

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL CASE NO. 59 OF 2015

THE REPUBLIC.....THE REPUBLIC

VERSUS

DANIEL CHUMBI NYABUTI.....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 unknown dates between 7th February 2015 and 20th March 2015 at Enjoro Sub-location in Nyamira District within Nyamira County he murdered **FAITH NYANCHAMA OMWENGA.**

The accused pleaded not guilty to the charge whereupon the prosecution called five witnesses in order to prove its case.

Briefly the facts of the case are that on 7th February 2015 at about 1pm Margret Nyaboke (Pw1), the deceased's mother, left the deceased at home with her siblings and went to Church. When she returned home in the evening she did not find the deceased. The next day as she was going to church she saw the deceased standing outside the house of one Nyabuti Makworo and when she made inquiries she was told Daniel Nyabuti (the accused) had taken the deceased. She interpreted this to mean the accused had married the deceased who was twenty years old. She therefore went home and waited for him to go and notify her. However on 13th February 2015 she met people who notified her that the deceased had not been seen since 12th February 2015. After two days she went to the accused's home and met the accused's mother who confirmed that the deceased was not at their home and said that she could have gone to visit an aunt at Kinyamware. Pw1 testified that following that information she looked for the deceased in the homes of all their relatives in vain. Two weeks later she learnt that the deceased's slippers had been spotted on a path leading to the accused's house. This made her start wondering where the deceased could have gone and so on 15th March she went to the accused's home with two elders and found him with his mother. When they inquired the whereabouts of the deceased the accused chased them with a panga and referring to the deceased as a prostitute told them to go look for her elsewhere. It was then that she reported the matter to their village elder who referred them to the Assistant Chief who in turn referred her to Nyamira Police Station. When she went to the police station she was given an arrest order to take to the Assistant Chief but the Assistant Chief did not arrest the accused allegedly because he (accused) had refused to honour his summons. He advised her to go back to the police station. On 20th March 2015 she went back to Nyamira Police Station and was referred to the CID office. It was then that a team of police officers accompanied her to the accused's home. Among the officers were Sergeant Charles Kiprono (Pw2), of Scenes of Crime and Corporal Humphrey Mureithi (Pw5), the investigating officer. The court heard that since the house was locked the officers gained entry through a window and when they broke the door to let in more light they noticed something about the floor which made them suspicious. They told this court that the floor seemed wet as if recently plastered. They therefore dug it up and saw a body which Pw1 identified as that of her missing daughter, the deceased in this case. The officers immediately approached the court at Nyamira and obtained an exhumation order. Armed with the order they returned to the scene and retrieved the body from the shallow grave. The body was identified by Pw1 and it was removed to Nyamira Level 4 Hospital Mortuary. The court heard that a post-mortem conducted on 22nd March 2015 revealed the cause of death was cardiorespiratory arrest secondary to cerebral damage due to an open head injury. Dr. Gogo (Pw3) who produced the post-mortem on behalf of the doctor who conducted the post-mortem testified that the body had a linear cut wound to the left side of the scalp measuring 12cm with exposed fractured skull and a cut wound to the anterior aspect of the leg (mid-tibia) measuring 5cm. Other findings were a linear fracture on the skull measuring 6cm and evidence of intra cerebral bleeding. It was noted that the body was wrapped in a dirty mosquito net. Corporal Humphrey Mureithi told this court that when the body was retrieved the accused who was within the vicinity attempted to flee but police officers gave chase and arrested him. He was taken to the police station where he was interrogated and subsequently charged with his offence.

On his part the accused made an unsworn statement in which he maintained his innocence. He stated that a murder occurred in his area between 7th February 2015 and 20th March 2015. He also stated that he eked a living in Kericho but would go home every month; that at the material time he went home on a Saturday evening and the next day went to Church with the deceased. After that he left her with his sister and returned to Kericho where he continued working. He stated that while he was in Kericho his sister called him with news that they had been attacked by thugs. He came home but there was nobody. When he called his sister she told him she had fled to Kitale. He went to the home of the deceased but her mother started wailing accusing him of killing the deceased. He stated that he reported the matter to the village elder who told him to continue looking for the deceased. He therefore went home only to be arrested by the CID officers. He stated that while he was at the police station, police officers went there with a body which they alleged to have exhumed from his house. He denied the house was his and contended that he lived in an entirely different place and that the deceased's mother had sent people to kill the people there. He denied that he had anything to do with the murder and said it was a lie that his sister confirmed the house where the body was found was his.

