

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL CASE NO. 19 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

ALFRED NYASERA MOSE.....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 8th December 22018 at Kanyora Two village in Masaba North Sub-county in Nyamira County the accused murdered Geoffrey Ongeri.

The accused pleaded not guilty to the charge.

Briefly the facts of the case are that on the material day at about 8pm the deceased, then a Form two student at a school called Nyanchoroni bid his mother (Pw1) and other siblings good night and left saying he was going to his house to sleep. Shortly thereafter his mother (Pw1) heard her aunt who lived nearby calling out the deceased's name. Pw1 went out to investigate and finding the deceased's door was bolted on the inside and the deceased was not responding, she caused one of his brothers to enter through the window to check why he was not answering. The deceased was not in the house. It was then that Pw1's aunt told her that she had received a telephone call from another of their kin that the deceased had been killed at the home of the accused. She gathered a few of her kin and together they proceeded to the home of the accused where they found the deceased lying on his back outside the accused's house with dry blood on his face. He was dead.

Julius Menzo (Pw2) a clan village elder and Janet Moraa Otworu (Pw2) testified that they were the accused's close neighbours and that on that night they went to his house upon hearing his wife's screams. On arrival they found the accused beating his wife one Catherine. When Pw2 demanded to know why he was beating her the accused led him to the place the deceased was lying and told him he was the cause; that he had found the deceased with his wife and that his wife had refused to pick his calls when he called her to open the gate for him forcing him to jump over. Pw2 and Pw3 testified that they had in fact found the couple's young son opening the gate. Pw2 and Pw3 testified that the deceased was lying on the ground lifeless and bleeding on the face. There was a jembe next to the body which the accused claimed the deceased had attacked him with and which he had in turn used to defend himself. On seeing the lifeless body Pw3 started wailing. Soon villagers and the area Assistant Chief (Pw4) arrived at the scene. The accused is alleged to have repeated the same story to the Assistant Chief (Pw4). He was apprehended and when police officers were called they took him away together with the body of the deceased. He was taken to Nyamira Police Station where he was charged with this offence.

On 11th December 2018 a post mortem was conducted on the body of the deceased which revealed that the cause of death was severe head injury secondary to sharp trauma to the head. According to the doctor, the body had a deep cut wound on the scalp with a fracture of the occipital bone with exposed brain tissue.

In his defence, the accused testified that on the material day he left for his house at about 8pm and arrived there at about 9.45pm. On his way he had, as was his custom, made several calls to his wife so that she could open the gate. All his calls however went unanswered forcing him to jump over the gate. Even his persistent knocking on the door did not yield a response so he went and knocked on the window. This time she responded although she took long to get to the door to open for him and when she did she was naked. He stated that he was trying to enquire why she had gone to the door in that state somebody covered his head with a piece of cloth. This act knocked him down. His wife tried to hold him down but he resisted and held the man by the legs and started shouting. He stated that he heard his wife telling the man not to hit him with some object. At that juncture he let go of the man's legs and the man ran outside and climbed on the roof of the toilet. He stated that he freed himself from his wife and locking her inside went after the man. He asked the man who he was but he did not respond. It was when he called Getanda, his neighbour, that the man allegedly jumped from the roof of the pit latrine and was caught by a clothes' line before falling onto the flower bed. He stated that he did not touch or lay his hand upon the man. He contended that when the village elder arrived they discovered that the deceased had fallen on a jembe that was in the flower bed. He denied there was a commotion outside the house but admitted there was a scuffle inside the house.

The post mortem done on the body of the deceased indicates that he had not one but multiple (six) deep cut wounds in the scalp and a fracture on the occipital bone with exposed brain tissue. According to the doctor the cause of death was due to severe head injury secondary to sharp trauma to the head. These injuries are inconsistent with what the accused person described as **"falling on a jembe which was in the flower bed"**. If the deceased fell on a jembe one would expect that he would have sustained an injury in one spot of his body but not multiple cut wounds. It is my finding that the nature of these injuries are more consistent with several strikes with a sharp object and this by a person acting deliberately. In other words, the deceased was deliberately struck several times on the head with a sharp object by a person. The injuries on his body led to his death. The deceased did not die from falling from the top of a latrine. He was killed.

The point for determination is whether the death arose from an unlawful act of the accused person and if it was whether that unlawful act was with malice aforethought.

The evidence against the accused person is circumstantial. There was no direct eye witness account of what transpired at the home of the accused on that fateful night. Pw1, Pw2, Pw3 and Pw4 all arrived at the scene after the act. I am however satisfied that the circumstantial evidence points to the accused as the person who killed the deceased. In his testimony the accused seemed to suggest that the object the deceased attacked him with was the very jembe on which he fell when he jumped from the roof of the toilet. He had earlier told his neighbour Pw2 that the deceased had attacked him with a jembe. As I stated earlier the injuries sustained by the deceased are more consistent with a human hand rather than falling on an object. I find and hold that there is evidence beyond reasonable doubt that the accused person killed the deceased. This however was a crime of passion. It was not premeditated. Although the accused did not come out clearly one can discern him on the one hand saying that he acted in self-defence and on the other hand saying he was provoked. There is evidence which was not rebutted that the accused found the deceased in a compromising position with his wife. His wife would not answer his telephone calls and worse still even after he jumped over the gate she did not answer his knocks on the door and when he went round to the bedroom window he heard her talking to a man. When she eventually went to open the door she was naked. Any man would have felt provoked by this. It is therefore understandable that any reasonable man would have reacted in the manner the accused did. However it is my finding that the accused used more force than was reasonable. The deceased had already run out of the house and was no longer a threat to the accused person but the accused continued giving him blow after blow on the head causing the multiple injuries listed in the post mortem report. It is therefore my finding that although this crime was not premeditated the force used was more than was reasonable in the circumstances and that the deceased unlawfully killed the deceased. He may not be guilty of murder but I find that the offence of manslaughter has been proved against him beyond reasonable doubt. I find him guilty of manslaughter contrary to Section 205 of the Penal Code and convict him accordingly.

Dated, signed and delivered in Nyamira this 4th day of July 2019.

E. N. MAINA

JUDGE