



**REPUBLIC OF KENYA**

**High Court of Kisii**

**Criminal Case 58 of 2010**

**REPUBLIC ..... PROSECUTOR**

**VERSUS**

**ZAPHANIA OKWOYO GESURE ..... ACCUSED**

**JUDGMENT**

1. The accused in this case, Zaphania Okwoyo Gesure was arraigned before Makhandia J. on 15<sup>th</sup> April 2006 where he pleaded not guilty to an information of murder contrary to **section 203** as read with **section 204** of the **Penal Code**. It was alleged that on the 10<sup>th</sup> day of May 2005 at Bosinange sub location in Gucha District within Nyanza Province he murdered Clemensia Nyaboke.
2. The accused appeared before Makhandia J. following an order of the Court of Appeal dated 19<sup>th</sup> March 2010 for a retrial.
3. The prosecution called 5 witnesses. PW1 was John Maragia Sagwe, a stone carver in Bosinange village, and a step-son to the deceased Clemensia Nyaboke. On 10<sup>th</sup> May 2005 while he was at his place of work at Bomware, he received information from a child by the name Oganyo that the deceased had been killed. He hurried home and went to the scene where the deceased had been killed. He found other people at the scene among them the Assistant Chief, Mr. Atanas Ombongi who gave him a letter to take to Ogembo police station. He took the letter to Ogembo police station and was given 3 Police officers who accompanied him back to the scene. the OCS also went with them. The police removed the body of the deceased to Tabaka Mission Hospital Mortuary. When PW1 (John) returned home after taking the deceased's body to the mortuary, he got information that it was the accused who had killed the deceased and dumped her body in a disused pit latrine. The accused is a nephew to John.
4. When put under cross examination, John stated that he could not give the names of those who alleged that the accused was the one who had killed the deceased. John also stated that when Oganyo took the news to him, he (Oganyo) did not tell him who had killed the deceased.
5. PW2 was Andrew Machogu (Andrew) a stone carver from Tabaka area. On the 10<sup>th</sup> May 2005, at about 12.00 p.m., he got news about the death of the deceased who was his mother. On getting home, he found the body of the deceased in the home of the accused, lying next to a hole. After looking around, Andrew contacted the area Chief who came and in turn contacted Ogembo police station. The body of the

deceased, who was a grandmother to the accused was taken to Tabaka Mission Hospital mortuary. Andrew was not aware of any bad blood between the accused and the deceased. Later on, the accused who had disappeared from home after the deceased died, surrendered himself to police and was subsequently arraigned in court.

6. During cross examination, Andrew stated that the accused, whose grandfather was a brother to the deceased's husband, was a neighbour. Andrew however stated that he was not aware that the accused's 2-month old child was ailing. Andrew also testified that the deceased who had been cut on the neck had also been raped and her body was lying next to a hole.

7. Dr. Ezekiel Ogando testified as PW3. He carried out a post mortem examination on the body of the deceased on 16<sup>th</sup> May 2005 at the Kisii District Hospital. According to Dr. Ogando, the deceased Clemensia Nyaboke had multiple cuts and obvious fractures of the skull, with brain tissue oozing from the fracture. Dr. Ogando opined that the deceased had died as a result of severe head injury and haemorrhage. The post mortem report duly filled and signed by Dr. Ogando was produced as **P. Exhibit 1**.

8. During cross examination, Dr. Ogando stated that at the time of post mortem, the deceased's skull was visible though he eventually had to open up the body. The deceased was about 60 years of age at the time of her death.

9. PW4 was No.57079 Police Constable Fredrick Onsembe of Ogembo Police station. He testified that the accused herein surrendered himself at Ogembo Police Station on 11<sup>th</sup> May 2005 and informed PW4 that he (accused) had killed his grandmother, the deceased. The accused is said to have told PW4 that he had had to spend the night in the bush for fear of being lynched by members of the public. PW4 booked in the accused and placed him in cells. That the accused told PW4 that he had killed the deceased on suspicion of being a witch.

10. In cross examination, PW4 told the court that the accused arrived at Ogembo police station at about 8.00 a.m. on 11<sup>th</sup> May 2005 and told the police officer that he had killed the deceased on suspicion that she was a witch. PW4 also said that he recorded whatever the accused told him the OB, though the accused did not have the murder weapon with him. PW4 further testified that the accused's clothes were not blood stained. PW4 also testified that whatever the accused told him was relayed to the OCS.

11. PW5 was Andrew Bisieri Maoro, a brother in-law of the deceased. He is the one who identified the body of the deceased to Dr. Ogando for post mortem.

12. At the close of the prosecution case, the accused was put on his defence. This was done after the Court (Makhandia, J) considered submissions by both counsel on a no-case to answer. I took over this case following transfer of Makhandia J. from Kisii High Court to Machakos High Court in October 2011. The accused elected to give an unsworn statement.

