



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL (MURDER) NO. 46 OF 2013

REPUBLICPROSECUTOR

VERSUS

DENNIS NYABENGI MIRORO.....ACCUSED

JUDGMENT

1. **Charles Ondieki Onguti (the accused)**, is charged with murder, contrary to S. 203 read with S. 204 of the Penal Code, in that on the 21st April 2013, at Nyamecheo Sub-location within Kisii County, murdered Evans Stima Ondieki.

2. The case for the prosecution was that the deceased was son to the accused and on the material date at about 6.30 pm, a report was made to an assistant chief that the deceased had been assaulted and killed by members of his family as well as members of the public.

3. The report was conveyed to the police and in the course of investigations the scene was visited and the body of the deceased removed to the mortuary. It had deep cuts on the head. An autopsy was conducted with the result that the cause of death was cardiopulmonary failure due to intracranial haemorrhage and severe head injury due to blunt trauma.

4. Police investigations indicated that the deceased attacked the accused with a panga (machete) and in the process they fought. Both suffered bodily injuries but those inflicted upon the deceased were fatal.

The accused was then charged with the present offence.

5. The case for the defence was that the accused was at home on the material date and time when the deceased arrived and chased after his mother intending to assault her. The mother ran away thereby causing the deceased to confront and attack his father (accused) with kicks and fist blows. A crowd of villagers attracted to the scene by the ensuing commotion set upon the deceased and assaulted him with the result that he suffered fatal injuries.

6. From all the foregoing, it is undisputed that the deceased sustained fatal injuries after being assaulted.

The big question was whether the accused was the assailant or one of the assailants.

The defence raised by the accused was essentially a denial and a suggestion that even though the deceased was the aggressor against his parents he (accused) did not assault him.

7. The accused directed the blame for the offence against unidentified villagers or members of the

public who appeared at the scene after being attracted to the commotion and assaulted the deceased.

However, there was evidence from the investigating officer, **PC Alfred Nyasio (PW 4)**, implying that the accused may also have participated in assaulting the deceased as a way of defending himself from the deceased's attacks against him.

8. The learned defence counsel, **MR. Ombachi**, submitted that the police investigations were faulty as no attempts were made to find the actual people responsible for fatally assaulting the deceased. He thus implied that the accused did not take part in the assault.

9. The learned Prosecution Counsel, **M/s Mbelete**, relied fully on the evidence on record thereby implying that the accused assaulted the deceased while the two engaged in a fight.

This aspect of a fight came from the investigating officer (PW 4) who stated in turn that it came from the mother of the deceased and wife to the accused, **Pauline Nyabonyi Ondieki (PW 3)**.

10. But, in her evidence, Pauline (PW 3) stated that the deceased chased her and the accused with a panga. She escaped from the scene and left the accused being chased by the deceased. She returned later only to find the deceased already dead. She did not know who killed him. She did not say anything to do with a fight meaning that the investigating officer (PW 4) had no basis to link the accused with the death of his own son in whatever manner.

11. The chief, **Jason Onkoba Ontieri (PW 1)**, indicated that the accused was arrested and charged on mere suspicion after a report was made to him (chief) to the effect that the deceased had been assaulted by his family members and members of the public. He (chief) did not venture to confirm whether the accused was among the said family members.

12. The accused's other son, **Polycap Ondieki (PW 2)**, was not at the scene when his brother (deceased) died. He arrived there only to find his brother's body on the ground with injuries. Somebody he did not mention told him that the deceased had attempted to assault their father but fell down and hit his head against a panga.

13. In essence, the prosecution failed to prove beyond reasonable doubt that the accused was the person or one of the persons responsible for assaulting the deceased and causing him fatal injuries. He was arrested and charged on mere suspicion which would not on its own be evidence of commission of a criminal offence however strong (see, **Sawe Vs. Republic (2003) KLR 369**).

14. It was unfortunate that members of the public interfered in a matter which was purely domestic and took the law into their hands by assaulting the deceased and occasioning him fatal injuries. They indeed went to the rescue of the deceased's parents after calls of distress were sounded by the deceased's mother (PW 3) but they used excessive and unlawful force against the deceased aggressor. Most unfortunate was that none of them was arrested by the police and charged with the present offence or related offence.

15. The accused found himself in the thick of things because he was at the mercy of an enraged deceased when a mob of villagers arrived at the scene in answer to the calls of distress raised by his wife (PW 3). There was nothing which showed that he played a criminal role in the entire saga. He is therefore found not guilty as charged and is hereby acquitted.

[Delivered and signed this 5th day of July 2016]

J.R. KARANJAH

JUDGE