



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL CASE NO. 69 OF 2015

REPUBLIC.....PROSECUTOR

=VRS=

1. DAVID NGASURA NYAMONGO.....1ST ACCUSED

2. THOMAS ARANGA NYANDIBI2ND ACCUSED

JUDGEMENT

The accused persons who, initially were charged separately but whose charges were later consolidated face a charge of Murder contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars of the charge are that on 15th May 2010 at Obwari Location in Nyamira District within Nyanza Province jointly with others not before court they murdered Hellen Nyamongo. They denied the charge.

The 1st accused was represented by Mr. Nyagwencha Advocate and the 2nd accused by Mr. Ondigo Advocate. By the time of writing this judgement the 2nd accused had however escaped prison custody and could not be traced.

The trial begun at the High Court in Kisii but when the High Court at Nyamira was established the case was transferred here the offence having been committed within this jurisdiction and the Judge who had been hearing the case at Kisii having been transferred. The case was then taken over by my predecessor Nagillah J, who was however prevented from writing this judgement by reason of his retirement.

The court heard that the 1st accused and the deceased in this case were husband and wife. They had been married for twenty years and their union was blessed with six children; four girls and two boys. However as at the time of this occurrence they were estranged. According to the witnesses they had separated for seven years and the deceased was living with her parents. Charles Ombati Nyambega (Pw1) narrated an incident when his sister, the deceased, went to his home in Nakuru badly beaten. The 1st accused went there and admitted they had differed over family issues and that he no longer wanted her in his home. Apparently he had taken another wife and the deceased was not happy about it. It was following that incident that Charles Ombati (Pw1) advised the deceased to go live with their parents in the village.

The court heard that she lived there until one day in April 2010 (her mother Pacifica Gesora (Pw2) could not recall the exact date) two men one of who Pacifica (Pw2) and Rudia Nyamboga (Pw3) identified as the 2nd accused visited their home. The two men were allegedly looking for Charles Ombati (Pw1) who was not there at the time but they also asked to meet the deceased so she could tell them where they could find Ombati. Pacifica (Pw2) testified that the deceased was in the shamba so she instructed Rudia (Pw3), her granddaughter, to take them to the shamba. Rudia (Pw3) complied. According to Rudia when she took the men to the shamba they told the deceased they were Antony and Jones. The two men then allegedly told her that they were looking for Charles Ombati to thank him because he had gotten them jobs. They wanted the deceased to give them his phone number as well as hers which she did. The men then went away. The next day the deceased is alleged to have received a telephone call from someone whose identity she did not disclose. She left home saying she was going to Kioge. Charles Ombati (Pw1) told the court that it was on 15th May 2010. He had travelled from Nakuru to attend a function at his home church. He testified that on arrival and as he was branching to enter their home he met the deceased and she told him she was going to church. They exchanged pleasantries and agreed to meet later in the day. He attended the function at the church and then joined mourners at one of their neighbour's home. At about 6 pm he went home but did not find the deceased. He testified that at about 7 pm she telephoned him and told him that she was not going to come home that evening as she had gone to Ekerenyo to see her sister-in-law concerning school fees for her daughter. The next day he tried to reach her on phone but in vain and by the time he left for Nakuru she was still out of reach. It was the same even when he went to Mombasa the Monday following and so he got concerned and told his brother-in-law to go to Ekerenyo and confirm whether she was still there. The next day the brother-in-law is said to have told him of a woman whose body had been found near a river at Ekerenyo and taken to the mortuary by the police. He sent the brother-in-law to go to the mortuary to confirm if it was his sister and when the said brother-in-law went it unfortunately turned out that the woman was the deceased in this case.

A post mortem conducted by Dr. Muguna but produced by Dr. Harrison Onguti (Pw3) on 27th May 2010 established that she had died as a

result of among other injuries a cut on the neck extending to the nervous system and injuring the spinal cord. After the post mortem the body was released to the 1st accused for burial.

