



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Case 66 of 2003

REPUBLIC.....PROSECUTOR

VERSUS

ESSAU STAMETTO NGOSSOR.....ACCUSED

JUDGMENT

The accused, Essau Siameto Ngossor was charged with Murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence were that on the 17th April, 2004 at Ten acres farm, Narok District, the accused murdered Margaret Sei Ngossor (*hereinafter referred to as the deceased*). The accused pleaded not guilty to the charge when he was arraigned before this court. The prosecution called seven witnesses in its bid to prove its case on the charge of murder against the accused. After the close of the prosecution's case, the accused was put on his defence. He denied the allegation that he had killed the deceased. After the close of both the prosecution's and the defence case, submissions were made by Miss Abuga, learned counsel for the accused urging this court to acquit the accused as the prosecution had not established its case to the required standard of proof. Mr. Koech for the State argued that the prosecution had proved its case against the accused to the required standard of proof beyond reasonable doubt.

I will analyse the evidence adduced and the submissions made after briefly setting out the facts of this case as adduced by the prosecution's witnesses. PW2 Sammy Parsaloi Ngossor hired PW4 James Muhia Karanai to plough for him his 30 acres of land at Ten acres farm near Nairagie Enkare. PW2 had hired PW4 in the year 2003. According to PW2, after PW4 had completed ploughing his farm, he paid him in full. He testified that he had even over paid him by Ksh.400/=. On his part, PW4 insisted that PW2 had not paid him any money. He testified that PW2 still owed him the sum of Ksh.50,000/= that was the agreed amount for ploughing the said parcel of land. PW4 testified that PW2 had told him that he would pay him the say sum of money at the end of the season after he had sold produce from the said farm. It is apparent that after the close of the season, according to PW4, PW2 did not pay him. After seeing PW2 severally, and not being paid the amount that he claimed was owed to him, PW4 referred the dispute to the area chief. PW2 was summoned by the area chief to have the dispute arbitrated upon with a view of finding an amicable solution.

PW2 was summoned to appear before the chief on the 15th April, 2004. PW2 was unable to answer to the summons because at the time he was at his place of work at Keekorok lodge. He sent his wife, the deceased, to represent him. However, the chief insisted that PW2 be present. On the 16th April 2004, PW2 sought permission from his employer and appeared before the chief. He met PW4 at the office of the OCS Nairagie Enkare Police Station. The OCS, a Mr. Kamau, was present. The chief, a Mr.

Kodonyo was also present. After hearing PW2 and PW4, the chief ruled that PW4 had not established his case. This was because the agreement between PW2 and PW4 had not been reduced into writing. PW4 was advised to pursue the matter by filing a suit in court. From the testimony of PW2, it is apparent that PW4 was extremely unhappy with the verdict of the chief. PW4 told the people present at the office of the OCS that since PW2 had refused to pay him his money, he was leaving everything to God. The meeting then dispersed.

PW2 testified that after leaving the office of the OCS, he went and hired tractors to plough his farm. He also hired a planter to plant wheat as it was the planting season. He testified that he was in his farm on the 16th and the 17th April 2004 planting wheat. On the 17th April, 2004 at about 6.30 p.m., he was dropped at his house by a driver of one of the tractors that he had hired to plough his farm. PW2 recalled that when he reached his house, his wife went to the bathroom to take a bath. He was seated in the sitting room talking to his two year old child. He recalled that the sun had set and it was beginning to get dark. At that time, he had put on a hurricane lamp. He recalled that there was one hurricane lamp in the sitting room and another hurricane lamp in the kitchen. The bathroom where the deceased was taking a shower was inside the house next to the kitchen.

PW2 testified that at that time he heard someone knock at the kitchen door. He went to investigate to see who it was. The deceased asked who the person knocking the door was. The person answered that he was the owner of the tractor which had been hired by PW2 to plough his farm. PW2 went and opened the kitchen door. He recalled that he opened the door slightly as he first wanted to ascertain the identity of the person knocking at the door. At that specific moment, the three people who were outside the door forcefully pushed the door with a view of gaining access to the house. PW2 desperately held on the door but was overpowered. He recalled that it was at that moment that he saw the accused, (*who is a son to his sister called Doris*), in the company of two strangers who were attempting to gain entry to his house. PW2 was positive that he had recognised the accused when he saw the three people in the split time when he slightly opened the door to the kitchen.

