

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL CASE NO. 47 OF 2015

THE STATE.....PROSECUTOR

=VRS=

ALBERT ONDIEKI MOSIOMA.....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 2nd March 2014 at Matangi village in Masaba North District within Nyamira County in the Republic of Kenya he murdered Cyprian Misoi Nyarache, the deceased.

The accused pleaded not guilty to the charge and to prove its case the prosecution called seven witnesses.

Briefly the prosecution's case is that the deceased in this case was at the material time working at the home of Rebecca Nyakerario Mokaya (Pw1). On the material day at about 5pm she left him at home and went to her mother-in-law's house about 100 metres from her house. When she went back she found his hands tied with a belt. The accused was there with two other men. When she inquired why he had been tied and why he was groaning in pain he told her that the accused had kicked him in the belly for preventing him from entering her house. Pw1 knew the accused person as well as the men he was with. She asked him why he had assaulted the deceased but instead of responding he attempted to hit her. He was however chased away by villagers who upon hearing her screams came to find out what was happening. Since the deceased was in a lot of pain, Pw1 took him to Keroka Police Station where he lodged a complaint against the accused. She then took him to Keroka General Hospital where he was treated. They went back home but the next day his condition deteriorated and she took him back to the hospital where he died. She reported the matter to Keroka Police Station.

On 4th March 2014 a post mortem was conducted on the body of the deceased at the Nyamira County Hospital Mortuary. The post mortem was produced by Dr. Fred Zoga (Pw4) as the attendance of the doctor who conducted the post mortem could not be procured without causing unreasonable delay. Relying on that report, Dr. Zoga testified that the deceased died as a result of cardiopulmonary arrest secondary to peritonitis following perforated intestines due to blunt force trauma to the abdomen. The deceased did not have any other injuries and disputed that the cause of death had anything to do with the deceased's hands being tied.

Following the death of the deceased, the accused person was arrested and subsequently charged with this offence. Corporal Megtida Akunu (Pw5) who at the time was working at Keroka Police Station stated that she was in the team of officers that arrested the accused in his house about two kilometres from the police station. She stated that he was known to the police as he was member of "community policing."

Corporal Joseph Mogusu (Pw6) the investigating officer confirmed that the deceased had made an assault report at the station. He also confirmed that the death of the deceased was reported to the police station. He however explained that he took over the file after investigations had been completed by a colleague who was transferred.

In his defence the accused made an unsworn statement. He stated that on the material day he worked in his bar at Keroka and later after taking the stock he went to a place called Kiamokama. It was while he was there that he heard that some vigilantes had arrested a suspect. Later that night police officers went to his house and arrested him. He stated that the OCS asked him if he had beaten someone but he said no.

Mr. Ondigo, Learned Counsel for the appellant summed up the defence case by way of written submissions. The prosecution however opted to rely on the evidence on record and did not offer any submissions. To his submissions, Counsel for the accused annexed the statement made to the police by Pw1, an investigation diary, a statement by one Sgt. Abdirashid K. Abdi and a statement made under inquiry by the accused. He marked them as defence exhibits 1, 2, 3, 4 and 5. This is un-procedural as the same should have been produced by the accused during the trial. Be that as it may, the same supports the case of the prosecution rather than discredit it. Contrary to Counsel's submission, Pw1 has in the statement told the police exactly what she told this court. In the statement she reports the deceased as telling her that he was hit in the stomach by Boys which this court interprets as Boy the other name of the accused person. The Investigation Diary produced as exhibit D2 confirms that on the material day the deceased lodged a complaint against the accused at Keroka Police Station. The report indicates that the complaint concerned an assault and that the deceased stated that he was assaulted for preventing the accused from going into Pw1's house. This was the same thing the deceased told Pw1 as well as Pw2 whose statement Mr. Ondigo produced as defence exhibit 4. The statement of Sgt. Abdirashid K. Abdi (defence exhibit 5) according to Mr. Ondigo confirms/corroborates rather than discredits the testimonies of Pw1 and Pw2. The exhibits go to the aid of the prosecution's case rather than the defence.

The deceased's statement to Pw1, Pw2 and the police that he was kicked in the stomach by the accused qualifies to be a dying declaration. The same was corroborated by the results of the post mortem that the cause of death was secondary to peritonitis following perforated small intestine secondary to blunt force trauma to the abdomen. The submission by Counsel that the accused did not act alone, even were it true, does not absolve him from culpability because under **Section 21 of the Penal Code** he would be just as guilty as those others with whom he

had formed a common intention to prosecute an unlawful purpose in this case going into Pw1's house without her authority or a search warrant, and in the prosecution of that unlawful purpose committed this offence. It is my finding that the death of the deceased was caused by an unlawful act of the accused person. He had no justification to inflict punishment on the deceased whether as a vigilante or a member of community policing. The most he could have done was to exercise his civil duty to apprehend the deceased and hand him to the authorities.

Pw2 testified that when he went to the scene he met with the accused who was being expelled from the homestead by people. He testified that the accused had a club which confirms the report made to the police by the deceased that the accused had hit him in the abdomen with a rungu. I am satisfied that the evidence on record proves beyond reasonable doubt that the accused person caused the death of the deceased by an unlawful act. His unsworn statement could not withstand such cogent evidence and I did not find it convincing.

For a murder charge to be complete it must be proved that the accused person killed the deceased of malice aforethought. The circumstances under which malice aforethought is established are provided under **Section 206 (a) – (d) of the Penal Code**. It is my finding that none of those circumstances were established in this case. It was not proved that the accused had formed an intention to cause the death of or to do grievous harm to the deceased. It was also not proved that the accused knew that kicking or hitting the deceased in the abdomen would probably cause the death or cause grievous harm to the deceased. There was also no evidence that he had an intention to commit a felony. The accused nevertheless unlawfully caused the death of the deceased which constitutes offence of manslaughter. Accordingly, I reduce the charge against the accused to manslaughter contrary to Section 202 (1) as read with Section 205 of the Penal Code and convict him accordingly.

Dated, signed and delivered in Nyamira this 7th day of March 2019

E. N. MAINA

JUDGE