Duke Arasa Nyamongo (Pw5) a son of the deceased testified that on 1st June 2010 he attended the deceased's burial at his father's home and that when he viewed her body in the coffin he noticed that she was wearing a scarf she had worn on the day she left home on 15th May 2010. He claimed to have been with her before she left for Ekerenyio.

Anderson Kimathi, a police sergeant told the court that at the material time he was working at the Nyamira CID (Criminal Investigations Division) and was the one tasked with the investigations in this case. He stated that he received the brief on 17th May 2010 from his then boss Chief Inspector Laban. He stated that in the course of investigations he learnt that on 15th May 2010 the 1st accused had reported that his wife was missing and that he had confirmed that the body of the deceased was found near Ibacho River on 17th May 2010 and taken to the mortuary. According to the witness, the 1st accused is alleged to have said that he had in fact gone to Nyamira Mortuary and confirmed that she was the one. Pw7 testified that in the course of his investigations he obtained the telephone numbers of the deceased and the 1st accused and sent them to the CID Headquarters for data analysis. He stated that the data he received established that the 1st accused had been in communication with the subscriber of a telephone No. 0725 829 377 which number had also been used to call the deceased's number 0714 684 093 at 12:59pm on 14th May 2010, a day before her disappearance, and again on 15th May 2010 at 1.29.26sec, 5.56.09 sec and again at 6.35. This same number had been used to call the 1st accused at 7.40.49sec on 15th May 2010. Pw7 therefore shifted the focus of his investigations on the 1st accused as according to him he had information from the family of the deceased that he (the 1st accused) had been threatening her. The report he had made at the police station was also being treated with suspicion as they (1st accused and the deceased) had not been living together. Coincidentally as the investigation was going on the 2nd accused was arrested at Ekerenyio in connection with an unrelated matter. It turned out during his investigation that he was the subscriber of telephone number 0725 829 377 which the police had been tracking in connection with this case. The 2nd accused is alleged to have admitted killing the deceased and even recorded a confession in which he implicated the 1st accused saying that he was a hired hitman for the 1st accused. The confession was taken on 13th October 2010 by James Tali (Pw8) a Chief Inspector then stationed at Nyamira County as the District Criminal Investigations Officer. The accused persons were then charged with this offence.

In support of its case, the prosecution called 8 witnesses and produced a post mortem report signed by Dr. Njuguna Mwangi (Exhibit 1), the 2nd accused person's telephone's Safaricom data (Exhibit 2), the 1st accused's telephone's Safaricom Data (Exhibit 3), data from the deceased's phone (Exhibit 4) and the confession by the 2nd accused (Exhibit 5).

After the close of the prosecution's case and upon considering submissions from Counsel for the accused persons and the State, the court found there was evidence to connect the accused persons to the death of the deceased and put them on their defence.

Both accused persons elected to make unsworn statements.