To prove the offence of murder, **the prosecution must prove the death of the deceased; that the death was by an unlawful act or omission of the accused and that it was of malice aforethought, malice aforethought being proved by establishing the existence of any of the circumstances set out in Section 206 of the Penal Code.** The onus of proof as in all criminal cases being upon the prosecution to prove the afore-stated ingredients beyond reasonable doubt.

In this case the death of the deceased is not in doubt. Her mother (Pw1) testified that she went missing on 12th February 2015. She identified her as the person whose body was exhumed on 20th March 2015 from a shallow grave in a house allegedly belonging to the accused but whose ownership the accused denied. The body was also identified by her cousin (Pw4) who knew her well. The fact of death was also proved through the post mortem produced in evidence by Dr. Gogo (Pw3). The accused by his own statement also seemed to concede that Faith, the deceased, was no more. From the evidence as a whole therefore this court is satisfied that the death of the deceased was proved beyond reasonable doubt.

This court is also satisfied that the death of the deceased was by a human hand and by an unlawful act. Corporal Mureithi (Pw5) and Sergeant Charles Kiprono (Pw2) corroborated Pw1's evidence that the body was recovered in a shallow grave inside a dwelling house. This is further confirmed by the photographs taken by Pw2 which were tendered in evidence as exhibits. Pw1 testified that the body was wrapped with a mosquito net a fact corroborated by the doctor who conducted the post-mortem. It is my finding that the body was buried in the house so as to conceal a crime which is a pointer to an unlawful act. Moreover, the body had injuries on the head which were no doubt inflicted by someone. There was a cut which caused a fracture of the skull exposing brain matter and another cut wound on the leg. I further find that the extent of the injuries and the act of burying the body inside a house speak to a person whose intention was to kill the deceased and to thereafter conceal the crime which establishes that the perpetrator acted of malice aforethought.

Having found that the death of the deceased was by an unlawful act and that it was of malice aforethought, the next point for determination **is whether the accused person was the perpetrator of this heinous crime.**

Having carefully considered the evidence of the prosecution witnesses and the unsworn statement of the accused person I am satisfied that the accused killed the deceased. In his statement, the accused admitted that a murder was committed in his area at the time in issue. He also conceded to have been with the deceased around the time she disappeared hence corroborating Pw1's evidence that she had seen the deceased at the home of the accused. I am satisfied therefore that evidence that the deceased's body was found buried in a shallow grave inside the accused's house was not farfetched and was in fact true. Pw1 had been to that house in search of her daughter just a few days earlier and had seen him emerge from that house and she therefore knew it to be his house. That his sister did not testify to confirm that was his is therefore not fatal to the prosecution's case. His allegation that there was an attack in his home while he was away in Kericho eking a living was not convincing in light of the cogent evidence that the deceased was found buried in his house. Moreover, there was evidence from the investigating officer that it was Pw1 but not the accused who reported the disappearance of the deceased to the police. His unsworn statement could not withstand the very cogent and credible evidence of the prosecution witnesses. The deceased's mother impressed this court as a very truthful and honest witness. From the time she learnt her daughter was missing she did not relent her search for her. She visited Nyamira Police Station twice and eventually her persistence paid and forced the police to go to the accused's home. Her evidence was corroborated by the other prosecution witnesses unlike that of the accused which could not even be tested by cross examination as it was not made on oath. There was nothing in the evidence and neither did the accused offer any explanation as to why Pw1 and the other prosecution witnesses could have framed him. I am satisfied that the charge against the accused was proved beyond reasonable doubt. Accordingly, I find him guilty of murder contrary to Section 203 as read with Section 204 of the Penal Code and convict him.

Signed, dated and delivered in Nyamira this 21st day of November 2019.

E. N. MAINA

JUDGE