



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL CASE NO. 20 OF 2009

REPUBLIC PROSECUTION

VERSUS

NYIRO NYAE ACCUSED

RULING

The accused **NYIRO NYAE** faces a charge of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE**. The particulars of the offence are that

“On the 9th day of December 2008 at about 5.30 p.m. at Kinyingo Village of Dzombo Location, Msambweni District within the Coast Province murdered NYAE MWANZA”

The accused entered a plea of **‘not guilty’** to the charge and his trial commenced before the High Court in Mombasa on 17th February 2010. The State led by **MR. ONSERIO** learned State Counsel called a total of seven (7) witnesses in support of their case. **MR. MATHEKA**, Advocate appeared for the accused.

Briefly the prosecution case was that the accused was a son to the deceased. **PW1 NYAMAWE NYAE**, an elder brother to the accused told the court that on 9th December 2009 at 5.30 p.m. he got home from his farm. He went to a banana plantation to bathe. Whilst he was bathing **PW1** heard his father (the deceased) coming home singing. He was drunk. He later heard the deceased quarrelling with the accused. Shortly thereafter **PW1** heard his children crying. He hurriedly dressed and went to the scene where he found the deceased lying dead on the ground. The accused had vanished. **PW1** looked at the body and noted a bruise on the right side of the head which wound was bleeding. He then reported the matter to authorities. The accused who returned to the home two (2) months later was then arrested and charged.

In this as in all other criminal cases the burden of proof lies on the prosecution. At the closure of the prosecution case the State is required to have shown a prima facie case against the accused, one that would warrant that the accused be called upon to give his defence to the charge.

The offence of Murder is defined by S. 203 of the Penal Code which provides

“Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder”

The offence of murder contains two main elements both of which must be satisfactorily proved by the prosecution. First is the '**actus reus**' or unlawful act. This is defined as that unlawful act or omission which is the direct or proximate cause of the death of the deceased. In addition the prosecution must also prove the '**mens rea**' or guilty mind on the part of the accused. It must be shown that the accused with **malice aforethought**, committed the unlawful act or omission which caused the death of the deceased.

In this case the deceased Nyae Mwanza met his untimely death on 9th December 2009. There was no eye witness to the incident which led to his death. The closest the prosecution have to an eye-witness is **PW1**. This witness was in the vicinity at the time of the incident but he was candid enough to admit that he did not actually **see** what happened as he was in a banana plantation next to his home taking a bath at the material time. **PW1** said that he heard his father (deceased) come home and begin to quarrel with the accused. **PW1** told court that this did not bother him unduly as the deceased whom he describes as a drunkard was in the habit of coming home drunk and picking quarrels with either of his sons. **PW1** only became alarmed when he heard his children start to cry. He hurriedly concluded his bath and proceeded back to his compound. There he found the deceased lying dead on the ground. He saw a bruise on the side of head and he also saw a rungu lying beside the body, giving rise to the suggestion that this was the weapon that inflicted the wound on the deceased's head.

PW2 SALAMA NYAMAWE is the wife of **PW1**, she tells the court that she was away from the home at the time of the incident having gone to her father-in-laws (deceased's) home to prepare his evening meal. She only ran back to her home when she heard her children crying. **PW2** also testifies that she found the deceased's body lying on the ground and upon examining that body she noted a wound on the head. She also saw the rungu lying beside the body. Likewise these two witnesses who were the first to arrive at the scene only saw a wound on the deceased's head. However **PW6 DR. KEVIN KINYUA**, a medical officer attached to Msambweni District Hospital, states that when he performed the autopsy on the body, apart from the blunt object injuries on the body he also noted a '**penetrating injury to the right cheek bone about 10 cm deep and 2 cm wide**'. This penetrating wound had penetrated the brain and in the opinion of **PW6** was the cause of the death of the deceased. It is curious and surprising that out of the five or so witnesses who saw the deceased's body only **PW6** spoke of a cut wound on the cheek. Could all the other witnesses have overlooked this wound? I do not think this is likely. **PW3 CORPORAL DANIEL KAIMUGUL** of Mamba Police Post was the first officer to arrive at the scene. His testimony to court was as follows:-

"I saw a wound on the right side of the head. It looked like a wound caused by a blunt object"

PW3 being a trained police officer, not a layman, I have no doubt that he has the requisite training to professionally observe scenes of crime more especially the bodies collected at such scenes. It is very unlikely that **PW3** would have failed to notice a cut wound on the face of the deceased. The doctor's opinion that the cause of death was an injury caused by a sharp object is a contradiction in the face of the evidence of all the other witnesses who saw no cut wound on the deceased's body. This is an inconsistency which the court cannot overlook. Doubt remains about the cause of the deceased's death and the benefit of such doubt must go to the accused person.

Both **PW1** and **PW3** told the court that they were not witnesses of how the deceased sustained his fatal injuries. However both state that their children at the scene, the same children whose crying alerted them. Why were these children who must have seen what happened not called to testify in court? They were crucial witnesses in the matter. The court is not told why they were not bonded to testify. No allegation has been made that the children were too young or were unable to testify for some specific reason. The failure to call these eye witnesses greatly weakens the case of the prosecution.

PW7 PC. DAVID KIBET was the investigating officer for this case. He told the court that his investigations revealed that the deceased and the accused quarreled over a bicycle which the accused allegedly took from the house of the deceased. It is strange that neither **PW1** nor **PW2** who were at the scene have mentioned this issue of a bicycle being the cause of the quarrel between the two. **PW1** who said he heard the accused and the deceased quarreling made no mention of the cause of their quarrel. **PW2** who at the material time was inside the house of the deceased preparing his evening meal made did

not mention having seen the accused taking away a bicycle from that house. It remains a puzzle as to where **PW7** obtained this information from. He was not at the scene and has no first hand knowledge of the events. This story remains uncorroborated by any other witness.

The evidence against the accused is largely circumstantial. It is based on the fact that the accused was heard quarrelling with the deceased shortly before he died, and on the fact that the accused left the home immediately after the incident and did not return even to attend his father's burial. This last fact can be said to be unusual even callous but cannot amount to evidence of guilt on the part of the accused. In order for circumstantial evidence to suffice such circumstantial evidence must exclude any other hypothesis to explain the death of the deceased. In this case the stated cause of death – penetration by a sharp object – does not corroborate the evidence that the deceased was clobbered to death by a rungu which was found next to his body. No knife, panga or any other sharp object was found at the scene. In my view the circumstantial evidence relied upon by the prosecution is not water-tight. Certainly the evidence raises suspicion that the accused killed the deceased but it has oft been stated that suspicion alone no matter how strong cannot form the basis for a conviction in law. Based on the foregoing I find that no prima facie case has been established against the accused. To call upon him to tender a defence would be tantamount to requiring that the accused plug the loopholes in the prosecution case. This would amount to shifting the burden of proof to the accused and would make a mockery of the presumption of innocence. I therefore enter a finding of '**not guilty**' and I hereby acquit the accused under S. 306(1) of the Criminal Procedure Code.

Dated and Delivered in Mombasa this 21st day of December 2010.

M. ODERO

JUDGE

Read in open court in the presence of:-

Mr. Ondari for State

Mr. Kinyua holding brief for Mr. Matheka for Accused

M. ODERO

JUDGE

21/12/2010