



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL CASE NO. 70 OF 2015

THE REPUBLIC.....PROSECUTOR

=VRS=

SAMWEL OTIENO NYAKWARA.....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 the night of 8th and 9th October 2015 at Miruka village within Miruka Sub-location in Nyamira South District within Nyamira County the accused jointly with another not before court murdered Beatrice Nyakanga Nyakwara.

The accused pleaded not guilty to the charge following which the prosecution called eight witnesses. The star witness was Kelvin Nyakwara (Pw1) who testified that his mother the deceased, was cut with a panga by his father, the accused. He stated that he was not sure of his age but he could remember that it was at night and he was sitting on a chair in the house. He stated that his mother and the accused quarrelled and after that the accused cut his mother. The accused, then called his mother. Pw1 stated that after that the accused made him to drink the deceased's blood then told him to go to sleep. Nyakundi Nyamwange (Pw2) testified that the accused and the deceased were his parents but he was not at home when the incident occurred and only heard about it from his brother Pw1. Penina Moraa (Pw3) testified that she was away in Narok at the time. She stated that the deceased who was her sister had told her that her marriage to the accused was problematic and that the accused used to spend the night outside on a mattress. The witness stated that the accused used to threaten the deceased and the deceased had reported the threats to their Chief. She stated that the deceased had gone back to her maiden home after an argument with the accused but had soon gone back to him. Violet Kwamboka (Pw4) testified that on 2nd October 2015 the accused, who is her step-father, went to her house and told her that her mother, the deceased, was not at home. She therefore went to the deceased's home the next day. She found Kelvin then aged three years (Pw1) who told her that the accused had cut their mother on the head with a panga. He even led them to the place it had happened. Pw4 told this court that the deceased and the accused had been married for only two years and the deceased was expecting their first child together although the deceased had children from a previous union. She stated that the accused had threatened to kill the deceased on several occasions. On this day she went home with her uncle and so when Kelvin (Pw1) told them that their mother's body had been taken to the river they went there and found the head, neck and torso separately. The parts were collected by the police and taken to the mortuary. Tabitha Biyaki (Pw5) another of the deceased's daughters testified that when she learnt that her mother was missing she went home and her little brother Kelvin told her how the deceased cut their mother on the neck with a panga. She stated that when she probed him further he started crying so she did not get an answer on the time it had happened. Like her sister Violet (Pw4) she told the court that the deceased used to beat the deceased and that she (Pw4) left home to get married when the accused made sexual advances at her.

PC Walter Kiprono (Pw6) was part of the team that retrieved the deceased's mutilated body from Charachani River. They took the body to the Nyamira Hospital Mortuary. He then instituted investigations. He stated that he rescued the accused from a lynch mob at Miruka market and because he had heard rumours that the accused was involved in the death of the deceased he recorded statements from witnesses and charged him with this offence. He stated that he especially relied on the evidence of Kelvin (Pw1) who told him that the accused cut the deceased on the neck with a panga. He found out that the motive was an argument between the couple over their daughter Tabitha (Pw5).

John Momanyi (Pw7) told the court that the deceased was his daughter. He was categorical that she had been killed by the accused as she used to tell him that the accused had threatened to kill her. He confirmed that she had run off to his home several times. He stated that when he went to the house he saw blood. Later in cross examination he stated that the blood was not inside but outside the house. He stated that he did not enter the house.

Dr. Chrisbine Nanjala (Pw8) conducted a post mortem on the body of the deceased. She stated that the body was decapitated and that she formed the opinion that the cause of death was cardiorespiratory arrest as a result of massive haemorrhage following penetrative trauma. She confirmed the body she examined was the one in the photographs taken by the investigating officer.

When we put the accused on his defence he elected to make an unsworn statement. He stated that he married his first wife in the year 2000 but when he fell ill in 2010 and became impotent she deserted him. He stated that in the year 2013 he married the deceased who had five children and paid her dowry. He stated that he loved her a lot. In 2015 he left her at home and went to work in Narok. Soon her daughters

Janet Kemunto and Violet followed him there and told him that their mother had left and had not gone back home. He accompanied the girls home on 12th October 2015 but upon arrival he found his in-laws had burnt his house. He stated that they beat him and demanded that they wanted to know how his wife had died. He therefore fled to the authorities and was subsequently brought to this court. He contended that he did not commit the offence and stated that he was still in shock. He claimed that Kelvin was coached and in court was told how to answer questions by his grandmother. He also stated that he was inconsistent on the issue of where the offence was committed. He urged this court to consider the evidence by both sides and stated that to date he does not know what killed his wife.

The offence of murder is committed when **“any person of malice aforethought causes death of another person by an unlawful act or omission.”** The burden of proof lies on the prosecution and as in all criminal cases the standard of proof is beyond reasonable doubt.

From the evidence in this case there is no doubt that the deceased was murdered. The investigating officer told this court that they found her decapitated body, which was in parts, in a river and that it took them three days to retrieve it. This was confirmed by the doctor who performed the post mortem. No doubt the person who did it acted of malice aforethought. He no doubt had intention to kill her because no person would have survived the kind of injuries that were inflicted upon her. There is no evidence that she had done anything to provoke such a vicious attack and it is my finding that whoever did it acted unlawfully.

The issue for determination is whether the accused was the perpetrator of this heinous crime. The case against the accused revolves around the evidence of Kelvin who at the material time was, according to his sister Violet Kwamboka (Pw4) only four years old. His evidence apart from being that of a minor is also evidence of a single identifying witness. The law requires such evidence to be treated with a lot of circumspection. In **Maitanyi Vs Republic [1986] KLR 198** it was held: -

“1. Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult.

2. When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light available conditions and whether the witness was able to make a true impression and description.

3. The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision, it must do so when the evidence is being considered and before the decision is made.

4. Failure to undertake an inquiry of careful testing is an error of law and such evidence cannot safely support a conviction.”

The duty to test the evidence of the eye witness in this case is greater given that he was only three years old. Although he seemed confident that the accused cut his mother on the neck with a panga it was his evidence that all this happened at night. However, he did not state if there was any light in the house when it happened. Neither was he questioned on the intensity of the light if there was any. Neither did he state how he came to the conclusion that the attacker was the accused person. Did he see him or did he recognize his voice or perhaps was it because of the clothes he was wearing? None of the other witnesses gave evidence that corroborated that of Kelvin in any material particular. Their evidence tended to demonstrate that the accused had a motive to kill the deceased or that he had threatened to kill her. He may have had a motive and also threatened the deceased but it is dangerous to convict him only on the evidence of a three-year-old which I have observed was not even tested through cross examination. There is a possibility that the witness was mistaken; that he did not see the attacker properly and only told this court what he was told to say.

Much as this court put him on his defence, the charge against the accused person was not proved beyond reasonable doubt. Accordingly, this court shall give him the benefit of doubt and find him not guilty of murder and acquit him under Section 306 (1) of the Criminal Procedure Code. He shall be set at liberty forthwith unless otherwise lawfully held.

Signed, dated and delivered at Nyamira this 14th day of March 2019.

E. N. MAINA

JUDGE