



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYAMIRA**  
**CRIMINAL CASE NO. 1 OF 2020**

**THE REPUBLIC.....PROSECUTOR**

**=VRS=**

**JOSEPHINE NYAKERARIO GEKONGE.....ACCUSED**

**JUDGEMENT**

The accused is charged with the offence of **murder contrary to Section 203 as read with Section 204 of the Penal Code**. The particulars of the offence are that on 4<sup>th</sup> January 2015 at Riabore village, Embaro Sub-location in Masaba North District within Nyamira County jointly with others not before court the accused murdered **CHARLES MOKAYA MOKUA**.

The accused pleaded not guilty to the charge and the prosecution proceeded to call witnesses to prove its case. During the trial the accused was represented by Mr. Ondigo Advocate and the prosecution by Mr. Majale, Senior Prosecution Counsel.

Briefly the facts of the case are that on the material day the deceased was involved in an altercation with Momanyi, one of the sons of the accused. It was at about 2pm and the altercation concerned a woman/widow who the said Momanyi was intent on "*inheriting*", a thing which the deceased was opposed to. The altercation between the said Momanyi and the deceased led to a fight in which Momanyi sustained injuries. He retreated to his home and when members of his family, to wit his father, mother (the accused) and siblings saw him they decided to retaliate and so they proceeded to the scene armed with crude weapons. The court heard that they found the deceased grazing cattle not far from his house and set upon him with the objects. The accused is said to have given the deceased several blows on the head with a stick the type used by women as a walking aid. George Nyabuchwa (Pw1), one of the prosecution witnesses told this court that he tried to rescue the deceased but as there were a total of five people assaulting the deceased he was overpowered. He stated that he (Pw1) even lost a tooth in the process and so he fled the scene.

Polycarp Mokaya (Pw2) stated that he too witnessed the assault on the deceased and that he saw the accused hit the deceased on the thigh and belly with a stick (walking aid) as he lay on the ground. Like Pw1, Polycarp (Pw2) stated that he watched long enough to see the accused, her husband and their children beating the deceased until his skull opened and brain matter come out. He stated that when he saw the brain matter coming out he became afraid and he left the scene. He stated that before he left he saw the accused's husband stab the deceased in the belly with an arrow head.

When word reached Assistant Chief Dalton Ombae Makori (Pw4) that the deceased had been assaulted and that he was no more he went to the scene. He confirmed that the deceased's skull was broken and

brain matter was spilt around the head. He stated that he enquired what had transpired from people at the scene and was told about the assault. The occurrence was reported to the police and a team of police officers was dispatched to the scene. By then members of the public had torched the homestead of the assailants and the assailants had fled. The officers removed the body from the scene and took it to Gucha Nursing Home Mortuary. A post mortem performed on the body on 5<sup>th</sup> January 2015 confirmed that the cause of death was severe head injury. The doctor who performed the post mortem noted that the deceased's brain was exposed and that there were multiple skull fractures and cut wounds on the occipito-parietal region measuring 5cm. The accused's son Ronald Momanyi was the first to be arrested, arraigned, found guilty and sentenced but the accused and the other accomplices stayed in hiding and it was not until 8<sup>th</sup> February 2020 when Pw6 (Roseline Bosibori) spotted the accused in Keroka Town that she was arrested and arraigned.

When this court put the accused on her defence she made an unsworn statement in which she told the court that on 4<sup>th</sup> January 2015 she was at home when her son went home in a state that got her wailing for two hours causing people to jam her home. She stated that when she realized her son had left she followed him to the scene where she found another group of people. She stated that she found her son beating the deceased. She confirmed that her husband and George Nyabuchwa (Pw1) were at the scene. She stated that she tried to restrain her son but she was not strong enough for him and so she beseeched George Nyabuchwa (Pw1) to help her. She stated that together they tore her son from the deceased and she left with him. She stated that her husband gave her son money to go to hospital and asked her to accompany him but she was to walk as she did not have fare. She told the court that when she arrived at the hospital she met a village mate who told her he had gone there to see her son and it was while she was talking to that fellow villager that she learnt that the deceased had died. She stated that she remarked loudly that he would not have died if she had been there. On the way home she met her husband and sister who also expressed the same sentiment, but she told them she was not present when the two fought and did not know the genesis of the fight. The accused vehemently denied that she participated in assaulting the deceased. She stated that following the incident elders met and resolved that her son and the deceased were both to blame but that notwithstanding her home was razed to the ground. She urged this court to forgive her as she is the sole breadwinner.

In summing up, Mr. Ondigo, Learned Advocate for the accused, submitted that the prosecution did not prove the charge against the accused beyond reasonable doubt. He submitted that the prosecution called only two witnesses and it was difficult to tell who between them spoke the truth. Counsel contended that in his statement to the police Pw2 did not mention the name of the accused yet it was his evidence that he knows her very well. Counsel argued that the purpose of making statements to the police is to record what the witness saw. Counsel contended that because Pw2's statement left out the accused and this was confirmed by Pw7 (the investigating officer) then she was not there. Counsel urged this court to ignore Pw2's evidence that implicated the accused and contended that it was not even communicated to the defence in advance. Counsel contended that the new evidence by Pw2 which had not been reduced into a statement was unconstitutional because it violated the right to a fair trial under **Article 50 (2) (k) of the Constitution**. Counsel urged this court not to admit the evidence as it will be detrimental to the administration of justice. In regard to the evidence of Pw1 Counsel submitted that being a cousin to the deceased Pw1 was not likely to tell the truth. Counsel contended that whereas Pw1 and Pw2 claimed that the accused hit the deceased with a stick this was not disclosed to the investigating officer. Counsel stated that according to the investigating officer (Pw7), the weapons used were jembe, stick, rungu, arrows and knife. Counsel stated that although Pw7 claimed to have read the statements of the witnesses to them Pw2 stated that that was not the case. Counsel urged the court to accord the accused the benefit of doubt and acquit her.