13. In his defence, the accused stated that he knew nothing about the case against him. He also testified that on 10<sup>th</sup> May 2005, he woke up as usual and went to his shop which was opposite Tabaka Mission Hospital. At about 5.30 p.m., police officers went to his shop and told him they were looking for him. They asked him to accompany them to Ogembo police station and that once they got there, they would tell him the reason for wanting him to go with them. When they got to the police station, he was informed that he was under arrest. He was kept in police custody for 8 months before he was arraigned in court. According to the record in the old file – Cr. Case No.39 of 2005 – The accused first appeared in court on 7<sup>th</sup> July 2005 when the plea was fixed for 25<sup>th</sup> July 2005. Clearly, it was not 8 months between 10<sup>th</sup> May 2005 and 7<sup>th</sup> July 2005. The period was roughly 2 months. The accused contended that all the evidence that was adduced against him was a pack of lies and that all that the witnesses talked about was news to him. The accused did not call any witnesses.

14. At the close of the defence case, counsel for the accused submitted that the prosecution had not

proved its case against the accused person beyond any reasonable doubt. Counsel, Mr. Ombachi, submitted that the only evidence tending to connect the accused to the alleged offence is that of PW4, No.57079 PC Fredrick Onsembe to the effect that the accused had admitted to having killed the deceased on suspicion that the deceased was a witch. Counsel submitted that the procedure for taking confessions from suspects was not followed and that in any event, the OB in which PC Onsembe allegedly recorded the said confession was not produced in evidence. Counsel submitted that the evidence of the alleged confession was thus not admissible, and that the prosecution had not discharged its burden of proof to the required standard. I have carefully considered those submissions and the submissions made by both counsel on a no case to answer.

15. The issue that now arises for determination is whether on the evidence on record, the prosecution has proved that the deceased was murdered and that it was the accused who murdered her. Murder is defined as causing the death of another by malice aforethought and through an unlawful act or omission. Malice aforethought as defined under **section 206** of the **Penal Code** is the *mens rea* for the offence of murder. It is that intention to kill another person deliberately and by an unlawful act or omission.

16. In the instant case, there is evidence that the deceased, Clemensia Nyaboke died on 10<sup>th</sup> May 2005. All the prosecution witnesses have testified to this fact. The post mortem report - **P. Exhibit 1** – shows the cause of death as cardiorespiratory arrest following severe head injuries and severe haemorrhage. The question that follows this fact of death is was the death a murder or did the deceased die from natural causes? If it was murder, is it the accused who perpetrated it?

17. From the evidence in the post mortem report and also from the evidence of the witnesses who saw the deceased as the body lay by a hole in the home of the accused, she had a deep cut wound on the head, to the extent that the skull was visible and brain matter was oozing from the cut wound. So it is clear from the said evidence that the death of the deceased was not from natural causes.

18. Now, apart from the fact that the body was found near a hole outside the home of the accused, there is no other evidence which tends to point to the accused as the person who killed the deceased. The evidence given by PW4, PC Onsembe to the effect that the accused admitted to having killed the deceased on suspicion that she was a witch had no backing from any other evidence. Though PC Onsembe told the court that he recorded all that the accused told him in the OB, no effort was made to produce the said OB as a confirmation that indeed the accused said what PC Onsembe said he (accused) told him. In any event, the accused denied any such statements and further, PC Onsembe said that when the accused presented himself at the police station, his clothes were not blood-stained. It beats logic that someone who had so mercilessly slashed another on the head could have had no blood stains on his clothes even if he spent the night out in the cold.

19. So, what I am saying here is that the circumstantial evidence which the prosecution hoped to anchor its case on against the accused is far too weak to be of any use to the prosecution case. None of the persons who are said to have told John that it was the accused who killed the deceased was ever called to testify. Not even the chief or the Assistant Chief were called to testify. The prosecution case was thus badly investigated and vital evidence which would have helped the prosecution's case was not placed before the court.

20. In the circumstances, I find and hold that the prosecution has not proved its case against the accused person beyond any reasonable doubt. I therefore find that the accused is not guilty on the charge of murder. Accordingly, I acquit him of the same under **section 322 (1)** of the **CPC**.

21. Unless he is otherwise lawfully held, the accused shall be released from prison custody forthwith.

22. Lastly, the delay in delivering this judgment is very much regretted. At the time it was due, I was engaged in hearing and determining the more than 125 boundary dispute cases filed against the Independent Electoral and Boundaries Commission. Judgment in the said cases was delivered by the 5-Judge Bench on 9<sup>th</sup> July 2012.

23. It is so ordered.

**Dated and delivered at Kisii this 4<sup>th</sup> day of October, 2012**

**RUTH NEKOYE SITATI**

**JUDGE.**

In the presence of:

Mr. Mutai (present) for State

Mr. Kaburi for Ombachi for Accused

Mr. Bibu - Court Clerk

**RUTH NEKOYE SITATI**

**JUDGE.**