After he had been overwhelmed by the strangers who had gained entry into the kitchen, PW2 rushed to his bedroom and armed himself with a spear. He recalled that it could have taken him about 2 minutes to rush to the bedroom and come back to the kitchen. Meanwhile, the deceased was screaming to alert the neighbours to assist them. She was screaming while she was in the bathroom. When PW2 came back from the bedroom while armed with a spear, he found that the intruders had disappeared. PW2's mother, who resided next to his house came to the house and informed PW2 to look for the deceased because she was no longer screaming.

PW2 entered the bathroom and found the deceased slumped on the wall of the bathroom. She was not talking and had sustained a stab injury on the left side of her chest under her left breast. PW2 immediately made arrangements to have the deceased taken to hospital. He rang his father in-law PW3 Gideon Sindiyo to assist him with his vehicle to ferry the deceased to hospital. PW2 also rung his brother called James to come to his assistance. James arrived before PW3. The deceased was rushed to Nairagie Enkare Health Centre where she was pronounced dead on arrival. PW3 arrived at the Nairagie Enkare Health Centre and was shocked to be informed that his daughter had died.

The matter was reported to the police at Nairagie Enkare Police Station. Among the police officers who received the report was PW6 PC Felix Muthengi. He testified that earlier on that evening at about 7.00 p.m., the OCS had received information that the accused, who was suspected to have been involved in various robberies within the area, had been sighted within the area by an informer. PW6 was instructed by the OCS to patrol the area where the accused had been seen with a view of apprehending him. PW6 was with other police officers. It was while PW6 was on patrol that he received information that the deceased had been killed in an attempted robbery. PW6 suspected that the accused was involved in the death of the deceased. After interviewing PW2, he escorted the body of the deceased to Narok District Hospital mortuary for the purposes of the post-mortem being performed.

Meanwhile, on the 17th April 2004 at about 10.00 p.m., PW5 Senei Nalang'u was driving his motor vehicle from Nairobi to Narok. At a petrol station at Mai Mahiu, he found the accused. The accused was

known to PW5. The accused hiked a lift from PW5. PW5 gave the lift to the accused with another man who was unknown to him. He testified that the accused requested him to also give the lift to the other man. He dropped them at a place known as Stima which is a distance of about 10-15 km from Nairagie Enkare. He testified that Stima was about seven kilometres from Ten acres farm where PW2 resided with his wife. When the police made inquiries on whether any one had seen the accused on the material day when the deceased was killed, PW5 recalled that he had given a lift to the accused. PW5 denied that he had given the said information to the police because of the grudge that existed between the accused and his brother.

The body of the deceased was taken to Narok District Hospital mortuary where the post-mortem was performed on the 23rd April 2004 by PW1 Dr. Abakalwa Gerishom. He observed that the deceased had sustained a 3cm x 2 cm stab wound below the left nipple into the 3rd inter-costal space. On internal examination, he found that there was sub-sternal haematoma and pericardial haematoma. He formed the opinion that the cause of death of the deceased was cardiac arrest due to cardiac tamponade due to a penetrating (*stab*) injury.

After the report of the attempted robbery was made, the police commenced investigations. PW7 PC David Migwi based at Narok CID office was assigned to investigate the case. He was assisted in investigations by one Cpl. Wachira. He testified that after the death of the deceased, PW4 was immediately suspected. This is because PW2 suspected that because of bitterness by the alleged non payment of the ploughing costs by PW2, then the said PW4 could have hired people to kill PW2. PW4 was arrested and detained at the Narok Police Station. Based on the information given by PW2, the police looked for the accused and managed to arrest him on the 21st April 2004 at Mai Mahiu. It is apparent that the accused did not take kindly to his arrest. He claimed that he had in his possession Ksh.23,060/= which was relieved from him by the police officers who arrested him. This court ordered an inquiry to establish the veracity of the claim by the accused. The inquiry's report was inconclusive.

