



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL CASE NO. 12 OF 2019

REPUBLIC.....-PROSECUTOR

=VRS=

ROBERT MASIRA ONDORO.....ACCUSED

JUDGEMENT

The accused is charged with Murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the charge are that on 8th June 2019 at Matongo village Bokiambori Sub-location in West Mugirango Location within Nyamira County the accused murdered Monicah Bochareri Ondoro.

The accused pleaded not guilty to the charge. At the trial the accused was represented by Mr. Ondigo Advocate while the State was represented by Mr. Majale, Senior Prosecution Counsel. The prosecution called ten witnesses while the accused was the only witness for the defence.

Briefly the facts of the case are that the deceased was the accused's mother; that on the material day the deceased was at home with her grandson Abel Mogaka Mogoi (Pw1) while her daughter-in-law Karen Moraa Kengura (Pw2) and the accused were in their respective houses within the homestead. The deceased noticed that one of her hens (chicken) was missing and suspecting the accused was involved went to his house to inquire if he had seen it. The accused came out of his house and denied that he knew where the chicken was and the deceased told him that she was going to report the matter. The court heard that it was at that juncture that the accused went into his house and got a plank of wood. Sensing danger, the deceased tried to calm him down but he would not listen. He hit her on the hand and when she used her other hand to ward off further blows, he hit that hand too. When she fell to the ground he continued hitting her on the head. Pw1 who was watching all this while started shouting and the accused ran into his house with the plank of wood. His aunt (Pw2) had also witnessed the event from her house where she was washing clothes. She too started shouting from the safety of her house and neighbours who heard their shouts went to the scene. They took the deceased who was by then unconscious, to Nyamira County Referral Hospital which referred her to Kisii Teaching and Referral Hospital which again referred her to Moi Teaching & Referral Hospital in Eldoret. The deceased's sons Ronald Ndoro (Pw3) and Richard Osoro (Pw5) and daughter Isabella Nyamusi (Pw4) testified that as they escorted the deceased to Eldoret she made a dying declaration to the effect that it is the accused who had beaten her. They stated that she was admitted to Moi Teaching & Referral Hospital Eldoret and was taken to theatre but her condition deteriorated and on 12th June she was taken to the ICU (Intensive Care Unit) where she died at about 1pm. The court further heard evidence that the assault upon the deceased was reported to the police on 9th June 2019 and that police officer Henry Isaak (Pw6) of Nyamira Police Post was in the team that apprehended the accused person and recovered the wooden plank that he had allegedly used to assault the deceased. The officers took him to Nyamira Police Station and booked him in for assault.

On 19th June 2019 a doctor at Moi Teaching & Referral Hospital performed a post-mortem on the body of the deceased and came to the conclusion that she died as a result of a severe head injury due to blunt trauma (assault). In the post-mortem report it is noted that at the time of the post-mortem the deceased had bandages on both upper limbs, a surgical wound (sutured) on the right side of the scalp 21cm long and a bilateral fracture-radius/ulna. All her internal systems were normal save that in the head there was massive subcutaneous haemorrhage (scalp), linear fracture to the left temporal/parietal bone and skull defect (right parietal bone) – removed surgically. Generalized subdural haemorrhage was also noted.

The accused person was initially held for assault but upon the death of the deceased he was charged with the present offence.

When this court put the accused on his defence he elected to testify on oath. He denied that he had killed anyone and stated that he was arrested by vigilantes for quarrelling with his brother. He stated that he did not know the whereabouts of his said brother and contended that those who arrested him knew best why they implicated him.

In summing up, Mr. Ondigo, Learned Counsel for the accused analysed the evidence of the prosecution witnesses and submitted that the same was full of contradictions, inconsistencies and non-corroboration and hence the prosecution had not proved the charge against the accused. He urged this court to acquit the accused forthwith.

On his part, Mr. Majale urged this court to find the evidence of the prosecution witnesses was consistent and that it was clear that the accused maliciously attacked and fatally wounded the deceased. He submitted that the consistency in the evidence of Pw1, Pw2 and Pw3 who were at the scene coupled with the dying declaration of the deceased confirm that the accused occasioned the injuries which caused the death of the deceased. He submitted that the accused inflicted the serious injuries evidenced by the post-mortem report and that the same satisfied the provisions of **Section 206 (b) of the Penal Code** as to malice aforethought. In support of his submissions Mr. Majale relied on the case of **Moses Wanjala Ngaira v Republic [2019] eKLR**.

The issues for determination in this case are **whether the accused caused the death of the deceased, whether it was by an unlawful act and whether it was of malice aforethought**.

Having carefully evaluated the evidence by both sides and also considered the rival submissions of Learned Counsel I am satisfied that the accused person caused the death of the deceased and that it was by an unlawful act. The accused was seen not just by one but two witnesses assaulting his mother, the deceased. It was at 2.30pm hence in broad daylight when he took a wooden plank which had nails attached to it and set upon his mother for asking him about her missing chicken. Although Pw1 and Pw2 gave different accounts of how it happened there was no contradiction whatsoever when it came to the fact that they saw the accused beating the deceased with that piece of wood. They also corroborated each other as to the fact that by the time the accused was done with her she lay on the ground unconscious. They both also stated that he beat her several times on the hands and the head.

The post-mortem report confirmed that she died as a result of a severe head injury due to blunt trauma or assault. This is consistent with the evidence of the two witnesses. They both knew the accused person well and the offence having been committed in broad daylight the circumstances were favourable to a positive identification and the evidence of identification was free from any possibility of error. Moreover, if there was any doubt that Pw1 and Pw2 identified the accused that doubt was erased by the dying declaration made by the deceased to her sons Pw3 and Pw4. Whereas the deceased was unconscious when she was being taken to hospital it is on record that she regained consciousness after being given first aid in Nyamira hospital and when she spoke it was to say that her son the accused had finished her. She died barely one week thereafter and her communication to Pw3 and Pw4 therefore qualifies as a dying declaration. The evidence that the accused killed the deceased is so strong that the mere denial by the accused could not resist it and I am satisfied therefore that that fact was proved beyond reasonable doubt.

As to whether the accused caused the deceased's death by an unlawful act this court heard that the genesis of the altercation that led to the assault was a missing chicken which the deceased suspected the accused had stolen from her. The deceased had every right to question the accused about it. She was not armed when she went to his house and according Pw2 she even tried to calm him down by telling him that she was not going to take the issue any further. The accused did not listen but went for a wooden plank and beat her mercilessly. The attack on the deceased was not justified at all and as there is evidence that she died as a result of the serious injuries she sustained during the attack I am satisfied that the cause of death was by an unlawful act.

Section 206 of the Penal Code sets out the circumstances by which malice aforethought is established. In this case I am satisfied that the circumstances establish more than one of those circumstances. By beating the deceased on the head with that size of a wooden plank which had a nail, the accused must have intended to cause her grievous harm if not to kill her and even if he did not have such intention the facts reveal that he must have known that it would probably cause her grievous harm. A mental assessment done on the accused before this charge was preferred against him indicated that he was sane. He therefore knew that he was doing. I am therefore satisfied that the offence of murder was proved beyond reasonable doubt.

In the premises I find him guilty of murder contrary to Section 203 as read with Section 204 of the Penal Code and convict him accordingly.

Signed, dated and delivered at Nyamira this 6th day February 2020.

E. N. MAINA

JUDGE