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REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII
CRIMINAL CASE 19 OF 2005

REPUBLIC..... PROSECUTION

VERSUS

STEPHEN MARWA MWITA MWISARI ACCUSED

JUDGMENT

The accused was charged with the offence of murder contrary to **section 203** as read with **section 204** of the **Penal code**. The particulars of the offence were that on the 17th day of January, 2005 at Masangura Sub-location in Kuria District within Nyanza Province, the accused murdered **AMC**, herein after referred to as “**the deceased**.”

The prosecution evidence briefly stated was that on the material day at about 2.00p.m, **SRK, PW1**, an uncle to the deceased, was herding cattle when he heard screams. He saw people running towards a place where the screams were coming from. When PW1 rushed to the place, he found the deceased lying down unconscious. The deceased’s brother, **PC**, told PW1 that the deceased had been assaulted by the accused. At the time the accused was not at the scene.

PW1 observed that the deceased was still alive, though he had multiple injuries. The right hand had been chopped off and was merely hanging by the skin, the mouth had been cut as well as the right knee. The left arm was also cut. The deceased was taken to a hospital but died on the following day.

Chacha Marwa Sasi, PW2, was the Assistant Chief of Masogoro Sub-location. He testified that on 17th January, 2005 at 2.00p.m, the accused went to his office and complained that he had married the daughter of the deceased and paid two cows as dowry. Later the girl went back to her parents and the accused wanted the dowry refunded to him. PW2 summoned the deceased and he went to see him the same day. PW2 and some elders heard the accused and the deceased. The deceased agreed that the said dowry had been paid to him. But before PW2 and the elders could decide on the matter, the deceased stormed out of the meeting, saying that the case was being handled by the Police. The accused left about five minutes later.

PW2 went on to say that after about ten minutes he heard screams and when he went to the place where the screams were coming from, he found the deceased had been cut and was lying on the ground. PW2 rushed to Ntimaru Police Station and made a report. The people who were at the scene were saying that it was the accused who had assaulted the deceased. PW2 went to the accused’s home but he was not there. The accused disappeared for two months.

Peter Mwita Mwinga, PW4, a brother in law to the accused, was one of the people who rushed to the scene of the crime immediately after the deceased had been assaulted. PW4 asked the deceased what had happened to him and the deceased said that he had been assaulted by the accused.

SBM, PW5, the deceased’s widow, was told by MW that the deceased had been assaulted by the accused. When she rushed to the scene she

found the deceased lying down, alive but unable to talk. She added that the accused had abducted their daughter and raped her. The accused was staying with their daughter but had not married her officially.

Police Constable Richard Kirui, PW7, together with other Police Officers arrested the accused on 8th March, 2005. The witness said that the accused had surfaced, having gone into hiding after the death of the deceased.

Dr. Aggrey Indagiza, PW10, conducted a post mortem on the body of the deceased. He formed an opinion that the cause of death was cardiovascular collapse secondary to excessive bleeding due to multiple cut wounds. The deceased's body was identified to PW10 by the deceased's relatives.

In his defence, the accused testified that on the material day he had been summoned to the office of PW2 together with the deceased. The deceased was asked by PW2 to sit down but he declined, saying that he was tired of being summoned by PW2 about the dowry issue. The deceased walked away and after about thirty minutes the accused also left. He said he went to his home. The accused denied having assaulted the deceased. He said that from 17th January, 2005 until 4th March, 2005 when he was arrested he was in his home and denied that he had gone into hiding. He alleged that after his arrest, the Police officers who arrested him urged him to admit he was the one who killed the deceased but he refused.

From the evidence on record, there is no dispute that shortly before the deceased was assaulted, the accused and the deceased had been summoned by PW2 to his office following a disagreement between the two, after the accused claimed that the deceased had failed to refund some dowry that had been paid to him by the accused. The deceased's daughter had been married by the accused but she had gone back to her parents' home. However, the deceased's wife told the trial court that the accused had actually abducted and raped their daughter and they lived together for a while, though not officially married.

According to PW2, the deceased stormed out of an arbitration meeting that he had summoned and the accused also left about five minutes later. Shortly after about ten minutes, screams were heard and the deceased was found lying down with serious cut wounds. Although a number of people at the scene were reported to have said that it was the accused who had assaulted the deceased, none of them saw the accused assaulting the deceased shortly after they left the office of PW2.

However, PW4 testified that the deceased told him that he had been assaulted by the accused and shortly thereafter he died. People started looking for the accused but they could not get him. PW2 and PW4 went to the accused's home but he was not there. The accused went into hiding for about two months. Why was that so? I believe he knew that he was being sought. The accused's conduct after the deceased's death was a pointer to his guilt, I so believe. The deceased's dying declaration to PW4 is also important and admissible, see **section 33(a)** of the **Evidence Act**. In **CHOGE –VS- REPUBLIC, [1985] KLR 1**, it was held that the general principle on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at the point of death and the mind is induced by the most powerful considerations to tell the truth. In the same decision, the Court of Appeal held that there need not to be corroboration before such a declaration can be accepted but the exercise of caution is necessary.

In this case, other than the dying declaration aforesaid, there is additional evidence, albeit circumstantial, which points to the accused as the only person who caused the death of the deceased. I considered the accused defence, which was a mere denial, but found no merit in the same. I find the accused guilty of murder as charged and convict him accordingly.

DATED, SIGNED AND DLIVERED AT KISII THIS 23RD DAY OF JULY, 2009.

D. MUSINGA

JUDGE.

Accused: I am sick. My family members have been killed. My wife ran away._

D. MUSINGA

JUDGE.

COURT: There is only one sentence that is prescribed by the law for the offence of murder and that is death. I sentence the accused to death. Right of appeal within 14 days from the date hereof.

D. MUSINGA

JUDGE.