



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISII

Criminal Case 76 of 2003

STATE PROSECUTOR

VERSUS

MAKARIO NYANGWONO NYAOGA ACCUSED

JUDGMENT

The accused person faces a charge of Murder contrary to S.203 as read with S.204 of the Penal Code. Particulars are that on 9th June 2003 at Bogiakumu Sub Location Central Kisii District he Murdered SAMUEL OMWERI NYAOGA.

The deceased was a step-brother of the accused person. Their father PETER NYAOGA OMWERI (PW1) told court that on the fateful day in the morning he was with the deceased and his other son ONDARI NYAOGA (PW4) and his wife SARAH MOKEIRA (PW2) outside their house taking porridge before going to look for grass for roofing. Accused who apparently is a son of another wife and whose compound was nearby went there armed with a panga. He was also with his son Ibrahim who too had a small slasher. Accused threatened to cut his father with the panga and said he was going to kill someone. PW1 told him to calm down but he insisted that he will cut him.

PW1 jumped on him and took the panga from him. The son Ibrahim charged towards PW1 with the slasher. However PW1, deceased and Ondari (PW4) disarmed him.

He went back to their compound leaving the accused behind. Ibrahim returned with a Somali sword and found the accused struggling with the deceased. Ibrahim aimed the sword at the deceased but missed him. He cut his father. The father told him to stab the deceased who he was holding. Ibrahim stabbed the deceased with the sword.

The deceased jumped up but fell down soon thereafter. He died on the spot.

PW1 went and reported the matter to A. P. CORPORAL SAMWEL NYACHIRO (PW3) at Bogiakumu Chiefs camp who advised him to report to Gensonso Police Post. Later the accused went to the same chiefs camp with a cut wound on the head.

He told PW3 that he had fought with his father. PW3 took him to Gensonso Police Post where they found the father (PW1) reporting to Cpl. JOSPHAT CHACHA (PW5).

PW1 identified the accused to Cpl. Chacha as the person who killed his brother.

He was arrested. PW4 went to the scene and later the body was removed to the mortuary. Accused was eventually charged.

Accused denied the offence and said he was not present when the deceased died. He said he was going home from his shamba when he heard noises from his uncle's home. He met his father and asked him what was happening. As they were talking his step brothers arrived and attacked him. He was cut on the head with a panga.

He ran home. Later he went to chief's camp to report. He found an Administration Policemen who told him to go for treatment first before reporting at Gensonso Police Post. On the way he met his father who was with two policemen in civilian clothes.

His father identified him to them. He was arrested and told he had murdered.

He said he was not aware of the murder.

There is no dispute that the deceased SAMUEL OMWERI NYAOGA died on the fateful day. Dr. Ezekiel Ogando (PW6) who performed Post Mortem on the body told court that the cause of death was Cardiopulmonary arrest due to massive bleeding due to a chest injury. He said he had found a penetrating wound at the root of the neck.

The left lung was lacerated leading to heavy bleeding. The issue to consider is who caused the wound which led to the death of the deceased.

The evidence on record is candid and overwhelming. It is clear that it was the son of the accused, one Ibrahim, who is said to be still at large who inflicted the injury which led to the death of the deceased. PW1, 2 and 4 all clearly narrated to court how the accused and the son went to their compound. The accused wanted to attack his father but he was disarmed. Somehow they started struggling with the deceased. Accused's son Ibrahim had gone back home and returned with a sword. He stabbed the deceased once and the deceased died at the scene. Ibrahim disappeared. This evidence was not at all contraverted by any other evidence. There were no contradictions and there are no doubts at all that deceased was stabbed by Ibrahim. The accused is not the one who actually stabbed the deceased but it is clear that he had a common intention with his son Ibrahim. The two had gone to that home armed and clearly ready to attack those who were there. Accused was armed with a panga and he threatened to cut his father with it.

The father (PW1) told court that accused said he will kill someone.

He and his son were disarmed and accused started to struggle with the deceased.

The son went home and returned with the Somali sword. He cut his father when he missed the deceased. PW1, 2 & 4 told court that the father told Ibrahim to stab the deceased and he did so. When Ibrahim stabbed the deceased accused was holding him.

After he stabbed the deceased and the deceased fell down the accused advised his son to ran away. It is therefore clear that the two had a common intention and they aided each other. The acts of Ibrahim are acts of the accused person who actually was the one who began the whole saga.

They knew by stabbing the deceased it could lead to his death which is what actually happened. Accused had said in defence that he was not at home when the incident happened but that was not plausible. The evidence of PW1, 2 & 4 was clear that the accused was present and was holding the deceased when he asked his son to stab him. Accused himself went to Chief's camp with a cut wound and told PW3 that he had fought with his father and others and was cut. The claim that he was in the shamba was therefore an afterthought.

From the foregoing therefore I find the accused person guilty as charged and convicts him.

Dated 9th March 2006.

KABURU BAUNI

JUDGE

cc. Mobisa

Mr. Kemo for State.

Mr. Okenye for Accused.

Court:- Judgment read.

KABURU BAUNI

JUDGE

Mr. Kemo: Accused is a first offender.

KABURU BAUNI

JUDGE

Mitigation:

Mr. Okenye: Nil.

KABURU BAUNI

JUDGE

Court: There is only one sentence provided for.

Sentence: Accused sentenced to death.

KABURU BAUNI

JUDGE

14 days R. O. A.

KABURU BAUNI

JUDGE