will still find it difficult to attribute the death of the deceased to the accused. There is no other evidence proving that the deceased died and that he died as a result of the activities of the accused.

It is also instructive that no evidence of the investigating officer was availed to court to establish the basis upon which he came to the conclusion that the accused be charged with information. His evidence was crucial in view of the lack of medical evidence as to the death of the deceased and the cause thereof. Such evidence no doubt would have tended to show that the deceased passed on for he must have collected the body, that the accused undoubtedly committed the offence from his investigation. No reason was advanced by the prosecution as to why it could avail such vital witness.

In the absence of such crucial evidence viz medical as well as that of the investigating officer, I am left with no other choice but to hold that nobody by the names of **Truphena Nyanchama Obaga** was murdered by the accused on 28th August, 2009 as per the information. Since the prosecution has failed a prima facie case against the accused to require them to be put on their defence, they stand acquitted of the information. It is so ordered.

Judgment dated, signed and delivered at Kisii the 17th day of January, 2011.

ASIKE-MAKHANDIA

JUDGE