Senior Prosecution Counsel Majale submitted that the charge was proved beyond reasonable doubt and urged this court to convict the accused person. Counsel contended that the prosecution proved that the death of the deceased was directly linked to the attack upon him by the accused which attack was directly witnessed by prosecution witnesses 1 and 2. He contended that the accused and her family were opposed to the deceased having a relationship with their cousin who was a widow hence the attack. Counsel contended that the accused's defence put her at the scene of the crime. He urged this court to find that the defence did not alter the watertight case put forth by the prosecution and urged this court to find it is a

mere denial.

In reply, Mr. Ondigo reiterated his earlier submissions and urged this court to find the case not proved beyond reasonable doubt and acquit the accused.

As provided in **Section 203 of the Penal Code** the elements of the offence of murder are: -

- a. The death of the deceased and the cause of that death.**
- b. That the death was the result of an unlawful act.**
- c. That the accused was the perpetrator of the unlawful act.**
- d. That the accused acted of malice aforethought.**

In the case of **Antony Ndegwa Ngari v Republic [2014] eKLR** the court paraphrased those elements as:  
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- “(a) the death of the deceased and the cause of that death;**
- (b) that the accused committed the unlawful act which caused the death of the deceased and**
- (c) that the accused had the malice aforethought.”**

In this case the fact of the death of the deceased and the cause of that death are neither in doubt nor in dispute. As to whether it was by a lawful act it was held in the case of **Sharmal Singh s/o Pritam Singh v R [1962] EA 13** that: -

***“Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable, it must have been under justifiable circumstances, for example in self-defence or in defence of property.”***

The deceased was bludgeoned to death by a group of people and his killing was clearly not sanctioned by the law. There is also nothing in the facts and circumstances of the case that would make the killing of the deceased excusable under the law in that there is nothing in the evidence to demonstrate that his attackers were acting in self-defence or in defence of property. This was a retaliatory attack and it was for all intents and purposes unlawful and I find therefore that the death of the deceased was caused by an unlawful act.

I am also satisfied that the accused person was one of the attackers. The attack was witnessed not just by one but two people who came to testify in this court and even were we to exclude the evidence of one of those witnesses (Pw2) as submitted by Counsel for the accused we would still be left with cogent and credible evidence that the accused took part in the unlawful act that led to the death of the deceased. This is because she was positively identified as one of the attackers since the assault took place at 2pm meaning that the offence was committed in broad daylight. Pw1 testified that he was just 10 metres from the scene of the attack and the accused herself confirmed that he (Pw1) in fact was at the scene. Pw1 stated that he tried to rescue the deceased (and again this was confirmed by the accused) but the attackers turned on him and so he had to flee. It was also his evidence that he saw the accused person assaulting the deceased. He testified that she used a stick. This was also corroborated by Pw2 but even were we to exclude the evidence of Pw2, because it was not disclosed to the defence, the law is that even the evidence of a single witness can suffice to prove a case provided that it is tested with the greatest care. Pw1 knows the accused person very well as apart from coming from the same village they are related. Secondly, the offence was committed during the day – broad daylight – and the circumstances of making a positive identification were therefore more than favourable. I am satisfied that there was no possibility that Pw1 could have mistaken the accused person for anybody else. My finding is fortified by the accused’s own testimony that she was at the scene. I see nothing in the evidence to suggest that Pw1 was

lying against the accused. To the contrary I find his testimony cogent, credible and reliable. This is because it remained consistent even upon rigorous cross examination by the defence Counsel. What Pw1 told the police is also what he told this court. He struck me as a truthful witness and I am satisfied that his evidence was trustworthy and reliable. The accused did not go to the scene to assist the deceased but to help her son to beat the deceased. She and her husband and their children beat the deceased so brutally that his skull split and brain matter came out. This was confirmed not only by the investigating officer (Pw7) but also by the post mortem that was conducted on the body the day following the attack. Whatever their motive the weapons they used (jembes, sticks, arrow head) clearly establish that their intention was to kill or do grievous harm to the deceased and if that was not their intention they certainly knew that beating him as they did would probably cause him death or grievous harm. It was confirmed through the post mortem that the deceased died as a result of the injuries he sustained in the assault. It is my finding that the prosecution proved the death of the deceased, the cause of that death and that it was as a result of an unlawful act of the accused and others not before court beyond reasonable doubt. The prosecution also proved that the accused and her accomplices acted of malice aforethought. In the premises I find **the accused guilty of murder contrary to Section 203 as read with Section 204 of the Penal Code** and convict her accordingly.

**Signed, dated and delivered electronically at Nyamira this 25<sup>th</sup> day of March 2021.**

**E. N. MAINA**

**JUDGE**