

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CRIMINAL CASE NO. 09 OF 2018

THE STATE.....PROSECUTOR

=VRS=

ALEX BOGONKO MOKUA.....ACCUSED

JUDGEMENT

1. The accused is charged with Murder contrary to Section 203 as read with Section 204 of the Penal Code.
2. The particulars of the charge are that on 9th August 2018, at Mosobeti village in Masaba North Sub-county within Nyamira County he murdered Daudus Nyabuti Orina.
3. Briefly the prosecution's case is that on the material day at around 8pm the accused went home where he lived with his mother (Pw5) and sister (Pw4). After finishing his dinner, he picked a quarrel with his sister causing her and their mother to flee the house. They went to the road where they met the deceased who happened to be on his way home across the valley from theirs. He asked them what the matter was and when they told him the accused had chased them from the house he decided to go talk to him. They followed the deceased to the house but finding the gas was leaking they busied themselves with that and left the deceased with the accused. Shortly afterwards they heard the deceased saying he had been stabbed. According to Pw4 she heard the deceased saying "**Bogonko you have stabbed me with a knife.**" On going to the sitting room, she found the deceased lying on the floor bleeding from a stab wound on the chest. The accused was nowhere to be seen. Their screams alerted their neighbours among them the mother of the deceased (Pw1) who stated that she got there only to find her son dead. Sergeant David Muriithi (Pw3) testified that the matter was reported to Keroka Police Station the same night and that a team of police officers, him included, was despatched to the scene. He stated that they found the house where the deceased died had been burnt and the owners had fled. They removed the body of the deceased to Gucha Mortuary. Evidence was adduced that on 16th August one Dr. Mokaya conducted an autopsy on the body of the deceased and concluded that the cause of death was severe haemorrhage resulting from stabbed heart. According to the post mortem report the deceased had bruises on right chest arterially and a deep penetrating wound on the left side above the nipple.
4. The accused was apprehended on 26th August 2018 at a place called Ebachwa. He was taken to Nyamasibi AP Post and then to Keroka Police Station. It is alleged that on the same day he made a confession which was recorded by Chief Inspector Kaindi (Pw7). It is my finding however that the recorder (CI Kaindi) did not comply with **Rules 4 (3), 5 (1), 7, 8 and 9** of the **Evidence (OUT OF COURT CONFESSIONS) Rules, 2009** and the statement cannot be treated as a confession. It will therefore be disregarded.
5. When this court put the accused on his defence he elected to make an unsworn statement. He stated that he left his home for Nyamasibi on 2nd March 2018 and was given a motor cycle by his uncle. He stated that on 26th August 2018 he went to the stage at 9 o'clock only to be told by the Chief that he was wanted for doing something wrong. When he asked the Chief what he had done the Chief said he would know when they went to the office. He was however taken to the AP Camp and then to Keroka Police Station. He stated that he was subsequently arraigned for an offence he knew nothing of.
6. In his closing arguments Mr. Bwonwong'a Advocate, who acted for the accused, submitted that the prosecution had not proved its case beyond reasonable doubt; that nobody even the accused's mother and sister saw him stabbing the deceased. He suggested that the deceased was stabbed by the accused's sister and because she and the accused were not on good terms she decided to frame him. He contended that how the deceased went to the house and how he was stabbed yet the accused's sister and mother were not was not clear and that since it was dark nobody could have seen what transpired. He urged this court to find the accused had no case to answer.
7. Prosecution Counsel did not make any closing arguments.
8. The deceased died due to excessive bleeding resulting from a stabbed heart. He had bruises on the right chest arterially, bruises on the right hip region and on the right eye and a deep penetrating wound on the left side above the nipple. The cause of death leaves no doubt that he was killed. The issue for determination is whether the accused caused the death of the deceased, if so whether he did it by an unlawful act and of malice aforethought.
9. I have evaluated the evidence adduced by both sides and also considered the submissions of Counsel. The evidence of the prosecution witnesses in its totality proves beyond a shadow of doubt that the deceased was killed at the home of the accused person. The deceased's mother (Pw1) and brother (Pw2) and the accused's mother (Pw5) and sister (Pw4) attested to this fact. I am also satisfied that the testimonies of the accused's mother (Pw5) and sister (Pw4) squarely place the accused person at the scene of crime. The accused went home and picked a quarrel with his sister because of food. When it became too acrimonious they ran away and as they were pondering their next cause of action the deceased who was going home appeared by chance. When they narrated what had happened he could no take it because according to him his own mother was a widow and they had never mistreated her like that. He therefore decided to confront the accused but before he

could even say anything the accused stabbed him fatally wounding him. These two witnesses knew the accused person very well as he used to live in the same house. It is unlikely even in the face of misunderstanding that a mother and sister would conspire to fabricate evidence and frame their own and the accused person himself did not allege that they framed him. The allegation that he was framed and that it is Pw4 who killed the deceased came from his Advocate. These were allegations made from the bar which were not substantiated through evidence. The accused's evidence was that he was not at home that day. He made this claim in an unsworn statement which could not be tested through cross examination. It is my finding that his unsworn statement does not take away any weight from the evidence of Pw4 and Pw5 which remained unshaken even upon rigorous cross examination by defence Counsel. They remained steadfast that the only person who was with the deceased when he was fatally wounded was the accused person. This evidence irresistibly points to the accused person and I am satisfied beyond reasonable doubt that he is the one who killed the deceased.

10. The deceased had just entered the house and seems not to have done anything before Pw4 heard him saying the accused had stabbed him. The accused himself does not allege that the deceased attacked him or did anything else that could have caused him to retaliate. It is my finding that the attack was unprovoked and was therefore unlawful.

11. Malice aforethought is established if there is evidence proving anyone or more of the circumstances set out in **Section 206 of the Penal Code**. It is my finding that the nature of the injuries inflicted upon the deceased prove there was an intention by the accused person to do grievous harm to the deceased. If not, then he must have had knowledge that stabbing the deceased in the places he did could probably cause him grievous harm or even death.

12. I am satisfied that the ingredients of the offence of murder have been proved beyond reasonable doubt. I find the accused guilty of murder contrary to Section 203 as read with Section 204 of the Penal Code and convict him accordingly.

Signed, dated and delivered in open court this 18th day of July 2019.

E. N. MAINA

JUDGE