



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 22 OF 2019**

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

**-VS-**

**KEFFA MAYU MONDA *alias* KOROMBO.....ACCUSED**

**JUDGEMENT**

The accused is charged with the offence of **Murder contrary to Section 203 as read with Section 204 of the Penal Code**. It is alleged that on 3<sup>rd</sup> September 2019 at Nyamakoroto Shopping Centre, in Gesima Location in Masaba North Sub-county within Nyamira County jointly with others not before court the accused murdered **FRED MAKORI KAKA**, deceased.

The accused pleaded not guilty to the charge and in the subsequent trial was represented by learned Counsel Joshua M Orangi while Prosecution Counsel Ms. Busienei, Ms. Mokuia and Mr. Majale took turns in conducting the prosecution's case.

To prove its case, the Prosecution called nine witnesses. In brief the sum total of their evidence was that on the fateful day the deceased was amongst patrons who had gone to refresh themselves at Mwalimu Bar also known as Members Club in Sokobe market. He was alone. The accused was also there with his friends who were named as Ombati and Ondieki. At about 9pm Samson Oroka Onsongo and Silas Okendo Nyameno who testified at the trial as prosecution witnesses Pw1 and Pw2 respectively also went to the bar. Shortly thereafter an altercation arose between Samson Oroka Onsongo (Pw1) and Ombati when the latter greeted the accused and asked him to buy him a drink. The accused himself did not respond but the said Ombati turned violent and head-butted Samson Oroka Onsongo (Pw1) on the mouth. Samson Oroka (Pw1) started bleeding in the mouth and had to go outside the bar to spit out the blood. Samson Oroka (Pw1) testified that while he was outside Ombati started fighting with Silas Okendo Nyameno (Pw2) but they were soon separated. The court heard that when Samson Oroka Onsongo (Pw1) went outside to spit the blood in his mouth he found Fred (the deceased) who incensed with what Ombati had done went into the bar and confronted the said Ombati and the accused and demanded to know why Ombati had assaulted Samson to the extent that he was bleeding. That was when the accused and the said Ombati allegedly turned against Fred (the deceased) and started beating him. Silas Okendo (Pw2), the watchman and one Agnes are said to have separated them before the watchman threw the accused, Ombati and Ondieki out of the bar. Samson (Pw1), Silas Okendo (Pw2) and Fred (the deceased) also went outside. It was then that Ombati plucked a stick from the hedge and used it to beat the deceased all over the body. They were separated and soon thereafter the accused, Ombati and Ondieki left the scene. The deceased followed them. Samson (Pw1) and Silas Okendo (Pw2) were left behind but soon thereafter they heard noise a short distance away from where they were only to go there and find it was the deceased who was being assaulted with a stick by the accused, Ombati and Ondieki. When the accused and his accomplices saw Pw1 & Pw2 they ran away only to turn back to continue the assault. Silas (Pw2) told this court that at that juncture he and Samson (Pw1) fled the scene to their homes. They both testified that they were not far from the scene when they witnessed the deceased being beaten by the accused and his companions and that there was light from electricity in the vicinity.

Duke Nyambariga Makori (Pw3) testified that the deceased was his brother and that on the material day at about 11pm he received a call from his father that the deceased had been beaten and he was required to accompany his father to the scene so they could go take him (the deceased) to hospital. He testified that on arrival at the scene they found the deceased lying on his belly with his head touching the ground. They immediately put him in the car and took him to Keroka General but due to his condition they were referred to Kisii Level Five Hospital where they were again referred to Moi Teaching & Referral Hospital in Eldoret. Duke Mariga stated that on 4<sup>th</sup> September 2019 they took the deceased to Moi Teaching & Referral Hospital in Eldoret and due to the severity of the injuries he was immediately admitted to the intensive care unit (ICU). He however succumbed to the injuries on 1<sup>st</sup> October 2019.

Dr. Philemon Choge (Pw9) confirmed that the deceased was admitted to Moi Teaching & Referral Hospital on 4<sup>th</sup> September with a history of assault. He testified that an examination revealed the deceased had sustained severe head injury with commuted depressed skull fractures; that decompressive craniotomy was done the next day and multiple bone fragments were found on the skull with active bleeding and eviscerated brain tissue on the temporal and parietal lobes with associated dural tear. A report detailing all the injuries and the treatment given was produced in evidence by Dr. Choge as Exhibit 6.

Dr. Chesori Erick (Pw8), a practicing Pathologist at Moi Teaching & Referral Hospital, told this court that on 17<sup>th</sup> October 2019 he performed a post mortem on the body of the deceased and his opinion was that the cause of death was as a result of pulmonary oedema

bronchopneumonia which were complications of severe head injury due to severe blunt trauma. His findings during the post mortem are recorded in a post mortem report which he produced as Exhibit 5. He discounted that the deceased could have sustained the commuted fractures he noted from a fall and contended that it had to be from a strike. After the post mortem the body was released to the next of kin for burial.