PW7 testified that he conducted the investigations and established that it was the accused who killed the deceased. PW7 did not however produce a medical report which could have indicated that the accused was examined by a doctor to verify that he was mentally fit to stand trial. The main evidence that PW7 relied on to charge the accused was that of identification by PW2. It is imperative at this stage to state that the relationship between PW2 and the accused was extremely bad. Although they were relatives, PW2 and the accused had seriously disagreed in the not too distant past prior to the incident when PW2 claimed that the accused had stolen his safari boots. The accused was incensed by the claim of PW2 that he surrendered the safari boots that he was wearing at the time to PW2. PW2 got hold of the safari boots that had been surrendered to him and burnt them. When PW2 testified in court, he claimed that the accused was a known criminal within their area.

When the accused was put on his defence, he denied that he had killed the deceased. He further denied that he was at the scene when the said stabbing incident is alleged to have taken place. He testified that after his arrest he was robbed of his money by the police and tortured with a view of securing his admission of guilt. He testified that he was tossed from Narok Police Station to Melelo Police Station to harass him to admit to the offence which he had not committed. The accused produced a duly filled P.3 form as *defence exhibit No.1* which indicated that he had injuries on his knees. His knees had bruises and had swollen.

In criminal cases, it is the duty of the prosecution to establish the guilt of an accused person to the required standard of proof beyond reasonable doubt. An accused person is under no obligation to prove his innocence. His duty is only restricted to raising reasonable doubt on the prosecution's case. The onus of proving a criminal case is always on the prosecution and does not shift to an accused person.

In the present case, the prosecution basically relied on the evidence of PW2 in its bid to secure the conviction of the accused. PW2 testified that he had identified the accused among the people who had sought to forcefully gain entry into his house on the evening of the 17th April 2004. He testified that he had already put on the hurricane lamp. Although he testified that it was not too dark at the time the people forcefully gained entry into his house, it is clear from his evidence that visibility was poor. PW2

testified that he opened the door to the kitchen slightly with a view of ascertaining the identity of the people who had knocked at the door. It is when he slightly opened the door that he claimed that he was able to identify the accused among a group of three people. He testified that when he realised that the three men were up to no good, he attempted to lock up the door by pushing it back. The men pushed into the kitchen through the door. They were able to overwhelm PW2 who was unable to lock up the door.

It was at that moment that PW2 rushed to the bedroom so as to arm himself so that he could repulse the intruders. He testified that it took him about two minutes to rush from the kitchen to the bedroom and back to the kitchen when he returned armed with a spear. By the time he reached the kitchen, the intruders had made good their escape. His mother, who had responded to the screams by his wife who was taking bath in the bathroom next to the kitchen, informed PW2 to check the condition of his wife. It is then that PW2 saw that his wife had been stabbed on the chest. He rushed the deceased to the hospital but she was pronounced dead on arrival.

The evidence of PW2 is that of an identifying witness made in difficult circumstances. Although PW2 claimed that he was able to identify and recognise the accused as being among the three men who gained access to his house on that material evening, it is clear that the said identification was made when there was insufficient light. The identification by PW2 was that of identification by a single witness made in difficult circumstances. PW2 testified that he opened the door of the kitchen slightly before he realised that the people outside the door were up to no good. It is then that he attempted to push back the door and lock it. A struggle ensued between PW2 and the intruders. PW2 was overwhelmed. He abandoned his quest to lock up the door and rushed to the bedroom to arm himself. It is when he came back that he realised that the deceased had been fatally stabbed.

The law as regard the evidence of identification made in the circumstances similar to the one which PW2 made the identification is well settled. As was held by the Court of Appeal in the case of **Maitanyi vs Republic [1986] KLR 198** at page 200;

“Although the lower courts did not refer to the well known authorities Abdulla Bin Wendo & Another vs Reg (1953) 20 EACA 166 followed in Roria vs Rep (1967) EA 583, it may be that the trial court at least did have them in mind. It is important to reflect upon the words so often repeated and yet bear repetition:-

‘Subject to well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error’ .”

