

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CRIMINAL CASE NO. 10 OF 2020

THE REPUBLIC.....PROSECUTOR

=VRS=

ERICK NYAKORIA MOSE.....ACCUSED

RULING

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 the night of 6th May 2020 at Mongoris Sub-location he murdered Frida Nyaboke, deceased.

The accused pleaded not guilty to the charge following which the prosecution called twelve witnesses to prove its case.

Briefly the prosecution's case is that the accused and the deceased were husband and wife; that on 4th March 2020 at about 2pm while the accused was away the deceased left her house in the company of Maureen Bochaberi (Pw3) a self-confessed chang'aa brewer who happened to be her friend. When the accused returned home two days later he did not find her and when he inquired where she was their children Dominic Nyakoria (Pw1) and Stacy Nyakerario (Pw2) informed him she had gone with Maureen (Pw3). He decided to go for her with their son (Pw1) but when they got to Maureen's house they could not see the deceased. The accused asked Maureen (Pw3) where she was. The court heard that initially Maureen (Pw3) denied the deceased was there only for them to hear the deceased shouting from one of the rooms in the compound. Pw1 testified that it was Memba (Pw6), one of the many people who were drinking illicit brew in Maureen's house, who told them the deceased was locked up in one of the rooms there. However, Onserio Onyancha (Pw5) and Maureen (Pw3) denied that the deceased was confined in a room and stated that she was seated in an open place which was being used as a store where everybody including the accused could see her. Two other witnesses, Memba (Pw6) and Jared (Pw9) stated that the deceased was in Maureen's sitting room but she was not confined there. They however agreed with Pw1 that the deceased was drunk but she could walk and talk and that she walked away with Pw1 and the accused unaided save that she left her slippers behind forcing the accused to go back for them. Pw1 and his sister (Pw2) told this court that when they arrived home they were left to put the deceased to bed as the accused went to take care of the cattle. They stated that the deceased asked for food and they gave her. When the accused returned they took dinner and then retired to bed with Pw2 sleeping in the same room with the deceased while the accused, Pw1 and their little brother retired to a separate house. The court heard that the following morning Pw2 called Pw1 to tell him that the deceased did not respond when she tried to awaken her only for them to learn she was dead. Both Pw1 and Pw2 told the court that all this happened while the accused was asleep in the other house. They also stated that he did not leave the house where he was sleeping the whole of that night and nothing had transpired between him and the deceased. Pw1 testified that the deceased did not seem to have had any injuries when they took her home from Maureen's (Pw3) house. He however stated that since it was getting dark he had not observed her closely. He also stated that nothing happened between the accused and the deceased on the way home. As for Stacey (Pw2) it was her testimony that she spent the entire night with the deceased. The two witnesses stated that prior to the occurrence, the accused had been away from home on a safari but they did not know where he had gone. Joshua Onserio Onyancha (Pw5) and Richard Memba Tome (Pw6), both of who were present at Maureen's (Pw3) house when the accused went for the deceased were alleged

to have told the police that they had heard screams at the accused's homestead on the material night. In his examination in chief Pw5 denied hearing screams only to recant when Prosecution Counsel confronted him with his statement. It was then that he told this court that although many people heard the screams at the accused's home nobody went there as it was not unusual for the accused and the deceased to fight. This evidence of domestic violence was confirmed by the area Chief Ongera Nyakundi (Pw7) and by Pius Rono (Pw8), an Administration Police Corporal attached to the Chief's office, who gave evidence that on 4th May 2020 they had resolved a domestic dispute between the couple arising from the deceased's drinking and the accused's neglect of his parental role and they had both agreed to change only for the deceased to be found totally drunk the next day. Pw7 testified that he did not see or hear from them again until the morning of 7th when the accused informed him that Frida (the deceased) had died. He stated that he went to their house and found the deceased lying on a bed. He stated that the deceased was covered and was not breathing. It was his evidence that she had no injuries and there were no signs of a struggle in the room. However, there was contrary evidence in the testimonies of his colleagues IP Daniel Marucha (Pw11) of Scenes of Crime who produced photographs of the deceased with several injuries on the head and PC Erick Langat (Pw12), the investigating officer in the case who stated that the deceased had head injuries as if she was hit with a metal or iron bar. Benard Morara Nyakundi (Pw10) who attended the post mortem also testified that the deceased's left hand and both legs were swollen; that her head had a depression and that she had scratch marks on the face as if she had been assaulted. Dr. Ombati Timothy Mokuu (Pw4) testified that it was him who conducted post mortem on the body of the deceased. He confirmed that the body had several injuries and stated that in his opinion the cause of death was severe head injury secondary to blunt trauma with multiple body injuries. He also confirmed that the body was identified as that of the deceased by Benard Morara Nyakundi (Pw10) and one Joel Bosire.

