



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

HCR NO. 13 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS.

MARKO PATRICK MAKOKHA.....ACCUSED

JUDGEMENT

The accused **MARKO PATRICK MAKOKHA** is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.

Particulars of the offence are that **MARKO PATRICK MAKOKHA** on the 28th day of November, 2014, at Mauko village Bumula 'B' sub location, Elukongo location within Busia county, murdered **JOHN OPANG'A MAKOKHA**.

The accused is deaf and dumb and is not conversant with Kenyan Sign Language. However the court was informed by the mother that he can communicate through his sister Esther Akinyi Makokha whom this court took as the interpreter:

The prosecution case is that PW1 Justina Makokha was the wife of the deceased John Opanga Makokha and mother of the accused. On 28.11.2014 PW1 Justina was in her house asleep when he heard noise at the house quarreling at the house of her co-wife Winfred Makokha. She came out and saw her co-wife houses on fire. She ran into a cassava from where she hid. She then saw vehicles come to her home. She went back the next day and was informed that the husband, the deceased had been killed and body retrieved from her co-wives house.

PW6 Evaline Opanga Makokha the daughter in law of the deceased was at her house at Maugo village when at 8.00 p.m. she saw the house of her step mother in law on fire. She heard while about 100 meters away the accused who was making his peculiar noise when angry. She ran to police at Bumula and made the report. Police later visited the scene and later informed her that deceased had been killed. On being cross-examined by Wakoli for accused, she testified that on that night she did not see the accused but only heard his "groaning noise."

PW5 No. 65533 Cope Peter Maeala then attached at Bumula police base testified that on 28.12.2014 he was at the police post when he received a report from administration police officer from Bumula B AP post that the deceased John Makokha had been murdered by his son. He visited the scene where he found the deceased outside his house. He had injuries on the head, hands and a barbed tied along his neck. He did not find anybody at the home. Deceased was dead. They took the body to Busia Mortuary. He recorded statement from Witnesses. He established that the deceased had 2 wives. The 1st wife who was the mother of accused and the 2nd wife. A child of the 1st wife had been murdered and the 2nd wife was suspected to have been responsible. Accused ran away from home after this incident. On 9.12.2014 PW3 Cpl Ezekiel Nyakundi acting on information arrested the accused and took him to the police station.

PW4 Dr. David Mukabi who produced the post mortem report prepared by Dr. Patson Obate who performed the post mortem testified that on observation the deceased had multiple penetrating injuries on head- 10 injury stab wounds on neck, fracture of ulna and radius of left arm ring finger and small finger chopped off, cut on left elbow neck and fore-arm. Upon opening the body, he found the wind pipe was perforated, penetrating stab wound leading to lungs which collapsed. He also noticed penetrating injuries to the brain with tissue injury. He formed opinion that the cause of death was due to severe head injury secondary to assault.

The accused upon being placed on his defence elected to give unsworn evidence and called no witness. He testified that on the material day he only saw fire in his step mother's house and run away. He testified that his brother had been killed and he feared his step mother's children will arrest him. He did not go back until he was arrested. He testified that deceased was his father and did not have any grudge with him.

M/s Wakoli for the accused filed written submissions. Counsel for accused submitted that none of the prosecution witnesses who testified said they saw accused commit the offence. The prosecution witness only testified about hearing noise and on going outside saw houses on fire and ran away and hid due to an earlier attack on the homestead where accused's elder brother had been killed.

That the deceased died from multiple and vicious injuries inflicted on him is not in dispute. Indeed, the post moterm confirmed the severe

penetrating injury with 10 of them on the head. This shows the viciousness of the attack. The injuries would not have been as a result of accident nor would they be self inflicted. They were inflicted by a person who had the intention to cause grievous harm or to kill; and therefore with the necessary mens rea for murder.

The main issue in this case is whether it is accused who inflicted the injuries. PW1 Justina Makokha the wife of the deceased testified that she heard noise as of people quarreling. She came out and saw her co-wife's houses on fire. She ran away and hid in the cassava farm. She came home the next day to be informed that deceased had been killed. PW6 Evaline Opanga the daughter in-law of the deceased also saw the stop mother in-law's house on fire. She heard the accused screaming and recognized him by the voice. She ran away to police and made a report. She did not see accused but only recognized his voice.

These were the only witnesses at the scene. PW3 Cpl Ezekiel and PW5 Cpl Peter Mayaka being police officers who arrested the accused and visited the scene respectively.

The prosecution did not call any witness who saw the accused assault the deceased. The prosecution sought to rely on the evidence of PW6 Evaline who testified that she heard the accused screaming and would recognize the voice. She did not attempt to say whether he heard him say anything due to his disability. Indeed the accused in his defence states that he was at home and when he saw the fire he ran away. From the evidence adduced I do not find that there is any evidence pointing to the accused as the person who had inflicted the injuries on deceased either alone or with others. In the absence of such evidence, I find the prosecution has not proved beyond reasonable doubt that accused murdered the deceased. I therefore find the accused Marko Patrick Makokha not guilty of the offence of murder contrary to Section 203 as read with Section 204 Penal Code and acquit him under Section 215 of the Civil Procedure Code.

Accused to be set at liberty unless otherwise lawfully detained.

DATED AND DELIVERED AT BUNGOMA THIS 2ND DAY JUNE, OF 2021.

S.N RIECHI

JUDGE