



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYAMIRA**

**CRIMINAL CASE NO. 48 OF 2015**

**REPUBLIC.....PROSECUTOR**

**=VRS=**

**1. EVANS NYAKUNDI MONAYO.....1<sup>ST</sup> ACCUSED**

**2. CHARLES MOMANYI MONAYO.....2<sup>ND</sup> ACCUSED**

**3. JANE KWAMBOKA MONAYO.....3<sup>RD</sup> ACCUSED**

**JUDGEMENT**

The accused persons are charged with Murder contrary to Section 203 as read with Section 204 of the Penal Code.

The information states that on 26<sup>th</sup> January 2012 at Nyagacho village, Mogusii Sub-location Mekenene Location in Nyamira County within Nyanza Province they murdered Olipha Kerubo Nyakundi. They pleaded not guilty to the charge.

To prove its case the prosecution called six witnesses. Briefly the prosecution's case is that on 26<sup>th</sup> January 2012 at about 11pm Joshua Momanyi (Pw2) the Senior Assistant Chief for Mogusii Sub-location received a telephone call from the village elder for Kamaseba village saying that the 1<sup>st</sup> accused and his wife Olipha (the deceased in this case) had been attacked by gangsters. He immediately went to their house and found the deceased lying on a couch in the sitting room. She was dead. He called a police sergeant at Manga Police Station and police officers went and removed the body and took it to the mortuary. The Assistant Chief (Pw2) also advised the 1<sup>st</sup> accused to go to hospital as he may have sustained injuries. The court heard that when a post mortem was conducted on the body of the deceased, it revealed that she had died as a result of severe head injury due to blunt trauma and a depressed skull fracture. Dr. Ben Lipesa Ondere (Pw1) testified that he together with another doctor conducted that post mortem on 9<sup>th</sup> February 2012 at Nyansiongo Health Center. He stated that the significant findings were multiple cut wounds on the parietal and occipital parts of the head and that there was a depressed skull fracture on the occipital region.

The star witness was Dennis Ongoa Nyakundi (Pw5) a son of the 1<sup>st</sup> accused and the deceased. This is a witness who had testified before I took over the trial from my predecessor Nagillah J but who I ordered recalled. He told this court that at the material day he was a pupil at Nyagacho Primary School although he was in nursery class. He stated that on the material day he went home and had lunch with his mother (the deceased) and his father (the 1<sup>st</sup> accused). After that his father left. He stated that at about 8pm his father returned with his uncle (2<sup>nd</sup> accused) and his aunt (the 3<sup>rd</sup> accused). They found him in the bedroom and his mother in the sitting room. He stated that they (him and his mother) were using a tin lamp which one of the accused persons put out. The accused persons did not say anything to them but instead they set upon his mother. His mother shouted for help but nobody went to help her. He could see what they were doing from where he was – on the bed in the bedroom which did not have a door. After beating his mother, they went outside and dug a hole near the door after which his father went to him and asked him where his mother was. He pointed him to the couch where she was. His father, the 1<sup>st</sup> accused, started screaming because she was dead. He stated that by then the 2<sup>nd</sup> and 3<sup>rd</sup> accused had gone away. Many of their neighbours went to the scene when the 1<sup>st</sup> accused started shouting and that is when he (Pw5) saw that his mother was bleeding on the head. The witness testified that that was not the first time the 1<sup>st</sup> accused had beaten the deceased although he did not know why he used to do that. He recalled that the accused persons had used the handle of a hoe to beat his mother on that night.

The court further heard that this case was investigated by one Senior Sergeant Mulikoh who retired from the force. The investigations were handed over to one Corporal Chepkonga who was later transferred to Kiambu. Corporal Jackson Kisoe (Pw6) told the court that he stayed with the investigations file for 3 days and could confirm that witness statements were recorded and that the body of the deceased was found in her house. He could also confirm that a post mortem was conducted on the body.