In the present case, PW2 did not tell the court how he was able to identify the accused other than by stating that he had recognised the accused. It should be noted that the relationship between PW2 and the accused was not good. In fact, although PW2 and the accused were relatives, there was no love lost between them. PW2 did not state what clothes the accused was wearing at the material time. There is no other evidence which was adduced by the prosecution which could connect the accused to the said stabbing to death of the deceased.

The weapon which was used to stab the deceased was never recovered. There was nothing which was robbed from the house of PW2 when the deceased was killed. There was nothing which was found in the possession of the accused, either by way of forensic evidence or an item which could have connected the accused with the death of the deceased. The testimony of PW5 in this regard was instructive. He testified that he gave a lift to the accused at 10.00 p.m. on the 17th April 2004 when he found him at petrol station at Mai Mahiu. The deceased was killed some minutes after 7.00 p.m. on that evening. The accused has denied that he was involved in the death of the deceased. It is clear from the evidence adduced that the police proceeded on the premise that PW4 had hired criminals to do harm to PW2. This theory was

however debunked when PW4 was not charged together with the accused. This was after the police had established that PW4 was a person of unsound mind.

I have carefully evaluated the evidence that was adduced by the prosecution witnesses in support of the charge of murder against the accused. There are certain salient features or facts in this case. The first salient fact is that the accused and his uncle PW2, the husband to the deceased, had a very bad relationship. In fact in the year 2002, PW2 had chased away the mother of the accused together with the accused from their homestead. PW2 testified that he considered the accused to be a criminal. The second salient feature of this case is the fact that PW2 had disagreed with PW4 over payment when PW2 hired the tractor of PW4. PW4 was a known mental patient. On the day prior to the fateful day when the deceased was stabbed, PW4 had reported PW2 to the chief. PW4 and PW2 saw the chief who was however unable to resolve their dispute. PW4 told PW2 that he was leaving everything to God.

When the deceased was stabbed, PW2 informed the police that he had suspected that PW4 was involved in the stabbing. The police proceeded with the theory that PW4 had hired the accused to do harm to PW2 and the members of his family. When the case was investigated by the police, it was established that PW4 was not involved. This court saw the demeanour of PW4 when he testified before this court. It was clear to this court that PW4 was not mentally stable. He could have told PW2 that he had left everything to God with no malicious intent. The fact that he was not charged with the accused, confirmed that the police were convinced that he was not involved. The police reached this conclusion despite of the fact that PW2 believed that PW4 could have been involved with the fatal stabbing of his wife.

The only evidence therefore that the prosecution relied on to charge the accused is the evidence of identification by PW2. As stated earlier in this judgment, the circumstance under which PW2 is said to have identified the accused is such that this court cannot be certain that PW2 had properly identified the deceased. It is apparent that PW2 saw the assailants in a split second before he went to his bedroom to get his spear. He did not tell the court the clothes that the assailants were wearing. It is clear that PW2 did not mention the name of the accused when he made the first report to the police. I observed the demeanour of PW2 when he testified before court. His hatred towards the accused was palpable. This court is of the view that PW2's hatred of the accused could have clouded his vision to the extent that he thought that he had seen the accused.

The question that this court asked itself is this; what could be the motive for the accused to kill the wife of his uncle? The prosecution did not adduce any evidence which could have pointed to the motive of the accused. The only motive that seems to have informed the police during their investigations was the fact that they thought that PW4 could have hired the accused to do harm to the family of PW2. Nothing was stolen from the house of PW2 when the deceased was fatally stabbed. It is the view of this court that the stabbing of the wife of the deceased could be one of the unfortunately frequent cases of an attempted robbery which went awry. PW6 testified that there were several robberies and acts of thuggery in the area prior to the fatal stabbing of the deceased. The accused had no motive whatsoever to kill the wife of PW2. It is therefore the finding of this court that the prosecution has not proved its case to the required standard of proof beyond reasonable doubt.

The assessors who assisted this court during the hearing of this murder trial reached a similar verdict that the prosecution had not proved its case on the charge of murder against the accused. In the circumstances therefore, this court has no option but to acquit the accused. He is ordered set at liberty and released from prison unless otherwise lawfully held.

It is so ordered.

DATED at NAKURU this 31st May, 2007.

L. KIMARU

JUDGE