



IN THE HIGH COURT OF KENYA AT KISII

CORAM: D. S. MAJANJA J.

CRIMINAL CASE NO. 2 OF 2017

BETWEEN

REPUBLIC.....PROSECUTOR

AND

SIMION JACOB NYAKARO.....ACCUSED

JUDGMENT

1. **SIMION JACOB NYAKARO** (“the accused”) is charged with one count of murder contrary to **section 203** as read with **section 204** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. It is alleged that on 22nd January 2017 at Junction area within Esoit Location in Transmara West Sub-County of Narok County jointly with others not before the court, he murdered **WELDON KIPNGENO YEGON** (“the deceased”). The prosecution called 4 witnesses in support of its case while the accused gave sworn testimony in his defence.

2. **Section 203** of the *Penal Code* defines the offence of murder as causing death of another person by an unlawful act or omission with malice aforethought. The prosecution must therefore establish the fact of death of the deceased and the cause of that death; that the accused committed the unlawful act or omission that led to the death and that the accused committed the unlawful act with malice aforethought.

3. The fact and cause of death was not disputed as the post mortem established that the deceased died from a chest injury caused by an arrow. The post mortem report was produced by the investigating officer, Corporal Pascal Omondi (PW 4), in accordance with **section 77** of the *Evidence Act (Chapter 80 of the Laws of Kenya)* which allows the court to receive Government expert documents such as medical, analyst, document examiner’s and geologist reports without calling the makers thereof so long as the authenticity of the documents is not disputed.

4. The prosecution then had to prove beyond reasonable doubt that the accused inflicted the chest injury that led to the death of the deceased. The evidence on this issue was that on 22nd January 2017 at about 4.00pm, Damaris Cheruiyot (PW 1) and Faith Cherono (PW 2) had gone out to collect firewood with other women when they heard screams behind them. PW 2 recalled that they rushed to gather their goats. Suddenly, they saw the accused and five other people emerge from a maize farm armed with spears, bows, arrows and guns. PW 1 testified that she saw the accused carrying a bow and arrows. PW 2 testified that she saw six people, one who had a gun and the rest had bows and arrows. She saw the accused with a bow and arrows. The accused and the other armed men chased them away. PW 2 recalled that she had seen the deceased cutting grass on the way earlier that day. They later learnt that he had been shot dead with an arrow.

5. The father of the deceased David Kipyegon Kosgei (PW 3) testified that on the material day he was herding cattle when he heard screaming and wailing at about 4.00pm. He saw people running towards the commotion and after about 30 minutes, he was told by a neighbour that his son had been shot. His son was rushed to hospital but died on the way.

6. PW 4 testified that on the material day he received information that the deceased had been shot with an arrow at Esoit location, an area where there was heightened tension between the Kalenjin and Maasai communities over land. He proceeded to the location and found that the deceased had been taken to Longisa Hospital where he had been pronounced dead. He found out that the deceased had gone to cut grass near the Maasai-Kalenjin border when he was killed. He testified that the accused was arrested during a police operation as he had been identified and named by the witnesses who knew him well.

7. When placed on his defence, the accused denied the offence. He testified that on 25th December 2016 he had gone to visit his brother in Melelo which is about 10 kilometres from Esoit. He told the court that he was not in Esoit on the material day.

8. The issue whether the accused killed the deceased call for a consideration of circumstantial evidence as neither of the witnesses saw the accused kill the deceased. It is therefore important to recall the principle that has been restated by our courts on many occasions, that is, that in a case depending exclusively upon circumstantial evidence, the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than the guilt of the accused. It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference (see **Rex v Kipkering Arap Koske & Another [1949] 16 EACA 135** and **Mwangi & Another v Republic [2004] 2 KLR 32**).

9. Apart from the circumstantial evidence, counsel for the accused invited this court to analyse, PW 1's recorded statement which was inconsistent with her testimony. In it, PW 1 had stated that she saw the accused carrying a rifle and not a bow and arrows. The value of such a statement cannot be underestimated particularly when recorded at or immediately after the incident when the memory is still fresh. In **Tekerali s/o Korongozi & 4 Others v R [1952] 19 EACA 259** it was observed that;

We have had reason before to commend on the fact, particularly in cases tried in Tanganyika, that evidence of the first complaint made to a person in authority has not been adduced. Such Statements are admissible under Section 157 of the Indian Evidence Act which applies in the Territory. Their importance can scarcely be exaggerated for they often provide a good test by which the truth or accuracy of the later statements can be judged, thus providing a safeguard against later embellishment or the deliberately made-up case. Truth will often [come] out in the first statement taken from a witness at a time when recollection is very fresh and there has been no opportunity for consultation with others. [emphasis mine]

10. The statement of PW 1 was also inconsistent with that of PW 2 who stated that she saw the accused had a bow and arrow. The totality of the evidence putting the accused at the forest on that day was inconsistent and could not be relied upon solely to implicate the accused.

11. Although the testimony of PW 3 confirmed that the deceased was shot about 30 minutes after the accused was identified by PW 1 and PW 2, it was important to establish the location of the deceased body relative to the distance where the accused was seen. None of the people who discovered the deceased's body were called to testify.

12. Finally, since the deceased died from an arrow shot and there is evidence that the accused was carrying a gun when he was seen, the prosecution would have to establish that common intention with other assailants. The evidence pointing to common intention was threadbare and since the identification of the accused was wrought with doubt, I find and hold that the prosecution did not prove its case beyond reasonable doubt.

13. I therefore acquit the accused, **SIMION JACOB NYAKARO**, of the murder of **WELDON KIPNGENO YEGON**. He is accordingly discharged from these proceedings.

DATED and DELIVERED at KISII this 10th day of DECEMBER 2018.

D.S. MAJANJA

JUDGE

Mr Omwega, Advocate for the accused.

Mr Otieno, Senior Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions, for the State.