



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYAMIRA**

**CRIMINAL CASE NO. 03 OF 2017**

**THE REPUBLIC.....PROSECUTOR**

**=VRS=**

**IVAN MOIRE KOESA.....ACCUSED**

**JUDGMENT**

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 24<sup>th</sup> January 2017 at Nyasumi Village in Masaba North Sub County within Nyamira County the accused murdered Yuvenalis Ongiri Orioki. The accused pleaded not guilty whereupon the prosecution called five witnesses to prove the charge.

Briefly the prosecution's case is that on the material day at about 2pm the deceased found the accused person stealing sugar cane from his garden and confronted him. An altercation arose and the accused ran off to his house with the deceased in hot pursuit. The deceased was by then shouting for help to catch the thief. When they got to the accused's house the accused pulled the deceased inside, took a stick and beat him on the head repeatedly. The deceased fell down unconscious and began bleeding through the nose. A crowd which had gathered at the scene rushed the deceased to hospital but on 28<sup>th</sup> January 2017 he succumbed to the injuries. Purity Chebet (Pw1) testified that she heard the deceased shouting thief! while she was in her house and ran to see what was happening. She described the stick the accused used to beat the deceased as a big stick. She testified that she witnessed the accused beating the deceased and she described the stick he used as big. She testified that when she found the accused beating the deceased she ran towards the road shouting hence attracting people to the scene. Robina Nyaboke Mwebi (Pw2), testified that she saw the deceased and the accused that afternoon and shortly thereafter heard people shouting. She stated that when she saw them the accused was chewing sugar cane. On hearing the shouts, she stopped going to church and turned back and went to the accused's house and saw the deceased had been hit on the head and was bleeding through the nose. She clarified that the deceased was first taken to Gucha Dispensary where he was put on a drip. He was later transferred to Christa Marian Hospital in Kisii.

Samuel Ayaka Osindi (Pw3) told the court that he met three young men taking the deceased to hospital on a motor cycle. The deceased was not talking. He called the area assistant chief who instructed him to apprehend the accused which he did. He took the accused to Nyangori Administration Police Post. After the deceased's death police were notified. A post-mortem was then conducted which revealed that the deceased had suffered a fracture to the skull and the cause of death was a haematoma to the left frontal lobe. The accused was then charged with this offence.

The accused who was represented by Mr. Kaburi, Advocate testified that the deceased was his uncle; that on the material day at 2pm he was at home when the deceased went to his house and started beating him saying that his property had been stolen; that since the deceased seemed very angry he decided to run away to a nearby farm but the deceased followed him and fell into a hole as he was chasing him. He stated that the deceased was taken to hospital by villagers who saw him falling. He testified that he was initially charged with assault and confirmed that the deceased died one week after the incident. He denied that he stole from the deceased or that he beat him. He described their relationship as cordial and contended that the deceased sustained the injuries from the fall.

In summing up, Mr. Kaburi submitted that the evidence adduced by the witnesses was all hearsay. He submitted that it is the deceased who attacked the accused in his house and when the accused ran away the deceased pursued him and fell into a hole. Counsel submitted that the deceased was using his office as a clan elder to mistreat the accused by accusing him falsely. He submitted that it was the testimony of Pw3 that nothing was recovered from the house of the accused and also that the deceased did not have visible injuries. Counsel contended that the accused enjoyed a cordial relationship with the deceased and was charged with an offence which he did not commit. He urged this court to acquit the accused.

Miss Okok, Learned Prosecution Counsel did not submit. She preferred to rely on the evidence adduced by the witnesses.

The point for determination is **whether the death of the deceased resulted from an unlawful act of the accused and if so whether the accused acted of malice aforethought as defined in Section 206 of the Penal Code.**

Mr Kaburi, Learned Counsel for the accused, submitted that the evidence of the prosecution witnesses was all hearsay. I beg to differ. All the witnesses gave direct evidence of what they saw and heard. They saw the deceased following the accused because the accused had stolen his sugarcane. Pw3 may not have recovered the sugarcane but Pw1 heard the deceased saying the accused had stolen his sugarcane and Pw2 testified that she saw the accused chewing sugarcane which confirms there was an altercation concerning sugarcane. This court believed the witnesses as none of them had a grudge with the accused and as such they did not have a reason to lie against him. I therefore also believe the evidence of Pw1 that it is the accused that inflicted the injury to which the deceased succumbed. The accused was seen by Pw1 repeatedly beating the deceased on the head with a big stick. Pw2 testified that when she turned back upon hearing noise she found the deceased in the accused's house bleeding. Her evidence corroborated that of Pw1 that the incident occurred inside a house and negates the accused's evidence that the deceased sustained the injury from a fall. Mr. Kaburi's submission that the deceased was asserting his authority as a clan elder to mistreat the accused is not borne from evidence. The accused himself did not assert that the deceased abused his power and that submission amounts to a statement from the bar which is not evidence. The deceased succumbed to the injuries three days after the assault and it is my finding that he was killed by the accused. The cause of death evidenced by the post mortem report is consistent with assault and corroborates evidence that the deceased was assaulted. I am further satisfied the accused killed the deceased by an unlawful act as all the deceased had done was follow him for stealing sugarcane from his shamba. The court heard that the deceased was eighty years old and was therefore no match for the accused. Contrary to the defence, the deceased did not beat the accused. He never got a chance to do so because the accused pulled him into the house and beat him mercilessly on the head with a stick. It is my finding that the death of the deceased arose from an unlawful act of the accused.

**Section 206** of the **Penal Code** defines **malice aforethought** as follows: -

**“206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances –**

**(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;**

**(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;**

**(c) an intent to commit a felony;**

**(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”**

My finding is that from the circumstances of this case malice aforethought was not established beyond reasonable doubt. This court heard that the accused enjoyed a cordial relationship with the deceased and all the witnesses testified the two had not been involved in any other altercation. It is therefore clear that whatever occurred had not been planned. Neither is there evidence to suggest that the accused knew that the assault could lead to the death of the deceased. In the upshot I find that the accused unlawfully killed the deceased but as there was no malice aforethought he is guilty of **manslaughter** contrary to **Section 202** as read with **Section 205** of the **Penal Code**. He shall be convicted accordingly.

**Signed, dated and delivered at Nyamira this 7<sup>th</sup> day of November, 2019.**

**E. N. MAINA**

**JUDGE**