From the above evidence there is no doubt that the death of the deceased was by a human hand. Although those closest to the deceased sought to hide it from this court there is evidence from the two police officers (Pw11 and Pw12) and from the doctor, who in my view are all independent witnesses who have no reason to lie, that the deceased had injuries consistent with an assault. I find no reason to depart from the doctor's opinion that she died as a result of those injuries. I can also say without fear of contradiction and I do so find that the person who caused her death did so by an unlawful act. Being drunk as she was alleged to have been she could not have provoked or even assailed anyone as to justify an assault such as is evidenced by the findings of the post mortem and the photographs exhibited by Pw11. The assault was therefore without any justification. The fact that she was a drunkard or used to drink and neglect her duties as a mother/wife do not provide a lawful reason to assault her let alone to kill her. The nature and extent of the injuries also bespeak of an intention to either kill or cause her grievous harm. Having satisfied myself that the death of the deceased was by a human hand and by an unlawful act and also that it was of malice aforethought hence establishing the offence of murder, the only issue to determine at this stage is whether there is evidence that the accused committed the offence – ***see Section 306 (1) of the Criminal Procedure Code.***

As in such cases the prosecution was required to prove its case beyond reasonable doubt. However, having considered the prosecution's evidence in its entirety, I find there is no cogent evidence to connect the accused person to this offence. It is my finding that the prosecution did not adduce evidence to establish whether the injuries found on the body of the deceased were inflicted at the home of Maureen (Pw3) or after she was taken home by the accused and their son (Pw1). The people who were at Maureen's (Pw3) house seemed to me intent on a cover up and did not tell the court the truth of what transpired there. What for instance would Pw3 have been doing with the deceased in her home for a whole two days? Why did she keep her in her house? One of the witnesses (Pw9) seemed to suggest that she was a nuisance hence the reason she was locked up in the house. This in my mind gives rise to a suspicion that she (Pw3), could as well have beaten her. Pw5, Pw6 and Pw9 could not agree on where exactly the deceased was when the accused arrived at Maureen's home and my conclusion is that either their minds were too impaired by the liquor they were partaking as to tell what was happening around them or they were simply not telling the truth. Either way their evidence did not implicate the accused. As for Pw1, he told the court that when they picked the deceased he did not observe her closely to see if she had any injuries. The nature of the injuries seen in the photographs and described by the doctor both in his testimony and the post mortem were not such as would require close observation to note meaning

that Pw1 might have also not been telling the truth.

On the other hand, Pw1 and Pw2, although they lost a mother, gave evidence that completely absolved the accused of this crime. They were categorical that their father did not as much as touch or lay a finger on the deceased. The only piece of evidence that tended to implicate him was given by Joshua Onserio Onyantha (Pw5) who alleged to have heard screams emanating from the accused's home on the material night. This witness did not however impress me as credible as he had recanted his evidence only to own up when Learned Prosecution Counsel confronted him with his recorded statement. In the end therefore his evidence was rendered unreliable and untrustworthy and there is nothing to connect the accused with the death of the deceased. To put the accused on his defence therefore would be tantamount to asking him to prove his innocence which I ought not to do. Accordingly, I make a finding that there is no evidence that he committed the offence and acquit him under Section 306 (1) of the Criminal Procedure Code. He shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

Signed, dated and delivered in open court this 8th day of October, 2020.

E. N. MAINA

JUDGE