



**REPUBLIC OF KENYA**

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

**HIGH COURT CRIMINAL CASE NO. 74 OF 2015**

**REPUBLIC .....STATE**

**-VERSUS-**

**PAUL ANGASA MAKORI .....ACCUSED**

**JUDGMENT**

**1. Introduction**

*Paul Angasa Makori* is before this court on one count of murder contrary to **Section 203 as read with Section 204** Penal Code. The particulars thereof being that on 4<sup>th</sup> day of April 2010 at Riomoro sublocation in Nyamache District within Nyanza Province, murdered **Dennis Mong'are Ontobo**.

He pleaded not guilty to the charge. The case proceeded to hearing during which the prosecution called seven (7) witnesses.

**1. Facts of the case**

On the 4<sup>th</sup> day of April 2010 the accused went to Antakama Trading Centre where the deceased, **Dennis Mong'are Ontobo**, was going about his business and attacked/assaulted him by stabbing him with a Somali sword and hitting him with a walking stick at about 6.30p.m. It is alleged he stabbed him on the neck and hit him on the left leg. The accused then fled from the scene and was later arrested on 22<sup>nd</sup> of June 2010. It is alleged the deceased succumbed to these injuries. The post mortem carried out on his body on the 3<sup>rd</sup> July 2010 reveals that the deceased's death was as a result of cardio pulmonary arrest injuries due to blunt trauma. There was some blood inside the head and brain, that is, blood was present under the sculpt as per exhibit PW4- vide dated 3<sup>rd</sup> July 2010.

The accused was subsequently arrested and charged with the present offence on the basis that he had malice aforethought.

**2. Prosecution's evidence**

**PW1 and PW2, William Nyarobe Momanyi and Patrick Ombati Mose** both testified that they were at Antaka Hotel, they saw the accused Paul Angasa Makori fighting with Dennis Mongare Ontobo. They both saw Paul Angasa Makori not only hit Dennis with a walking stick and also saw him remove a Somali sword and stab Dennis with it. They say it was at 6.30. They say the visibility was good. PW2 testified that he knew Paul and Dennis, he knew them for a very long time. Their testimony corroborated each other. PW1 said Paul and Dennis are fellow villagers and he knew both very well.

Both **PW3 & PW4** were brothers to the deceased. They identified and witnessed the post mortem at Kisii Level six Referral Hospital. **PW6, P.C Joel Macharia (92233)** also witnessed the post mortem which was performed by **PW5 – Dr. Ongondo Zonga** and produced the same as exhibit (P.M.) -1.

### **3. The defence case**

When put on his defence, the accused denied killing the deceased. He testified that he did not murder the deceased person as alleged.

He alluded to the discrepancy of the date of death in the charge sheet/information and the evidence as testified by Dr.Ezekiel Ogonda Zonga (PW5) in which the doctor said that the deceased died on 22<sup>nd</sup> day of June 2010, both 4<sup>th</sup> April 2010 as alluded to in the information charge sheet. The accused urged the court to set him free in view of the variance in the date of death between the information and evidence.

### **4. Prosecution's Submissions**

It is prosecution's evidence that PW1 & PW2 identified the accused person who on 4<sup>th</sup> April 2010 assaulted the deceased with a Somali sword on the head and walking stick on his waist.

That the death was confirmed by PW5 that the deceased had head injuries and these injuries caused his death. That therefore the accused should explain that it is not him who assaulted the deceased. On that even if he did assault the deceased the assault was not the cause of the deceased's death.

That evidence so far pointed to the accused person, nobody else. That the accused upon seeing the arresting officer took off. That however the prosecution conceded that as on 4<sup>th</sup> April 2010, the deceased was not dead.

That under **S.179 C.P.C** the court has power to reduce the charge to manslaughter, if facts tendered before the court disclose a lesser offence.

### **5. The Defence's Submissions**

First, the investigating officer failed to testify on how he investigated the case.

Second, no reason was given why the accused was arrested on 22<sup>nd</sup> June 2010.

Third, there is no evidence that the accused was arrested for assault.

Fourth, no evidence of treatment notes to link the injuries of 4<sup>th</sup> April, 2010 to his subsequent death of 22<sup>nd</sup> June 2010. Therefore without medical evidence no link has been established to the first assault.

Therefore the defence urges the court to dismiss the charge.

The law

### **6. Section 206**

(a) An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

(b) Knowledge that the act or omission causing death will probably cause the death or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) An intent to commit a felony

(d) An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

8. What is clear from the above provision is that of the circumstances **(a-d)** supra, once proved by the prosecution establishes malice aforethought on the part of the accused.

9. The defence has however raised the issue of variance between the date of death on the charge sheet (information) and the date of death as given in evidence. The prosecution concedes to this discrepancy but goes not argue that this is not fatal. The prosecution invokes **S.179 of the C.P.C.**

**Section 179 says:**

(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence which he was not charged with it.

## **10. Analysis of the Evidence**

It is not in dispute that the accused assaulted the deceased, PW 1 and PW2 confirmed the assault. The visibility was good. Both witnesses know both the accused and the deceased, as they were fellow villagers.

The variance in date of death between the charge sheet and the evidence by PW5,

(i) is it fatal? **Section 214 (2) C.P.C.** confirms.

(ii) Whether or the deceased person's death is attributable to the assault of 4<sup>th</sup> April, 2010?

This, in my view, appears problematic. The absence of investigating officer compounds the problem. His testimony would have shed light on the linkage between the original assault and the subsequent death

Second, lack of medical notes and treatment cards to establish the link was wanting.

I have given careful consideration to the defence insistence that in the light of both variance in date of death and evidence on one hand and failure to establish the link to the original assault by tendering medical evidence by the prosecution on the other hand I am not inclined to make a finding not of murder but of manslaughter against the accused person, invoking **Section 179 of C.P.C.**

## **10. Conclusion**

The upshot of what I have stated above is that the accused person herein Paul Angasa Makori is guilty of the lesser offence of manslaughter under **Section 202 (1) of C.P.C.** Accordingly the accused is hereby convicted of the offence of manslaughter.

The accused is given 14 days to appeal.

It is so ordered.

11. The accused is given 14 days to appeal.

**Dated and delivered at Nyamira High Court this 9<sup>th</sup> day of September 2016.**

**C.B NAGILLAH**

**JUDGE**

In the presence of:

Omwega for accused PERSON

Konga for the State

Omayio - Court clerk