



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CRIMINAL CASE NO. 16 OF 2018

THE STATE.....PROSECUTOR

=VRS=

JUSTUS MAECHE NYAKUNDI.....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 29th October 2018 at Gesima Location in Masaba Sub-county within Nyamira County he murdered Jones Osebe.
3. Briefly the facts of the case are that on the material day the accused who was drunk arrived home at 8pm and finding his nephew Wesley Orioki Ochanda (Pw1) he accused him of having an affair with his wife. Wesley (Pw1) had gone there at about 6pm to visit his grandmother, the mother of the accused. Pw1 stated that after the accused picked a fight with him he went and locked himself up in the deceased's house. The accused grabbed a stool from the house of the deceased's mother (Pw2) and started going round the deceased's house threatening that he would kill Wesley (Pw1). He refused to heed his sister-in-law's (Pw2) counsel to put the stool down. It was while the accused was going round with a stool that John Osebe, the deceased arrived home from buying kerosene for his mother. The accused is said to have instantly hit him on the head with the stool for asking him why he was fighting with Wesley. According to Margaret (Pw2), the mother of the deceased, the accused hit the deceased on the head repeatedly while wishing him death. The deceased fell down. She helped him up and took him to hospital with the accused in tow. Pw2 raised the alarm and villagers streamed in to help. The deceased was taken to Gesima Dispensary. He however succumbed to the injuries. The next day information about his death was relayed to the area Assistant Chief and the accused was arrested. He was handed over to the police and subsequently charged with this offence.
4. Dr. Charles Ogachi Ogega (Pw5) testified that he carried out a post-mortem on the body of the deceased at Gucha Nursing Home on 6th November 2018. He estimated that the deceased was dead for about 24 hours. He stated that the deceased had two cut wounds on the scalp one linear 6cm on the occipital area and the other star shaped on the occipital area. The deceased also had a mouth and nasal discharge. On the head there was a scalp haematoma below the cut wounds, a subdural haematoma and haematoma in the brain tissues. The doctor concluded that the cause of death was due to severe head injury with resultant bleeding into the brain tissues secondary to being hit with a sharp edged surface.
5. In his unsworn defence the accused stated that when he arrived home on the material night he saw light at the place he used to keep his motor cycle. He called his wife Nyanchama and she came out with a torch. Then he entered the house and found Wesley had removed the battery of the motor cycle. He took Wesley's hand and led him outside and asked his wife how Wesley had obtained the keys. She replied that she did not know. When he asked Wesley he gave him a blow then ran away but his wife prevailed upon him to let go of the matter until the next morning. He stated that after that they took dinner and slept. He stated that the next day they heard people wailing at the home of the deceased. They went there and found several people including the deceased. He stated that the deceased had blood on the head and that he was persuaded by Richard to join those who were taking the deceased to hospital. Upon leaving the hospital he went back to his house. The next day as was his custom he took milk to the road but as he was going to collect the next load of milk he met Chief Edward Mokaya who told him all was not well at home and he needed to go and record a statement. He stated that from that time he has been in court.
6. In summing up Mr. Bwonwong'a, Learned Advocate for the accused, submitted that the prosecution did not prove the charge beyond reasonable doubt. He submitted that whereas it is alleged the accused fatally wounded the deceased with a stool one of the witnesses testified there was no stool in that house. He contended that the accused would not have accompanied the deceased to hospital but would have instead ran away if he was the one who assaulted him. Mr. Bwonwong'a submitted that if the accused could have assaulted anybody then it would have been Wesley since it is Wesley that had angered him. Counsel submitted that it was clear that the person who hit the deceased was Wesley. He discounted the evidence of Margaret stating that she denied selling chang'aa when there was evidence she used to do so. He submitted that her evidence was not reliable. He also submitted that Wesley was also not trustworthy as he had denied he knew the accused's wife yet they are closely related. He urged the court to acquit the accused.

7. There were no closing arguments from Prosecution Counsel.

8. The issue for determination is whether or not the accused of malice aforethought caused the death of the deceased by an unlawful act.

9. The incident that led to the death of the deceased occurred within his home. His mother (Pw2) and other relatives were at home and witnessed it. Wesley Orioki Ochanda (Pw1) whose altercation with the accused was the genesis of the events that culminated in the death of the deceased had gone into hiding but the mother of the deceased was not asleep and she witnessed the happenings. This court believed her when she stated that the accused grabbed a stool from her house which he later used to assault the deceased. The accused had intended to use it to hit Wesley who he accused of having an affair with his wife. Wesley however locked himself up. When the deceased turned up the accused attacked him with the stool giving him several blows on the head. The court heard that as he did so he wished death upon him saying **“hata wewe kufa”**. This is evidence that he knew what he was doing. He wanted the deceased to die. The deceased had just arrived home and had not done anything to provoke the vicious attack that followed other than inquiring why the accused was fighting his nephew. The accused person acted unlawfully and it is my finding that he did it of malice aforethought. The P3 Form reveals that the deceased suffered a severe head injury. He had cut wounds on the scalp and was discharging a coffee-like substance through his nose and mouth. He had a swelling in the brain. All these injuries are consistent with repeated blows to the head with a stool. The accused is said to have been drunk. He did not raise that as a defence instead choosing to say that the deceased was killed by Wesley. And even if he had raised it the defence would not have been available to him as he did not meet the conditions in **Section 13 (2) (a) or (b) of the Penal Code** which states: -

“(2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and –

(a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or

(b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.”

The accused did not plead any of those conditions that would bring his case under the defence of intoxication. Although his defence marched word for word with that of his mother it was not convincing and it offers no explanation for the vicious attack he meted upon the deceased. Contrary to his Advocate’s submission, the accused did not say that the incident had anything to do with his wife refusing to open the door for him. The issue which he raised concerning the motorcycle was between him and Wesley but had nothing to do with the deceased and was not an excuse for what he did. While admitting that the accused hit the deceased, Joyce (Pw4) the accused’s mother stated that he mistook the deceased for Wesley. The accused did not himself say that it was a mistake. He simply denied that he assaulted the deceased. I am satisfied that the charge was 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