



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYAMIRA**

**CRIMINAL CASE NO. 15 OF 2019**

**THE REPUBLIC.....PROSECUTOR**

**- VRS -**

**JOSPHAT MONARI OMOSA.....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 offence are that on 6<sup>th</sup> July 2019 at Enchore village in Gesima Location, Masaba North Sub-county, Nyamira County the accused jointly with others not before court murdered STEPHEN OSIEMO MAKORI.

The accused pleaded not guilty to the charge following which the prosecution called nine witnesses in an effort to prove its case. The sum total of their evidence was that on the material day the people living close to the accused's home heard screams there and went to see what was happening only to find the accused standing at the gate with a blood stained panga. He was daring people to enter his house so they feared and stood by the fence watching. Among the people who went there was the mother of the deceased (Pw1) and Peter Onwonga Mose (Pw3) a neighbour. The deceased's mother, Margaret Nyakerario (Pw1) testified that she was in her house when she got information that her son (the deceased) was in the accused's house. She went there but the accused chased her away prompting her to report the matter first at Enchore Police Post and then to Keroka Police Station. The court heard that it was not until police officers from Keroka Police Station arrived that people moved closer to the house. Peter Mose (Pw3) testified that when he entered the house he saw the deceased sitting on the floor at a corner of the sitting room with blood on his head and clothes; that the deceased was conscious but unable to speak. The court was told that shortly thereafter the area Assistant Chief (Pw4) came with a police land cruiser which carried the deceased and the accused person. The deceased was taken to Gucha District Hospital. The witnesses told the court that there were allegations that the accused had found his wife and the deceased in a compromising position in their marital bed. Peter Mose (Pw3) testified that another allegation was made that there had been an attack at the accused's house although he personally did not see the attackers. He also stated that the next day he heard one Thomas Omari bragging it was "**finished**". He stated that he had seen the said Thomas Omari in the accused's house on the material night and that he (Thomas) had assisted in carrying the deceased to the police vehicle.

Assistant Chief Henry Otiso (Pw4) told the court that on the fateful night he went to the accused's house at about 8.45pm after receiving a call from a village elder who informed him that someone had been found in the accused's house and was being beaten by people. He stated that on arrival he found the deceased who was dressed in a shirt but no trousers seated on the floor. He confirmed the deceased had been battered. He stated that the accused was in the house with other people and that the accused kept pacing up and down saying he had caught the deceased in the act with his wife. The Assistant Chief (Pw4) stated that on seeing this he called the police who went and took the deceased to hospital. He testified that the accused and the deceased lived about 100 metres apart and he had never received a report concerning them prior to this incident.

The deceased soon succumbed to the injuries and on 11<sup>th</sup> July 2020 Dr. Charles Oketch (Pw2) performed a post mortem and opined that the cause of death was due to cardiorespiratory arrest secondary to crush injuries to the chest and severe penetrating injury to the head with resultant haemothorax and bleeding into the brain. According to the doctor the body was dressed in a red T-shirt that was stained with blood and it had multiple lacerations on the legs and head. He stated that the anterior chest wall was depressed indicative of a crush injury and it had bruising on the left side of the head, 3 cut wounds on the parietal area of the head and a depressed skull fracture. The body also had depressed rib fractures with haemothorax bilaterally and there was also bleeding into the brain. The body was identified to the doctor by the deceased's father (Pw5) who had travelled home from Nairobi upon receiving news of the assault.

Inspector Marucha (Pw6) the officer in-charge of Scenes of Crime in Nyamira County produced four photographs taken at the house of the accused person the day following the occurrence.

Vanice Basweti (Pw7) the deceased's wife testified that on the material day the deceased arrived home from work at about 7pm and after keeping a power saw he had been working with outside the house he left saying he had been summoned by the village elder. She stated that shortly thereafter she heard screams at the accused's house about 200 metres from theirs. She rushed there only to be confronted by the

accused who was holding a panga. She stated that she could hear her husband inside the accused's house but she could not do anything because she was chased away by the accused person. She stated that on 10<sup>th</sup> July 2019 police officers told her to go collect her husband's gumboots which they alleged were found in the accused's house. She stated that she positively identified them as the ones her husband was wearing on that fateful evening. Pw7 and her mother-in-law (Pw1) also testified that there was a dispute between the deceased and the accused. While Pw1 attributed the dispute to land and alleged that the accused had threatened her on several occasions Pw7 stated she did not know its genesis. Pw7 further stated that she heard the call that was made to her husband on the fateful day and that she identified the caller as Paul the village elder. However, upon being cross examined by defence Counsel she stated that it was the deceased who told her the caller was Paul.

Richard Kimutai Langat (Pw8) a government analyst based at Kisumu testified that on 16<sup>th</sup> July 2019 he received a blood stained rungu, blood stained gunny bag and a blood sample of the deceased and upon analyzing them he found that they all generated a DNA belonging to the deceased. He stated that he did not receive a blood sample of the accused person. Sgt. John Okoth (Pw9) testified that the rungu and gunny bag were recovered from the accused's house when a team of police officers went to the accused's house on 8<sup>th</sup> July 2019. He reiterated the allegation made by the other witnesses that the accused assaulted the deceased after finding him with his wife. Asked how the officers determined that was the accused's house, Sergeant Okoth stated that the parents of the accused confirmed it was. He was candid that none of the witnesses claimed to have seen the accused beating the deceased. Like the deceased's wife (Pw7) he stated that the deceased was assaulted by several people not by the accused alone.

