



NO. 2821

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL CASE NO. 5 OF 2008

REPUBLIC.....PROSECUTOR

-VERSUS-

GASPAR ONGORI MARAGIA.....ACCUSED

RULING

The accused was charged with the murder of **Gerald Nyakundi** vide information dated 13th February, 2008 and filed in court on 6th March, 2008. It was alleged in the information that on 20th December, 2007 at Nyamange sub-location in Kisii Central District within Nyanza province, he murdered **Gerald Nyakundi**, deceased. He pleaded not guilty to the information and he was tried earnest.

The trial was initially handled by **Musinga J.** Indeed he presided over the evidence of four prosecution witnesses. However, before he could conclude the case, he left the station on transfer. Thereafter I took over the case with the consent of the parties who also agreed that I proceed with the case from where **Musinga J.** left.

The brief facts that informed the prosecution case were that on 20th December, 2007 at about 5.00p.m, **Daniel Mboga Nyankwara** (PW1) left for home from a hotel at Giseka, Nyamange with the deceased who was his younger brother and cousin, **Edwin Nyakundi**. As they neared home, they met one, **Mboga**, a son of the accused who greeted them. He thereupon demanded kshs. 20/= owed to him by the deceased. PW1 asked him to accompany them to his house and he would pay him the amount. As they walked along, suddenly, **Mboga's** sister, **Lydia** screamed and asked where they were taking his brother. Reacting to the scream, **Mboga's** family suddenly gathered around the deceased. Within no time, the accused who is the father of **Mboga** came running holding a worn out slasher and went for the deceased. He stabbed him on the chest and the deceased started bleeding profusely. The deceased was then rushed to Kisii Level 5 hospital where he was pronounced dead upon arrival. After the accused stabbed the deceased, he ran away. His children too ran away leaving behind the worn out slasher. The

same was subsequently collected by the relatives of the deceased and handed over to the police. On 21st December, 2007 at about 3.00p.m the accused reported to **PC Patrick Kimotho (PW3)** at Rioma police station that his life was in danger because members of public wanted to lynch him on suspicion of having killed the deceased. Because, the previous day a report of murder had been reported at the police station and the accused was the key suspect, PW3 immediately arrested him and locked him up.

Other witnesses related substantially similar story but with additions of what they saw and which were not captured by PW1. A total number of 8 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. In other words the prosecution closed its case without calling these two key witnesses.

In his written submissions on no case to answer **Mr. Omwega**, learned counsel for the accused stated that it was the paramount duty of the prosecution to prove that **Gerald Nyakundi** died and the cause of his death. The prosecution did not call any medical expert to testify and confirm that **Gerald Nyakundi** died and the cause of his death if at all. Failure to adduce such evidence was fatal to the prosecution case. In the same breathe, the prosecution did not adduce any evidence to prove that the accused had the necessary malice aforethought.

Mr. Gitonga, learned state counsel in response submitted that the deceased met his death at the hands of the accused. PW2 gave direct account of what he saw including seeing him holding a small panga and stabbing the deceased with it. He submitted further that though the prosecution was not able to call medical evidence, he nonetheless urged the court to be slow in making a harsh judicial decision as the offence was committed in broad day light and witnessed by at least 3 witnesses for the interest of justice.

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 him being placed on his defence. Even if the evidence on record was to be left as it is and no evidence in rebuttal called by the accused, it cannot find or sustain a conviction. I say so because it is trite law that in an information of murder, the prosecution must not only prove that the accused killed the deceased but that he 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 **Gerald Nyakundi** was murdered by the accused on 20th March, 2007. It is trite law that the standard of proof in any criminal cases 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, 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 or complications unrelated to the assault allegedly administered on him by the 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.

Of course, 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 he inflicted on the deceased in the course of this attack resulted in his death. It is instructive that though the accused raised these issues in his submissions, the state did not see the need to respond or rebut the same. Indeed the state gave the issues a wide berth. 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 the 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, that the accused undoubtedly committed the offence from his investigations. No reason was advanced by the prosecution as to why it could not 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 **Gerald Nyakundi** was murdered by the accused as alleged in the information. Since the prosecution has failed to establish a prima facie case against the accused to require him to be put on his defence, he stands acquitted of the information. It is so ordered.

Judgment dated, signed and delivered at Kisii the 30th day of May, 2011.

ASIKE-MAKHANDIA

JUDGE