The court heard that accused who had been apprehended by members of the public on 4<sup>th</sup> September 2019 was initially charged with grievous harm but after the deceased succumbed to the injuries the charge was substituted with one for murder.

When this court put the accused on his defence he elected to give sworn evidence and call one witness. The accused testified that he is a pit sawyer; that on 3<sup>rd</sup> September 2019 at 7pm he went to Mwalimu Members Bar at Nyamakoroto as he usually did. He stated that he was alone but his friends and village mates Ondieki, Moturi, Samson and Ombati Machuma were already there. He testified that he took one beer and also bought his friends Ondieki and Ombati a beer each. He contended that Samson arrived later and found him paying the bill at the counter and asked him if they would share certain proceeds once he (the accused) got paid. He confirmed that at that juncture Ombati head-butted Samson and kicked him out of the bar. He testified that he told Samson that he would not take beer, got his change and left the bar. He testified that Samson asked Ombati why he had hit him and Ombati retorted that he (Samson) was not going to eat his (accused's) money. He stated that it was at that juncture that he left the bar through the front door. He stated that there were many people in the bar but he could not remember any of them. He confirmed he knew the deceased but categorically stated that the deceased was not in the bar that evening. Going back to the head-butt given to Samson by Ombati the accused stated that Samson bled when Ombati hit him. He also contended that he was the first person to leave the bar and that nobody went to Samson's aid when Ombati assaulted him; that people said the two should be left alone as they were from the same area. The accused further testified that on his way home Ombati and Ondieki walked a distance behind him as they were all headed the same route. He stated that the next day he was on his way to work when he got information that there had been a fight at night. He stated that he did not witness any fight other than when Ombati head-butted Samson. He narrated how he was waiting for a power saw to do his work when he was approached by villagers who wanted him to tell them what had transpired during the night. He conceded that police officers found him kneeling down and when people pointed at him as having been present at the scene the police officers took him away. He denied that there was any scuffle or commotion when the officers arrived. He conceded that he was arraigned in court but stated that he did not know if any investigations were done. He stated that his DNA was collected but no blood sample was taken and that he told the police the names of the people he was with on the material night. He further stated that although he had a phone on that night nobody called him and the police did not ask him about his phone or take any interest in it. He also stated that he did not know if the officers who arrested him visited the scene. He contended that he left the bar at 9pm and that he knew the deceased as he was his regular "boda boda" guy.

The accused's witness Joseph Mariga Omas (Dw2) testified that he is a vigilante (community policing member); that on 3<sup>rd</sup> September 2019 he was preparing to go to bed when he received a telephone call from the chairman of Sokobe market who is also his assistant, to the effect that people were fighting at the market. He stated that he took his cane and went to the market but did not find anyone save for a person who was lying on the ground. He stated that when they moved closer they noticed that the person had a wound in the middle of the head. He stated that he left his fellow vigilantes at the scene and went to a nearby bar and spoke to a lady at the counter who told him of people namely Fred, Makori, Ombati Machuma and Ondieki who had fought in the bar. He stated that the lady did not mention Samson. He stated that upon getting that information he called his colleague and gave him the names and in turn his colleague told him the person lying there was Fred. He stated that they called Fred's kin who went and picked him and took him to hospital. He stated that the deceased and the people whose names he was given by the lady were not of good character. He stated that he knew the accused as Keffa Mayu Monda and that the next day he was present when a crowd confronted the accused and begun roughing him up. He stated that fearing the accused would be lynched he told the Chief to call the police. He stated that Ombati and Ondieki were from his village and that they fled after the incident and after the accused was arrested and have never returned. He also disclosed that the accused was his first cousin as their fathers are brothers. He however stated that he did not see him on the material night. He also stated that nobody told him about the fight between Ombati and Samson.

Mr. Orangi Learned Counsel for the accused had intimated that he wished to make his summing up and closing arguments in writing but he did not do so.

The offence of murder is committed when **"any person who of malice aforethought causes the death of another person by an unlawful act or omission."** (See *Section 203 of the Penal Code*).

**Section 206** of the **Penal Code** states that: -

**"Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances**

**(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 of 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."**

Therefore, the points for determination in this case are: -

**(a) The fact of the deceased's death and the cause of that death.**

**(b) Whether the death was by an unlawful act.**

**(c) Whether it was with malice aforethought.**

**(d) Whether the accused was the perpetrator.**

**(a) The fact of the deceased's death and the cause of that death.**

Having considered the facts of this case as laid out in the evidence of the prosecution witnesses, I have no difficulty in finding that the deceased Fred Makori Kaka indeed died. His brothers Duke Nyambariga (Pw3) and Nathan Nyasimi Makori (Pw4) testified to that as did the doctor (Pw9) who was treating him at Moi Teaching & Referral Hospital and the doctor (Pw8) who performed the post mortem after his death.

