

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL CASE NO. 34 OF 2015

REPUBLIC.....PROSECUTOR

=VERSUS=

ISABELLA KEMUNTO ISOE.....ACCUSED

RULING

The accused is charged with Murder contrary to Section 203 as read with Section 204 of the Penal Code. The information states that on the night of 24th and 25th January 2011 at Bokurai II Sub-location within Nyamira County she jointly with others not before court murdered Evans Isoe Matwere.

Briefly the prosecution's case is that at around 7.30 pm on 24th January 2011, the deceased who had two wives, left the home he shared with Nancy Nyaboke (Pw2) his second wife saying he was going to the home of his first wife, the accused in this case. He did not reach because at around 8 am he was found dead at Mwanchani village.

According to Japheth Obare Nyabinge (Pw1) the Assistant Chief of the area, the deceased's trousers were unzipped and his shoes and socks were worn in the opposite feet. He also had a cut on the head. When the Assistant Chief went to the house of the deceased 200 meters from the scene he saw blood on the door. Inside the house he saw blood on the mattress and an axe that was under the bed. When asked, the accused claimed the blood was from her menses. The Assistant Chief (Pw1) and his team comprising the area Chief and Administration Police Officers from Ekerenyo did not believe her. They arrested her and took her to Ekerenyo Administration Police Camp. They took with them the axe and the mattress. These were produced here as exhibit 1 and 2. Blood was also found in the house of one Ongwae who was also arrested and taken to Nyamira Police Station where he was charged jointly with the accused. His case was later withdrawn. The deceased's body was according to the witnesses found near the road and it was not known who took it there.

The officer who investigated this case did not come to testify. Corporal Kariuki Njeru (Pw4) who purported to give evidence on his behalf detailed how that officer was detailed to go to the scene and afterwards took the statements of the witnesses and also took possession of the exhibits.

At the end of the prosecution's case, Mr. Ondigo, Advocate for the accused person submitted that the prosecution had not made out a prima facie case against the accused sufficiently to warrant this court to put her on her defence. He urged this court to acquit her under Section 210 of the Criminal Procedure Code.

Mr. Ochieng, Senior Prosecution Counsel did not submit preferring instead to rely on the evidence of the prosecution witnesses.

Section 306 (1) of the Criminal Procedure Code requires this court to determine whether or not there is evidence that the accused committed the offence before requiring her to enter her defence.

I have considered the evidence of the prosecution witnesses and it is my finding that there is no evidence that the accused committed this offence. The evidence against the accused person is circumstantial. That evidence is that on the fateful night the deceased left his second wife's house saying he was going to the accused's house. The next morning, he was found dead and when people went to the house he shared with the accused there was blood on the door, blood on a mattress in the house and blood on an axe found under the bed in that house. The prosecution did not however take any specimen from the deceased to match with the blood found at the scene and on the exhibits produced at this trial which exhibits I must state had stains of blood on them. It was also incumbent upon the prosecution to establish a nexus between the place where the body was found to the accused person. The court was not told who took the body to the road where it was found the next day. The blood on the mattress and the axe might as well have been from the accused's menses as she told the Assistant Chief. It was incumbent upon the prosecution to prove beyond reasonable doubt that it belonged to the deceased and that he was killed in the house of the accused and dragged to the road where he was found. So it was not proved that the accused killed the deceased. The prosecution did not produce a post mortem report so even the cause of death was not proved so that even were we to act on the suspicion that the accused killed her husband, there would be no evidence to prove that he died as a result of her unlawful act. The recovery of the blood stained axe underneath a bed in the accused's house would have been of value had the blood been tested to see if it matched that of the deceased. Only then would this court have been convinced it was the murder weapon. As none of the witnesses alleges to have seen the deceased at the house of the accused that night, it is possible that he was killed at a place other than her house.

Conviction can only be based on circumstantial evidence if ***“the same points irresistibly to the accused person and the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt.”*** (See **Kariuki Karanja V. Republic [1986] KLR 190**). Conviction cannot be based on mere suspicion which is all we have in this case. Accordingly, I shall enter a finding of not guilty at this stage and acquit the accused under Section 306 (1) of the Criminal Procedure Code. She shall be set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

Signed, dated and delivered at Nyamira this 8th day of November 2018.

E. N. MAINA

JUDGE