The 1st accused stated that he married the deceased in 1979 and they had lived together for 20 years. He confirmed that they had six children. He stated that about 2002 the deceased was caught red handed committing adultery by their daughter Judy Moraa and when he spoke with her she admitted it. He stated that he caned her and she left with all her children for her parents' home and lived there for 9 years. He stated that on 18th October 2010 he got a call from his daughter who wanted to know if their mother was at his home as she had gone missing. He also got information from one Jonnes Mongare, his son-in-law, that a body collected from KIA area had been taken by Nyamira police. He went to the police station and confirmed. He informed people and subsequently wrote a statement at the CID Nyamira. On 29th May 2010 he was informed about the post mortem and for that too he made a record at the CID. He stated further that on 1st June 2010 he buried the deceased at his home. He commented on the photograph in the obituary saying it did not belong to his wife. He further stated that on 16th October 2010 police officers picked him from his home and took him to Nyamira police station giving reasons that it was about a solar and battery. They however questioned him about his wife's death. On 18th October 2010 they took him to court. He denied murdering his wife. He pointed out that whereas Pw1 had told the court that he had seen the deceased alive on 15th May 2010, Pw2 (the deceased's mother) had said she had been killed. The 1st accused also stated that the 2nd accused was his kin and that in 2012 he was charged with murder and was a convict at the time. The 2nd accused confirmed he was Thomas Aranga Nyandibi. He then told the court that he was arrested at Ikonge on 20th October 2010 for being in possession of a firearm and ammunition. He was taken to Nyamira police station and subsequently arraigned in Nyamira court. He stated that he pleaded guilty and was sentenced to ten years' imprisonment at Kisii Prison. Later he was transferred to Kodiaga Prison before being brought to Nyamira in 2011 and charged with the murder of Hellen. He stated that it was alleged that he had recorded a confession on 13th October 2010. He denied that he was the subscriber of the cell phone No. 0725 829 377 and pointed out that the Safaricom data produced in evidence was not signed and neither was it original data. Although a date for closing submissions was reserved by the court, Counsel did not file any submissions. On his part, Counsel for the State preferred to rely on the submissions made by his colleague after the close of the prosecution's case.

The offence of murder is said to be committed when as provided by Section 203 of the Penal Code **“any person who of malice aforethought causes the death of another person by an unlawful act or omission.....”**

To prove the offence therefore it must be proved and this beyond reasonable doubt not only that the person charged caused the death of the deceased but that it was by an unlawful act or omission. It must also be proved that it was with malice aforethought which under Section 206 of the Penal Code is 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.”

The issues for determination by this court therefore are first whether or not the accused persons caused the death of the deceased, secondly if they did, whether it was by an unlawful act or omission and thirdly if it was, whether the prosecution has proved any one or more of the circumstances set out in Section 206 of the Penal Code that establish malice aforethought.

In his submissions after the close of the prosecution's case, Counsel for the State conceded that there was no direct evidence linking the accused persons to the death of the deceased. He conceded that the evidence was circumstantial. To convict on circumstantial evidence **“it must point irresistibly to the accused and in order to justify the inference of guilt on such evidence, the inculpatory facts must be incompatible with innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt.”** See **Kariuki Karanja vs Republic [1986] KLR 190.**

Having applied the foregoing test to the case I am satisfied that the evidence adduced points irresistibly to the accused persons and that the inculpatory facts are incompatible with their innocence and incapable of explanation upon any other reasonable hypothesis than their guilt.