As to the cause of death, there was evidence from two eye witnesses Pw1 and Pw2 which this court found credible and reliable that on the night of 3<sup>rd</sup> September 2019 the deceased was viciously assaulted. Both Pw1 and Pw2 testified that the assault was perpetrated using a stick. The court was also told that a stick stained with blood was collected from the scene and when the stick was subjected to forensic examination by the government analyst the blood was confirmed to be that of a human being and more specifically that of the deceased. The report of the government analyst was tendered in evidence as exhibit 2. This evidence corroborated the testimonies of Pw1 and Pw2 that the deceased was assaulted using a stick. Their evidence was further corroborated by Dr. Philemon Choge (Pw9) who confirmed that he indeed attended to the deceased when he was admitted to the Moi Teaching & Referral Hospital on 4<sup>th</sup> September 2019. This was the day following the assault. In his testimony and also in the medical report he tendered in evidence (Exhibit 6), Dr. Choge (Pw9) enumerated the injuries he noted upon examining the deceased. My finding is that the injuries were grievous and the same are consistent with assault as narrated by the two eye witnesses. The doctor (Pw8) who conducted the post mortem also attested to those injuries and as can be seen from his testimony and the post mortem report the injuries were extensive. Pw8 told this court that he formed the opinion that the cause of death was pulmonary oedema and bronchopneumonia arising from complications of severe head injury due to blunt force trauma. He discounted that the injuries could have been as a result of a fall and contended that it must have been from a striking this again making the same consistent with an assault.

**(b) Whether the death was by an unlawful act.**

From the evidence of Pw1 and Pw2 there is nothing to suggest that the deceased provoked the assault meted upon him by his assailants. The extent of the injuries also rule out any justification and it is my finding therefore that the assault was unlawful and by extension that the deceased's death was by an unlawful act.

**(c) Whether it was with malice aforethought.**

I am also satisfied that the nature and seriousness of those injuries betray an intent to cause the deceased grievous harm if not to kill him and therefore that malice aforethought has been proved beyond reasonable doubt.

**(d) Whether the accused was the perpetrator.**

I have carefully evaluated the evidence of the prosecution witnesses as well as that of the defence and I am convinced beyond reasonable doubt that the accused committed this offence jointly with others who are yet to be brought to book. It is my finding that his own testimony placed him at the scene of this crime even though he tried to deny his involvement in it. He and his accomplices were seen beating the deceased by Pw1 and Pw2. It had all started in the bar when one of his companions (Ombati) assaulted the deceased for asking him why he had assaulted Samson (Pw1). After they left the scene of the attack the deceased followed them and that is when they set upon him and beat him mercilessly and left him at the scene. Pw1 and Pw2 testified that there was electricity in the vicinity of the scene and that they knew the accused prior to that incident. Indeed, in his testimony, the accused confirmed encountering them at the bar prior to the occurrence and I am therefore convinced that they positively recognized him as one of the assailants. As for the defence witness (Dw2), he arrived at the scene much later and it is not surprising that he did not find anyone there. His evidence did nothing to water down that of the two direct prosecution witnesses whose evidence I find more credible, reliable and trustworthy. The evidence of these two witnesses is rendered even more credible by the accused's own testimony that the two walked closely behind him on their way home. His testimony confirms that they were close enough to clearly see him and his accomplices assaulting the deceased. The accused clearly acted in cahoots with his accomplices and there was common intention either to kill the deceased or to occasion him grievous harm. Moreover, even if they had no intention to kill him or cause him grievous harm the nature of the injuries inflicted betray that they certainly had knowledge that beating him as viciously as they did could cause his death. Having analyzed the defence put forth by the accused, I am not convinced that there was any justification for the assault and the accused did not allege any. The assault that culminated in the death of the deceased was unprovoked and hence unlawful and as there is evidence that proves malice aforethought the offence of murder is established.

In the upshot I find that the charge against the accused was proved beyond reasonable doubt. I therefore find him guilty of **Murder** contrary to **Section 203 as read with Section 204 of the Penal Code** and convict him accordingly.

**JUDGEMENT SIGNED, DATED AND DELIVERED IN NYAMIRA (ELECTRONICALLY VIA MICROSOFT TEAMS) THIS 27<sup>TH</sup> DAY OF MAY 2021.**

**E. N. MAINA**

**JUDGE**