



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 6 OF 2016**

**REPUBLIC.....PROSECUTOR**

**=VRS=**

**BERNARD OBAIGWA ATEI.....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 1<sup>st</sup> June 2013 at Esamba village in Bosaragei Sub-location in Nyamira North District within Nyamira County, the accused murdered Damaris Kemunto Momanyi. The accused pleaded not guilty to the charge.

At the trial the prosecution called four witnesses. Pw1 (Everlyne Kesia Nyabaro) told the court that the deceased was her niece and that she lived with her at Nyarame market. She stated that on 2<sup>nd</sup> June 2013 she went to her farm to pick tea and left the deceased at home only to learn later that the deceased had been picked by a motor cyclist.

Two days later someone asked her if the deceased was still in her home and when she said she had left two days ago, the man directed her to a place where she went and saw a body which she identified as that of the deceased. She did not know how the deceased got there and according to her she did not see the person that picked her. Pw2 (John Nyang'au Onyambo) a vigilante testified that on 4<sup>th</sup> June 2013 at about 5 pm he was on his way to Kegogi market when someone pointed to the accused person as being wanted on suspicion that he had killed someone. He apprehended him and handed him over to the authorities.

Pw3 (Fredrick Atei Segera) is the father of the accused and is the one who discovered the body of the deceased a few meters from the house of the accused. He testified that he went back to his own house and told his wife who raised an alarm and soon villagers arrived at the scene. He stated that the deceased was not known to him and that when police officers went to the scene they went and searched the house of the accused and told him (Pw3) that they had recovered two blood stained shirts. He stated that he himself did not see any blood on those shirts. Pw4 (Charles Muchoya) a police constable based at DCI Jomo Kenyatta International Airport testified that he was one of the officers who visited the scene and removed the body to the mortuary. He stated that from the scene they could see marks of how the body was dragged; that the suspect was nowhere to be seen and was subsequently arrested by Administration Police Officers and handed over to the station where his statement was recorded by the DCIO. Pw4 stated that it was based on the statements of the witnesses and the accused's own statement under inquiry that he made the decision to charge him with this offence. He therefore took the accused for a mental assessment and then arraigned him in court. This witness also produced the post mortem report under Section 77 (1) of the Evidence Act. In the opinion of the doctor who conducted the post mortem, death was as a result of cardiorespiratory arrest as a result of head injury.

At the close of the case for the prosecution, counsel for the accused person submitted that the accused has no case to answer; that the evidence falls short of the proving the case against the accused person beyond reasonable doubt. Counsel urged this court to make a finding that the prosecution has not established a prima facie case and acquit the accused under Section 210 of the Criminal Procedure Code. Counsel cited several authorities.

Counsel for the prosecution did not submit instead preferring to rely entirely on the evidence of the prosecution witnesses.

At this stage, I am required to determine whether or not there is evidence that the accused person committed the offence. This is as provided by Section 306 (1) of the Criminal Procedure Code which states: -

***“When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is no evidence that the accused or any one of several accused committed the offence shall, after hearing, if necessary, any arguments which the Advocate for the prosecution or the defence may desire to submit, record a finding of not guilty.”***

Having considered the evidence of the witnesses for the prosecution as well as the submissions by Counsel for the accused, my finding is that there is no evidence that the accused person in this case committed this offence. There was no eye witness account as none of the four witnesses were present when the offence was committed. Secondly, none of the witnesses established any link between the accused and the deceased. For one, Pw1 who used to live with the deceased was emphatic that she was not at home when the deceased was picked by a person riding a motor cycle and the prosecution did not call the persons who saw her leave with the motor cyclist. Pw2's role in this case was in the apprehension of the accused person. He did not know anything about the murder. Pw3 – the father of the deceased – discovered the body in the tea farm where he had gone to pick the tea. The closest he came to implicating the accused was when he stated that he was told that two shirts with blood stains were found in the accused's house. However, the investigating officer (Pw4) did not allude to such evidence having been found in the accused's house and therefore that piece of evidence by Pw3 was hearsay. The investigating officer (Pw4) spoke about some “**dragging marks**”. He did not however elaborate or give an explanation of where the marks came from and led to. The court cannot presume that the marks came from the accused's house to the place the body was found as that would be tantamount to introducing its own evidence to the case. Pw3 told the court that he had heard that the accused had been seen with the deceased. That too

was hearsay as the person(s) who saw them together should have been called as witnesses. The prosecution did not call the people who identified the body for purposes of post mortem and whereas this court has no doubt that the deceased died, there is no way of knowing that this post mortem was in respect to the deceased Damaris Kemunto. I agree with Counsel for the accused that the investigations in this case were inconclusive. None of the ingredients of murder were proved. To the contrary, a lot of gaps exist in the case and to put the accused on his defence would be tantamount to asking him to fill those gaps which is unlawful. Accordingly, I enter a finding of not guilty and acquit the accused under Section 306 (1) of the Criminal Procedure Code. It is so ordered.

**Signed, dated and delivered in open court this 5<sup>th</sup> day of December 2018.**

**E. N. MAINA**

**JUDGE**