



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA OF KISII**

**Criminal Case 25 of 2004**

**STATE ..... REPUBLIC**

***VERSUS***

**JOSIAH NYAKENYANYA ..... ACCUSED**

**JUDGMENT**

The accused is charged of murder contrary to s.203 as read with S.204 Penal Code in that on 25<sup>th</sup> January 2004 at Kiogoro Location he killed JOSEPH OMARE.

Prosecution called a total of four witness. PW1 NAOMI NYABOKE

a neighbour of the accused told court that on the material day accused went to her house and told her he had killed somebody. It was at 8 p.m.

She went with her to their home and she went into his mother's house.

She found accused mother under a table and the deceased tied up near a window. She asked deceased how he went there. He told her he just found himself there. She did not see any injuries. He said he could not walk.

PW1 went and called ALICE NYANCHAMA (PW2) who is a sister of the deceased. PW2 told court that when she went to the scene she found the deceased lying on the ground in accused mother's house. He looked drunk.

When he asked him how he went there he told her to leave him alone.

PW1 & 2 supported and walked him home and called his mother.

At midnight they heard accused's mother screaming. They went and found him dead.

DR. EZEKIEL OGANDA (PW3) performed Post mortem on the body of the deceased. He found bruises on the chest and the skull. Right thigh was fractured. Two ribs were also fractured.

Evans Nyakundi is deceased's brother. He was at home at 8.30 p.m. when he was told that his brother the deceased was beaten. He went to deceased's house and found him there. There were other people there.

Deceased was asleep though he saw injuries on the head.

Accused gave sworn defence and denied the offence. He said he heard noises in his mother's house and when he went to check he found the deceased lying on the door. He was drunk. His mother screamed and neighbours went there. Deceased was picked and escorted home.

All the assessors returned a verdict of not guilty.

I have analysed all the evidence. Dr. Ogando (PW3) who examined the body of the deceased said he died due to injuries on head and others on the body. However the other evidence adduced did not conclusively show who inflicted those injuries. PW1 said she was called by the accused.

She did not witness deceased being assaulted. She even said that she never saw any injuries on the body.

Equally PW2 said she never saw any injuries on the body of the deceased. She said he was drunk but him talked to her. He never told her that he had been assaulted by the accused or by anybody.

He only told her to leave him alone. If indeed it was the accused who assaulted him then he should have said so. Accused's mother was never called to tell the court how deceased ended up in her house. True there may have been suspicion that accused may have assaulted the deceased when he found him with his mother but suspicion alone cannot be relied on the convict on a case like this. There was no direct evidence and any circumstantial evidence was not conclusive.

In the circumstances I find that prosecution have failed to prove its case beyond all reasonable doubts. I find accused not guilty and acquit her.

Dated 9<sup>th</sup> November 2006

**KABURU BAUNI**

**JUDGE**

Delivered in presence of:

cc. Mobisa

Mr. Chirchir for State

N/A for accused.

Accused P.I.P