When this court put the accused persons on their defence, they all elected to remain silent. Thereafter Mr. Bwonwong'a, Advocate who represented the accused persons throughout the trial reiterated submissions he made after the close of the prosecution's case. In those submissions he stated that the evidence of Pw5 differed greatly with the statement he had made to the police. He stated that whereas the witness had told the police that he was in class one at the time, in court he said he was in nursery school. Mr. Bwonwong'a stated that the witness also contradicted himself when he said the accused persons kept mum throughout the incident but later said they asked for money. Mr. Bwonwong'a wondered how the witness could not identify the person who blew out the lamp if indeed he could see them from the bedroom. Mr. Bwonwong'a submitted that the witness was either sleeping or lying in bed and pointed out that the witness stated he did not hear the 2<sup>nd</sup> and 3<sup>rd</sup> accused talk and that he did not know the voices of the assailants. Counsel contended that the witness was inconsistent as to the time the assailants went into the house with a torch and further submitted that it was not possible for the witness to identify people who were digging a hole from outside the house while he himself was inside the house. Counsel submitted that Pw2 corroborated evidence that there was an attack at the house of the 1<sup>st</sup> accused. He submitted that the 2<sup>nd</sup> and 3<sup>rd</sup> accused rushed to the scene to rescue the victims. He wondered why the other people in the homestead at the time did not record statements and submitted that no motive was established. He urged this court to find that the prosecution had not proved its case as no specimens were sent for analysis. He urged this court to acquit them.

On his part prosecution Counsel indicated that the prosecution would rely on the evidence on record and did not wish to submit.

**Section 203 of the Penal Code** defines murder in the following terms: -

**“203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”**

**Section 206 of the Penal Code** provides that **mens rea** is established if any or all of the following circumstances are established: -

**“(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;**

**(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;**

**(c) an intent to commit a felony;**

**(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”**

The issue for determination therefore is whether the accused persons killed the deceased and if they did whether it was by an unlawful act and of malice aforethought.

Pw2, (Senior Assistant Chief) told this court that when he went to the house of the 1<sup>st</sup> accused upon being told they had been attacked by gangsters, he found the 1<sup>st</sup> accused's wife lying on the couch dead. Pw5 testified that his mother was beaten with a hoe stick by three people who entered the house while she was in the living room and he in the bedroom. The doctor (Pw1) who performed the post mortem testified that the cause of death were injuries on her head. Such injuries are in my view consistent with an assault. It is my finding that the evidence of Pw1 and Pw2 taken together with that of Pw5 confirms that the deceased was killed. Her death was not due to natural causes. I am also satisfied that whoever did it, killed her pursuant to an unlawful purpose.

Although it is alleged that she was killed by gangsters that is not borne by evidence and it is my finding that the evidence by Pw5 that it is his father (1<sup>st</sup> accused), uncle (2<sup>nd</sup> accused) and aunt (the 3<sup>rd</sup> accused) persons who killed her is credible. Pw5 testified that after having lunch with his parents, his father left and did not come back until 8pm. Although the light was blown out that was not done immediately. According to Pw5 the assailants put out the lamp when they started beating the deceased. I am satisfied that Pw5 had opportunity to see and recognize the assailants before one of them put out the lamp. He knew them very well. It is clear from his evidence that his father had not been in the house all along and only came back with the assailants. I also believed the evidence of Pw5 that the accused persons dug a hole from outside so that it could look like gangsters had indeed struck. This was in an effort to confuse people into thinking that they were not the ones who had killed the deceased. I am however satisfied that there is evidence that points to their guilt beyond reasonable doubt. Although Pw5 was young at the time he could recall very vividly the events of that night. Contrary to Mr. Bwonwong'a's assertion there was no evidence to prove that he was asleep. He may have been in the inner room but he could hear and see all that was taking place. Mr. Bwonwong'a's submission that the witness contradicted himself is not supported by evidence as the statement he made to the police was not tendered in evidence. The witness remained unshaken even upon vigorous cross examination from counsel and I am satisfied that he was a witness of truth.

It is not motive but malice aforethought that is required to be established in a murder case. It is my finding that malice aforethought was proved beyond reasonable doubt. First of all, there is evidence that the accused persons tried to cover up what they had done by digging a hole to fool people that the deceased had been killed by robbers and that the 1<sup>st</sup> accused pretended to Pw5 that he did not know of his wife's whereabouts and to cover up he started shouting. Secondly, the three of them beat the deceased for no reason at all. They found her in her house and the injuries they inflicted on her were no doubt intended to kill her or to cause her grievous harm. Indeed she died as a result of those injuries. I am satisfied that the charge against them was proved beyond reasonable doubt. I find them guilty of murder contrary to Section 203 as read with Section 204 of the Penal Code and convict them accordingly.

**Signed dated, and delivered in open court this 7<sup>th</sup> day of February 2019.**

**E. N. MAINA**

**JUDGE**