



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 58 OF 2015**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**SAMWEL RIOGI MOKAYA.....ACCUSED**

**RULING**

The accused person 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 1<sup>st</sup> May 2015 at Sengera 2 village, in Masaba North District within Nyamira County, murdered one Cynthia Bochere Oguora.

The accused pleaded not guilty to the charge. In the ensuing trial the prosecution called eight (8) witnesses and produced a post mortem report which proves that the deceased died as a result of cardiac tamponade due to stab wound on the heart.

The star witness was Everlyne Nyakerario (Pw4) who on the fateful night had been sharing a bed with the deceased. Their aunt and benefactor Jane Mwangi (Pw2) had left them home alone to go attend a funeral of a relative. The court heard that the deceased had a mental disability. According to Everlyne they had spent the night at home alone and were sleeping in a bed in the kitchen where the accused broke the door and entered the house and stabbed them with a knife. She was stabbed on the back as was the deceased. She told the court that it all happened at about 2.30 am. She testified that although they had a lamp, they had put it off. Entry into the house was gained by demolishing the wall (removing mud) near the latch and opening it from the inside. Everlyne told the court that she managed to flee through the window and went to their sister's house for help but by the time they went back to the house, Cynthia, the deceased, was in critical condition. She was pronounced dead at the hospital she had been taken by the accused and other villagers. The accused was arrested the same day and subsequently charged with this offence. His wife (Pw2) testified that he had often berated her for keeping the two girls (Pw4 and the deceased) in her home and had asked her to chase them away which she refused to do.

At this stage my duty as dictated by Section 306 (1) of the Criminal Procedure Code, is to determine whether there is evidence that the accused person committed this offence.

The case against the accused person is hinged on what Everlyne told this court. It is she who has implicated the accused person as indeed it is only her evidence that links him to the commission of this offence. This is evidence of a single identifying witness in **Maitanyi Vs. Republic [1986] KLR 198** the court held as follows in relation to the evidence of such witnesses: -

**“1. Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were different.**

**2. When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light available conditions and whether the witness was able to make a true impression and description.**

**3. The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision, it must do so when the evidence is being considered and before the decision is made.**

**4. Failure to undertake an inquiry of careful testing is an error of law and such evidence cannot safely support a conviction.”**

In line with the above holding, I have duly warned myself of the need to carefully test the evidence of Pw4. It was her evidence that it was at about 2.30 am and that there was no light in the house. When asked how she knew it was the accused who broke into their bedroom her answer was that it was because he was standing at the cow shed. She did not give a clear explanation of why she believed it was the accused who committed this offence. She did not tell this court that she saw him and recognized him. If she saw the assailant, how did she recognize it was the accused yet there was no light in the room as according to her they had put off the lantern lamp. It is also noteworthy that whereas she claims to have recognized the accused as the assailant she never told the people she encountered that night and if she did none of them disclosed it to this court. Telling the people she sought help from that their attacker was the accused would have confirmed that she had indeed recognized him and that she was not mistaken. It is not clear from the evidence at what stage in the investigations that she said it was the accused. We are only told that the accused was carried in the same car that took the body of the deceased. In **Republic Vs. Turnbull [1976] EA ER 551** the court emphasized the need for such disclosure as the same confirms that the witness was being truthful. The court stated at page 552: -

***“All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the***

*accused's case, the danger of a mistaken identification is lessened; but the poorer the quality the greater the danger."*

It is my finding that the identification evidence in this case is of a very poor quality (2.30 am with no light in the room at all) and that this makes the danger of mistaken identity very high. In the premises I agree with Mr. Bigogo Learned Counsel for the accused, that there is no prima facie case made out against the accused sufficiently to warrant him to be put on his defence. I accordingly enter a finding of not guilty under Section 306 (1) of the Criminal Procedure Code. He is acquitted and should be set at liberty forthwith unless otherwise lawfully held.

**Signed, dated and delivered in open court this 4<sup>th</sup> day of December 2018.**

**E. N. MAINA**

**JUDGE**