



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL CASE NO. 27 OF 2015

REPUBLIC PROSECUTOR

VERSUS

EVANS NYONGESA ALIAS JOHNACCUSED

J U D G M E N T

1. The accused was charged with the offence of **Murder contrary to Section 203 as read with Section 204 of the Penal Code**. The particulars of the offence was that on the **1st day of September 2015 at Tulwet village within Trans Nzoia County murdered Margaret Nanjala Kiliswa. The accused denied the offence. The prosecution called a total of 9 witnesses. At the close of the prosecution case the accused was put on his defence and he gave unsworn evidence.**

2. The summary of the proceedings as presented during trial was as hereunder. **PW1 Twina Kemboi** , a minor gave unsworn evidence. He said that on that fateful night, the accused and the deceased quarreled. The accused then took out a panga and cut her severally on her body inflicting serious injuries. He thereafter ran away. He could see well as the light from a tin lamp (“Korboi”) enabled him.

3. **PW2 Roseline Naliaka Khaemba** a chairlady of “Nyumba Kumi” initiative testified that at 10.00 pm on 15/9/2015 as she slept, she heard screams emanating from the deceased home. She dressed up and went to the scene where she found the deceased lying in a pool of blood. There were other people including the village elder. She took the deceased to Tulwet Dispensary but were referred to the District hospital. While at the hospital, the deceased told her that it was the accused who had assaulted her. She unfortunately died two days thereafter. She told her that the accused has demanded money from her.

4. **PW3 Peter Wekesa** is a neighbour to the deceased as well as the accused who were staying as husband and wife. He said that the deceased came to his house while he was asleep. He did not have clothes except a short. He had blood all over his body. He threatened to cut him if he did not open the door. When he heard people coming he left. He went to the scene and found the deceased injured. She was taken to the health centre and later to the District hospital where he heard that she had died.

5. **PW4 Stephen Isika** testified that he was a neighbour to the accused . He heard screams from the deceased home that night. He went to the scene and heard that the accused had disappeared to Uganda. On 21st while being ferried by his son on a bicycle at around Toll station area he saw the accused sitted beside a tree and he organised for him to be arrested. The son went to AP Camp and called the police officers. He said that he knew the accused who was his agent during his campaigns for conucillorship.

6. **PW5 Ernest Wekesa Nyongesa** is a member of the vigilant group. He equally heard noise that night and he rushed to the scene and he saw someone running away out of the toilet. He shone his torch and saw that it was the accused. The deceased was crying and saying that it was the accused who had cut her. They took her to the hospital for treatment.

7. **PW6 Abinai Amukoya** said that he was a village elder at Tulwet. He also heard screams at night and went too the scene where he found the deceased badly injured. He assisted the deceased to the hospital. He found the panga which was in the house and it was the weapon used to attack the deceased. He gave it to the police officers the following day.

8. **PW7 Daniel Wanyonyi** is a brother to the deceased. He said that he participated in the exhumation and later witnessed the postmortem of the decomposing body. He also said that he spoke too the deceased at the hospital who told him that she had been cut by the accused.

9. **PW8 Dr. Okumu Moses** produced the postmoterm report on behalf of Dr Obala who formed an opinion that the cause of death was **“cardiorespiratory arrest secondary to massive hemorrhage due to polytrauma”**.

10. **PW9 P.C. Sammy Kimanzi** carried out the investigations after the matter was reported at Kitale police station. He recorded statements from the witnesses as well as obtained an order for the exhumation of the deceased body. He preferred charges against the accused. He equally produced the Murder weapon – panga.

11. When placed on his defence, the accused offered unsworn evidence. He said that he went to Kamukuywa on 4/9/2015 for a funeral. After the funeral he went home to build a house. He decided to visit his family and was on the way arrested by members of the public who accused him of killing someone. He was arrested and taken to AP Camp and later taken to Kitale police station and charges preferred against him which he still denied.

Analysis and Determination.

12. The court has perused the entire evidence as well as the exhibit produced and the written submissions by both counsels. The question of the deceased cause of death is not in dispute. The nature of injuries were clearly explained by the witnesses and the conclusion of the postmortem.

13. The question is whether it was the accused who injured the deceased. The crucial evidence is that of the minor. Although he was young and gave unsworn evidence, I find his evidence uncontroverted. These were people he was staying with in the same house. The light from the tin lamp (koroboi) assisted him in seeing what was taking place.

14. PW2 evidence centres in my view on what I term as a dying declaration. She was able to take the deceased all the way from her house to the hospital. She told her concerning the source of the quarrel, namely that the accused needed money from her. She gave him Kshs 500 for that is what she had but he was not satisfied. She gave him another Kshs 500 but he was not satisfied and thereafter proceeded to attack her.

15. PW2 stayed for had 2 days with the deceased before she died. This allegation of the accused demanding for cash from the deceased was narrated by the deceased to PW7 as well.

16. PW5 saw the accused getting out of the toilet and running away. The light from the torch he had enabled him to see the accused.

17. The accused that night went to the house of PW3 who had to restrain his dogs from attacking him. He was bloodstained. The witness was able to identify him using the torch he had. The accused equally threatened to attack him.

18. The sum total of the above evidence as narrated by the prosecution is that there were both direct and circumstantial evidence sufficient to convict the accused. Infact the evidence so far presented by the deceased to PW2 and her brother can be termed as a dying declaration. The courts have however warned that the same ought to be taken very cautiously. That position was clearly spelled out in the case of **Choge Vs Republic (1985) KLR 1** where the court stated that;-

“ The general principle on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at the point of death and the mind is induced by the most powerful consideration to tell the truth. In Kenya, however, the admissibility of a dying declaration does not depend upon the declarant being at th time of making it, in a hopeless expectation of imminent death.

There need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in the reception into evidence of such a declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person.”

19. In my view the dying declaration moreless was barked by the direct evidence of the witness who saw the accused assault the deceased,, those who saw him run away and the one who saw him blood stained that night. The defence he offered was of no probative value. He did not at any rate deny his relationship with the deceased or at all.

20. In conclusion I find that the prosecution did discharge its mandate. The case was proved beyond any shadow of doubt. The accused is hereby found guilty under the provisions of Section 203 of the Penal Code.

Delivered, signed and dated at Kitale this 11th day of February, 2019.

H.K. CHEMITEI

JUDGE

11/2/19

In the presence

Mr Omoria for State

Mr Abari for Accused

Accused – present

Court Assistant – Kirong

Judgment read in open court.