There is evidence from the family of the deceased that the 1st accused had on several occasions assaulted the deceased and even threatened to kill her. The 1st accused in his defence admitted that before they separated he had assaulted her (what he called caned her) and that they had been estranged for nine years. This confirmed her brother Charles Ombati's (Pw1) evidence that when she went to his home in Nakuru she had been beaten and needed to be treated. It also makes Pw1's evidence that the 1st accused followed her there and said he no longer wanted her for a wife, not too far fetched. It also confirms that it was following this beating that the deceased went to live with her parents. There is evidence that she left her parents' home on 15th May 2010. Her son Duke Arasa (Pw5) confirmed that the deceased confided in him that she was going to Ekerenyo. It was at Ekerenyo that her body was later to be recovered. The deceased's mother (Pw2) and a niece (Pw3) testified that the day before she went to Ekerenyo the 2nd accused and another man had gone to their home on the pretext that they were looking for Charles (Pw1) as he had found them jobs. These two witnesses identified the 2nd accused person in court and although this was dock identification I am satisfied that he was positively identified. This is given the length of time [three hours according to Rudia (Pw3)] the 2nd accused and his accomplice spent with the two witnesses, with Rudia (Pw3) even taking them to the shamba, and the fact that it was in broad daylight. Rudia (Pw3) testified that during their encounter with the deceased the 2nd accused asked the deceased for her telephone number and she gave him. Rudia (Pw3) testified that just before she left for Ekerenyo the deceased received a call although she (Pw3) did not know who the caller was. The deceased would later call her brother Charles (Pw1) to say that she would not return home that day. Pw3's evidence that the 2nd accused obtained the deceased phone number is corroborated by the Safaricom data produced by the investigating officer (Pw7). That data confirms that calls were made to the deceased's telephone number from a phone, which although he denied it, belonged to the 2nd accused. It is instructive that the 2nd accused made a confession in which he admitted killing the deceased. That confession was neither recanted nor retracted and I am satisfied that it was obtained in accordance with the law. In that confession the 2nd accused narrates how he obtained the deceased's telephone number and saved it on his phone. He stated that after that he seduced her and would call her now and then. He even admits that he called her on the day it is alleged she left home to go to Ekerenyo. This not only corroborates the evidence of Pw3 but also the Safaricom call logs (data) produced by the investigating officer. That data also shows that the 2nd accused had communicated with the 1st accused on several occasions and that on the very day the deceased met her death at about 7.30 pm the 2nd accused called the 1st accused person. In his confession the 2nd accused states that after they killed the deceased he called the 1st accused to say they had accomplished that mission. This call was traced to the 1st accused's call log. Whereas the confession of an accomplice can only be taken as evidence against him it is my finding that in this case there is evidence in the call logs that connects the two accused persons and proves beyond reasonable doubt that they formed a common intention to kill the deceased. Section 21 of the Penal Code states: -

“21. When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”

The post mortem report indicates that the cause of death was loss of blood and paralysis of one side of the body. The post mortem report states that the deceased had a cut wound on the frontal – parietal bone, and a cut wound on the right side. Her cervical vertebral had also been cut with the cut extending to the spinal cord on the left. She also had an incomplete cord transection at (6) running from left side. This is consistent with the 2nd accused's confession that the deceased was first cut on the head with a panga by his accomplice and when she fell without uttering a word he (the 2nd accused) drew a knife and stabbed her on the neck once. The fact that the 2nd accused was in communication with the 1st accused as proved by the Safaricom call logs makes the 2nd accused's confession that he was a hitman for the 1st accused more than convincing. There was also evidence by Duke Arasa (Pw5), which I believed that when the deceased was buried she was wearing a scarf that she had worn on the day she left her home. The 1st accused did not explain how he got this scarf. I am therefore satisfied that the prosecution has proved that the two accused persons killed the deceased.

I am also satisfied that they did so by an unlawful act. The deceased had separated from the 1st accused after he became violent and after he told her and her family that he no longer wanted her. There is no evidence whatsoever that she had provoked either him or the 2nd accused and in fact none of them claimed in their statements that she did so. On the contrary there is evidence offered by the evidence of the prosecution witnesses and the confession of the 2nd accused that the 1st and 2nd accused carefully plotted and schemed to kill her on an

unsubstantiated allegation that she was a witch. It is my finding that even had she been a witch they would not have been justified in killing her and therefore acted unlawfully.

The prosecution has also proved beyond reasonable doubt that the accused persons had formed an intention to kill the deceased person – the 1st accused so as to rid himself of her and the 2nd accused for monetary gain as he was going to be paid and indeed was paid for it by the 1st accused person. I am satisfied that the witnesses called by the prosecution were truthful, credible and trustworthy and that their evidence is reliable. The unsworn statements of the accused persons could not withstand the weight of such cogent evidence. I am not persuaded as, the 1st accused alleged, that they contradicted each other. The evidence against the accused persons is watertight and I am satisfied that the prosecution has proved the ingredients of murder beyond reasonable doubt. I find the accused persons guilty of murder contrary to Section 203 as read with Section 204 of the Penal Code and convict them accordingly.

It is so ordered.

Dated, signed and Delivered at Nyamira this 12th day of October, 2018.

E. N. MAINA

JUDGE