



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL CASE NO. 67 OF 2012

REPUBLIC PROSECUTOR

VERSUS

NDEGWA NYANJEACCUSED

JUDGMENT

NDEGWA NYANJE hereinafter referred to as the Accused is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code.

The particulars are that:-

“On the 13th day of March, 2012 at 11:00 pm at Matope Village in Kwale County, jointly, with another not before the Court, they murdered DZAME NYAE NYAMAWI”.

The prosecution in this case called six (6) Witnesses in support of their case. The defence called none apart from the Accused himself who gave unsworn statement.

The Deceased Dzame Nyae Nyamawi a lady aged around eighty (80) years, was murdered on the night of March, 2012. She had multiple deep cut wounds on the shoulder joint, the chest, the forehead, the cheek bones. She had a compound fracture to the right side of the head. The Doctor who performed post mortem Examination on her formed the opinion that the cause of death was as a result of Cardio-respiratory arrest due to head injury.

According to the evidence of PW 1 Nyanje Nyae, they were attacked in the middle of the night at around 11: 00 pm. He had been asleep when he was awoken by a knock at the door of the house he was sleeping in. He opened the door and saw two people Ndegwa Nyanje and Menza Nyanje behind a wall outside.

They were armed with pangas one of them hit him with the blunt part of the panga. He heard the Deceased shout that she was being killed. He decided to go and seek help from his brother Nyamawi Nyae who was staying about one kilometer away. Upon return they found the door of the Deceased house having been locked from outside. They forcefully entered and found the deceased with cuts all over her body. She was able to talk and she said that her attackers were sons of her uncle. They later reported the matter to the village chairman and later to police. The Deceased died on the way to police station and she was later taken to mortuary for post mortem examination.

The Witness further testified that the Deceased and her brother one Katambo Mrima were not in good books. That Katambo Mrima had threatened to kill her.

The two had a dispute over a piece of land belonging to the Deceased which Katambo had sold.

Nyamawi Nyae PW 2 was asleep when PW 1 went and woke him up and reported to him that Ndegwa and Menza had gone to the Deceased home while armed with pangas. They went to the scene arriving at around mid night and found her having been severally cut all over her body. They made arrangements for her to be taken to Hospital but she died on the way. She had a grudge with one Katambo over a piece of land which was sold without her knowledge and this Katambo had threatened to kill her.

Upon a careful analysis of the evidence before this Court, its noted that the investigating officer did not testify in this case. His evidence was vital as there are several gaps in the prosecution case which needed to be explained.

The first one is that this incident took place on the night of 13th March, 2012.

The Accused was arrested on 7th November, 2012 and arraigned in Court on 8th November, 2012.

The second issue is that of identification. This incident took place at 11:000 pm. Both the Deceased and PW 1 were asleep. PW 1 did not mention the source of light at the time. He only refers to moon light. The attack was inside a house it has not been explained how moonlight could have penetrated into the house.

PW 1 alleges to have seen the two attackers clearly and reported the matter to the village elder and chairman of community policing and also the police. None of the prosecution Witnesses did testify to the effect that the Accused had gone into hiding. PW 5 PC John Mbuda testified to have arrested the Accused while in house on the 3rd day of November, 2012. He did not resist arrest. What can be gleaned from the evidence adduced by the prosecution Witnesses is that there was a shamba dispute between the Deceased and the Katambo Mrima. This Katambo Mrima is not an Accused in this case. His role in the murder of the Deceased has not been clearly spelt out.

The connection between the Accused and this Katambo Mrima has also not been made clear. These were gaps the investigating officer was supposed to fill. This case has not been proved beyond reasonable doubt. The Accused is found not guilty on the offence of murder contrary to section 203 of the Penal Code and he is acquitted accordingly under section 322 of the Criminal Procedure Code. He is set at liberty unless otherwise lawfully held.

Judgment delivered, dated and signed this **9th** day of **October, 2015**.

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M. MUYA

JUDGE

9TH OCTOBER, 2015

In the presence of:-

Counsel for the prosecution Mr. Masila

Learned Counsel for the defence Mr. Nabwana holding brief Miss odhiang

Court Assistant Musundi