In his defence the accused person elected to make an unsworn statement. He told the court that he was on his way home from work at 9pm on the material day when he was arrested and taken to Gesima Police Post. He stated that he was detained at Gesima for two days before he was taken to Keroka Police Station. He contended that there was no grudge or dispute between him and the family of the deceased and was surprised he was accused of murder.

In summing up, Mr. Bwonwong'a, Learned Counsel for the accused submitted that the prosecution had not established a prima facie case against the accused person. He submitted that none of the witnesses claim to have seen the assailants they alleged were in the accused's house. Counsel contended that no clear evidence was given as to the motive of the murder. He stated that whereas the deceased's wife alleged a land dispute between the accused and the deceased, other witnesses alleged the deceased was found in the accused's matrimonial bed; that however none of the witnesses came out clearly. Counsel further submitted that since it was dark the circumstances did not favour a positive identification. Counsel reiterated the accused's evidence that he was shocked to be arrested on his way home from work and stated that that was a clear indication that the accused was not at home. Counsel wondered at why the clan elder who allegedly called the deceased was not called to testify and why no investigations were carried out to establish who the subscriber of the phone used to call the deceased was. He urged this court to acquit the accused person.

Mr. Majale, Learned Prosecution Counsel stated that he wished to rely entirely on the evidence on record.

Having considered the evidence carefully I have no doubt in my mind that the deceased was killed. There is overwhelming evidence that he was locked up in a house where he was assaulted. His wife (Pw7) told this court that the deceased left their house after being called by someone who he told her was their village headman. All the eye witnesses testified that they finally got to have a glimpse of him when police officers arrived at the scene. They testified that he was bleeding and his clothes were full of blood which confirmed that he was indeed assaulted. In his evidence, the government analyst confirmed that he examined items which had blood that matched the DNA of the deceased. The investigating officer (Pw9) testified that the said articles were found in the house which constitutes the scene of this crime. The deceased's mother (Pw1) confirmed it was her son in that house and this is further corroborated by the evidence of the government analyst. The injuries enumerated by the doctor (Pw2) who conducted the post mortem on the body of the deceased confirm that the deceased was battered to death. It is also my finding that from the nature and extent of those injuries it can be deduced that the assailant's intention was to kill the deceased or to occasion him grievous harm. On the whole therefore, I am satisfied that the deceased's death and the cause of that death were proved beyond reasonable doubt.

The only **other issues for determination are whether the accused caused that death and whether it was of malice aforethought.**

This offence was committed at night. From the witness accounts the time was between 7pm and 8pm. The scene was in a house which all the witnesses including the area Assistant Chief (Pw4) stated belonged to the accused person. All the witnesses knew the accused person as they were his neighbours. They all stated that when they heard noise and rushed to the scene they found the accused outside the house holding a panga. They could therefore go no further although they could hear someone being beaten inside. My finding is that although it was at night these witnesses positively identified the accused person. They knew him well and not only did they see him but he also spoke when he confronted them and dared them to go into the house. This was evidence of recognition both visually and by voice which as was held in the cases of **Ajanoni & Another v Republic [1980] KLR 59** and **Choge v Republic [1985] KLR 1** is "**more alluring and reliable.**" I am satisfied beyond reasonable doubt that the accused was at home and in his compound on that night and that he was positively identified by the witnesses. His evidence which was unsworn and hence not tested through cross examination cannot match that of the prosecution witnesses which I find credible and cogent. I do not therefore believe that he was arrested on his way from work. To the contrary I find it a fact from the evidence that he was not only present at the scene but that he was privy to all that was happening in his house and his duty was to ensure that nobody went inside to rescue the deceased. It is my finding that even if he himself did not physically assault the deceased he participated in the assault by abetting it. **Section 20 (1) (c) of the Penal Code** makes him as guilty of the crime as the people who actually committed it. Accused knew what was happening in the house hence the reason he was preventing people from going there. The offence took place in his house as he kept guard outside and I am therefore satisfied he committed the offence.

What about malice aforethought? The nature and extent of the injuries inflicted upon the deceased by the assailant(s) clearly evidence an intention to kill him or cause him grievous harm which constitutes malice aforethought as defined under **Section 206 (1) of the Penal Code**. Once malice aforethought is established the offence committed becomes one of murder except under the circumstances set out in **Section 207 of the Penal Code** which states: -

**"207. When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would**

**constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, is guilty of manslaughter only.”**

**Section 208 (1) of the Penal Code** defines provocation in the following terms:-

**208 (1)The term “provocation” means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of selfcontrol and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.”**

In this case some of the witnesses attributed the assault on the deceased to his being found in the accused’s matrimonial bed while his mother (Pw1) and (Pw2) attributed it to a land dispute. The first scenario was however based on hearsay as none of the witnesses were present when it happened. The accused himself did not raise provocation as a defence instead choosing to deny that he was anywhere near that scene on that night. It is my finding therefore that the act that caused the death of the deceased was unlawful and further that there is no evidence to negate that what occurred was murder. In the premises I find the accused guilty of murder contrary to Section 203 as read with Section 204 of the Penal Code and convict him accordingly.

**Signed, dated and delivered in open court this 15<sup>th</sup> day of October 2020.**

**E. N. MAINA**

**JUDGE**

**Judgement delivered virtually via Microsoft Teams**