



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL CASE NO. 03 OF 2018

THE STATE.....PROSECUTOR

=VRS=

ERICK OSIMBA OGETO.....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 12th June 2017 at Karantini village in Masaba North Sub-county within Nyamira County, jointly with others not before court the accused murdered Hudson Mokaya Nyangwono. The accused pleaded not guilty to the charge whereupon the prosecution called five witnesses to prove the charge.

Briefly the prosecution's case is that on the material night the deceased's brothers Alex Nyakundi Nyangwono (Pw1), Solomon Rosana Nyangwono (Pw2) and Hesbon Maroro Nyangwono (Pw4) heard noises at their mother's house and on rushing there they found the deceased literally on fire. He had suffered burns all over his body and his clothes had embers of the fire. The three witnesses testified that when they inquired what had happened the deceased told them how his son, the accused, had knocked on their door and because the two of them did not get along he told his wife, the accused's mother, not to open but to give him (the accused) whatever he needed through the door. His wife did not heed his advice and immediately she opened the door the accused entered with three other men and tied him up, doused him with petrol, covered him with cushions and then set him ablaze. However, he got a chance to escape to his mother's house.

Pw1, Pw2 and Pw4 testified that the deceased had burns from head to toe. Pw1 and one James took him to hospital via Keroka Police Station so that he could lodge a complaint but the police advised them to go to hospital first. At Keroka the doctors were on strike so they took him to Kisii Level 5 Hospital but the doctors there were also on strike so they ended up in Nyangena Hospital, a private facility. Pw1 stated that while in hospital the deceased also narrated his ordeal to the doctor who was treating him. Pw1 testified that the deceased would confide to him the disagreements he had with the accused who had dropped out of school. The prosecution witnesses stated that the deceased's wife, the mother of the accused disappeared after that incident and all efforts to trace her have proved futile.

The court heard that a post mortem conducted on the body of the deceased established that he died due to inhalation of burns to the lungs causing cardiorespiratory arrest. Dr. Ambrose Richard Nyabwanda (Pw5) testified that the post mortem was done at Nyangena Hospital on 21st June 2017. He stated that some of the significant findings were burns on the head, face, chest and abdomen up to the area just above the genitalia and on the upper limbs up to the shoulders and on the back up to the buttocks. Inside the respiratory system there was soot in the trachea, the left lung had burns and the blood vessels of the two lungs were burnt. He stated that also affected was the oesophagus which had burns.

The prosecution closed its case without calling two other witnesses namely an eye witness and the police officer who investigated the case.

On his part the accused testified that the deceased was his step-father – the man who married his mother while he was in high school. He denied having a hand in his death. He stated that on the material day he was in Keroka where he grew up and was plying his trade of selling clothes. He stated that he had not been to the deceased's home since 2016 because when his mother took him there to introduce them he realized the deceased and his brothers who were in the process of demarcating their land had a dispute. He contended that he was taken aback when he was arrested for killing the deceased and stated that the deceased's brothers accused the deceased of taking him there to inherit the land and were not happy. He asserted that he could not have killed the deceased as they had just met and he was excited at having a father.

In summing up Mr. Kaburi, Learned Counsel for the accused submitted that the prosecution did not adduce evidence to connect the accused to the crime. He submitted that no motive was demonstrated as to why the accused would kill a person he had visited only once. He reiterated the accused's evidence that when he went to that home the brothers of the deceased were up in arms that he could not inherit land there as a result of which the accused left and never went back. Mr. Kaburi wondered how other villagers could have arrived at the scene before the brothers of the deceased whose residences were closer. He contended that if indeed the deceased spoke then the first person he

spoke to was his mother and she ought to have been called as a witness. He submitted that there was no direct evidence against the accused and stated that the deceased's own brothers had a motive to kill him and could have cooked the story to cover up. Counsel stated that investigations in this case were shoddy and that the evidence of Pw1 was rendered untrustworthy by the fact that he claimed not to know the name of the deceased's wife. Counsel urged this court to find the accused not guilty and acquit him.

Miss Okok, Learned Prosecution Counsel did not submit but urged this court to rely on the evidence on record.

To prove the charge against the accused the prosecution was required to prove beyond reasonable doubt that the accused caused the death of the deceased by an unlawful act and of malice aforethought. In view of **Section 9 (3) of the Penal Code** the prosecution is not required to prove motive. **Section 9 (3) of the Penal Code** states: -

“3. Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility.”

In this case there is evidence beyond reasonable doubt that the deceased died as a result of inhalation burns to the lungs which resulted in cardiorespiratory arrest. A lay person would say that the deceased died as a result of burns. There is however no evidence that the burns were inflicted by the accused person or by any other person. The reason I say there is no evidence that the burns were inflicted upon the deceased by someone is firstly because although it is alleged he said he was doused with petrol before being set on fire there was no evidence to that effect. The post mortem was silent on the issue of petrol being used to burn the deceased and no forensic examination was carried out to confirm that petrol was used. On this I agree with Counsel for the accused that the investigations in the case were shoddy.

As for the accused killing the deceased there was no direct evidence placing him at the scene of this crime. The only evidence against him is the alleged **dying declaration** by the deceased before he was rushed to hospital and while he was in hospital. The declaration the deceased is said to have made to the doctor who was attending to him was not proved as that doctor was not called as a witness. This leaves us with what the deceased is said to have told his brothers Pw1, Pw2 and Pw4. Whereas a statement made by a deceased person relating to the cause of his death is admissible under **Section 33 (a) of the Evidence Act** the fact of the deceased having made the statement must be established beyond reasonable doubt. Only then can the court come to the conclusion that there was a dying declaration and the principles enunciated by the Court of Appeal in **Choge Vs. Republic [1985] KLR 1** come into play. My finding is that the fact of the deceased making that statement, or telling the witnesses that the person who set him on fire is the accused was not proved beyond reasonable doubt. It is my finding that that evidence by the prosecution was demolished by the defence. The accused's defence put together with the failure by the prosecution to call the wife and mother of the deceased to confirm that the deceased indeed made the statement creates doubt in the mind of this court. No good explanation was offered for not calling the deceased's wife who is a compellable witness. Although this court issued warrants to aid the prosecution to bring the witness, the same were not executed. As for the deceased's mother she would have been the first person the deceased spoke to and she probably would have also seen the perpetrators of the crime, if this was a crime and not an accident, as her house was very close to that of the deceased yet no effort whatsoever was made to call her as a witness and no explanation was given for not calling her.

It is my finding that whereas the **Evidence Act** is clear that there is no number of witnesses required to prove a fact one must draw an adverse inference in the prosecution's failure to call these particular witnesses. It may be that had they testified their evidence would have been prejudicial to the prosecution's case. In **Choge Vs. Republic [1985] KLR 1** the court held: -

“6. There need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in the reception into evidence of such a dying declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person.”

I find that the risk of relying on the dying declaration in this case is even higher because it is doubtful that it was made. Where doubt rears its head in a criminal case that doubt is given to the accused but not to the prosecution and accordingly I find the accused not guilty of murder and acquit him.

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

E. N. MAINA

JUDGE