

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL CASE NO. 12 OF 2018

THE STATE.....PROSECUTOR

=VRS=

THOMAS MAISO MARAGIA.....ACCUSED

RULING

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 13th March 2016 at Bogwendo Sub-location in Nyamira South Sub-county within Nyamira County he murdered Douglas Bosire Abuga, deceased.

The accused pleaded not guilty to the charge whereupon a trial in which the prosecution called six (6) witnesses ensued.

Duke Kasugu Nyakundi (Pw1) testified that on the material day he was in his house when at about 7.30pm he was called to join a search party for his aunt Stella Moraa's (Pw6) daughter who had allegedly been abducted by some young men and locked up in a house in the neighbourhood. He stated that the search led them to the house of one Ogoti where the young men were holed up. They did not however find the girl. They apprehended the boys and started asking them questions about the girl's whereabouts. He stated that the deceased who was a village elder was in the search party and that the accused who is his uncle also joined them. He stated that the accused was drunk and that he tried to beat the boys saying that he wanted to kill someone. Pw1 stated that he left the search party at that juncture and only learnt later that the deceased had been beaten. He vehemently denied that he witnessed the attack upon the deceased. He however recalled the accused mentioned the deceased as one of the people he had a grudge with. Pw1 also stated that his own father and the accused who is his uncle have a land dispute.

Francis Momanyi (Pw2) stated that he too was in the search party. He stated that when they apprehended the boys they handed them over to the deceased to take them to the Assistant Chief but somewhere along the way the boys and the brothers of the girl started fighting. The deceased tried to prevail upon them not to fight but when they did not stop he started beating them. Suddenly someone started throwing stones at them. He stated that one of the stones hit the clan elder. The search party cut short their journey to the Assistant Chief and started attending to the deceased. Pw1 stated that it was dark so they could not see who was doing what. He was categorical that he did not see the accused beat the deceased.

Dr. Macharia (Pw3) testified that he performed a post mortem on the body of the deceased. This was at the Moi Teaching and Referral Hospital and the date was 21st March 2016. He testified that the body was identified to him by two (2) relatives and that the body had a fracture on the right side of the skull, a concussion of the right side of the brain and bleeding over the right side of the brain. Other findings were subdural and subarachnoid haemorrhage in the right cerebral hemisphere. His conclusion was that the cause of death was raised intracranial pressure due to intracranial bleeding due to blunt force trauma to the head.

Stella Moraa (Pw4) testified that it was her daughter they were looking for. She is the only one who testified that she saw the accused repeatedly hit the deceased on the head with a stone. She stated that there was electricity at the place where this happened and that she positively identified the accused person.

Robert Dominic Bosire (Pw5) told the court that the deceased was his father and that when he learnt of this incident he sent money to someone so that his father could be taken to hospital. The next day he learnt his father's health had deteriorated and so he went to see him in hospital. Pw5 stated that although the deceased was in a bad condition and could not recognize other people he recognized him (Pw5) and told him that he had been beaten by the accused. Pw5 testified that when the results of the examination ordered by the doctor came in, they transferred the deceased to Christa Marriane Hospital in Kisii, then to Kisumu (Jaramogi Oginga Teaching & Referral Hospital) Russia and then to Moi Teaching & Referral Hospital where he died on 21st March 2016. Pw5 stated that long after burying their father he had an encounter with the accused in Keroka township. He stated that he asked the accused why he was roaming around yet he had killed the deceased and the accused responded that he could kill him (Pw5) in the same manner. Pw5 raised the alarm and people apprehended him and handed him over to the police.

Inspector Munga Mbwana (Pw6) testified that he was one of the officers who accompanied Sergeant Thairu, the investigating officer in the case to the scene. He stated that by the time they got there the deceased had been taken to hospital and the houses of the suspect had been razed in retaliation. He stated that from the scene they visited the deceased in hospital but found him in a comma. Later upon getting news of the deceased's death Sergeant Thairu accompanied relatives of the deceased to Eldoret for the post mortem after which the body was released to the family for burial. Pw6 stated that it was not until 30th September 2018 – 2 years and six months after the event – that the accused was arrested. He stated that the fact that the accused kept away from his home for so long was evidence it was him who killed the deceased.

At this stage this court is required to determine whether or not there is evidence that the accused committed this offence – **Section 306 (1) of the Criminal Procedure Code.**

There were no arguments by Counsel at this stage but upon carefully considering the evidence of the witnesses for the prosecution, my finding is that the prosecution has not established a prima facie case against the accused person sufficiently to warrant him to be put on his defence. Sadly, this is a case where the prosecution could but neglected to prove its case against the accused person. Although this court issued warrants of arrest against two witnesses who are alleged to have witnessed this crime and who for all intents and purposes were not only competent but also compellable, the same were not executed.

On 20th May 2019 two months after the warrants were issued the prosecution told this court that the witnesses had not been traced. The court granted them an adjournment and extended the warrants to 10th June 2019 but still the witnesses were not brought and all this court was told is that they could not be found in their houses or through their phones and that the prosecution was closing its case. In the absence of those witnesses this court is left with the evidence of Pw1 and Pw2 which exonerated the accused person because by stating that although they were present they did not see the accused hit the deceased they were exonerating him. Then we have Pw4 whose evidence was so inconsistent that it cannot be trusted. At times she would say she did not see the accused hit the deceased then after she was declared hostile she would state that she saw the accused repeatedly hitting the deceased on the head with a stone. Such an inconsistent witness is hard to believe as it is difficult to determine if she was telling the truth. She is the only one who stated that there was electricity at the scene when Pw2 stated that it was so dark that one could not tell who was who. As for the dying declaration alleged to have been made to Pw5 by the deceased, that evidence too is not reliable given that there is evidence by IP Mbwana (Pw6) that the deceased was in a comma. If he was in a comma when Pw6 visited with other police officers, when did he get out of it and if he did is it true that he could speak? The prosecution has a duty to prove its case beyond reasonable doubt and where there is doubt the benefit must go to the accused person but never to the prosecution.

Then we have the evidence of Pw6 who testified that the accused's fleeing the area is proof of his guilt. This does not give rise to strong circumstantial evidence but to strong suspicion. Moreover, the accused's flight from the area can be explained by or linked to the torching of his house/home. Secondly, given the ease with which Pw5 found him at Keroka it could also mean that the police had not looked or were not looking for him. Suspicion no matter how strong cannot be the basis of a conviction. Whereas there is evidence that the deceased may have been killed, the prosecution failed to prove he was killed by the accused. No reasonable tribunal properly directing itself would put the accused on his defence on such evidence as clearly there would be no evidence to sustain a conviction were the accused to elect to keep quiet. I accordingly enter a finding of not guilty and acquit him under Section 306 (1) of the Criminal Procedure Code. He shall be set at liberty forthwith unless otherwise lawfully held. Case closed.

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

E. N. MAINA

JUDGE