



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NUMBER 13 OF 2016**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**ABRAHAM SINDANI MAKASI.....ACCUSED**

**J U D G M E N T**

The Accused **Abraham Sindani Makasi** is charged with the offence of Murder Contrary to Section 203 as read with Section 204 of the Penal Code, Cap 63 Laws of Kenya. The particulars of the offence are that on the 8<sup>th</sup> day of May, 2016 at around 20.00 hrs at Wanambwa village, Sitabicha Sub-location, Malakisi Location in Bungoma West sub-country within Bungoma Country murdered **EVANS WAFULA WAFUKHO**.

The accused was charged in court took plea on 21<sup>st</sup> July, 2016 before Aroni J. Her ladyship then heard 2 witnesses. She then proceeded on transfer. On 23<sup>rd</sup> July, 2019 this court explained the provision of Section 200 Criminal Procedure Code to the accused. The accused elected that the matter hearing to proceed from where it had reached and did not wish to recall any of the witnesses who had testified.

The case for the prosecution is that on 7<sup>th</sup> May, 2016 **PW 1 Eric Khisa Lumbuku** was at his home at 6.30 p.m. when he saw Evans Wafula the deceased pass through his compound. He asked deceased where he was going and told witness that he was going to the home of Abraham Sindani the accused to pay a debt. At 8.30 p.m. he heard screams from the direction of the home of accused. He and 2 others neighbours ran there. On arrival he found deceased lying down. He noticed he had a cut wound on right side of the lips and was bleeding from the nose. The deceased was taken to hospital where he died at 11 p.m. the same day. On being cross-examined by Mr. Tsimonjero for the accused, he stated that the deceased kept crying and mentioning his money.

**PW 3 Simon Wakhungu Wamanani** a member of Nyumba kumi at Matisi Village was at his home on 7<sup>th</sup> May, 2016 at 8.00 p.m. when a village elder Martin Waiyaki came and informed him there was a problem at the home at accused. They went there and heard noise from the house of accused. The house was locked but would hear a person saying "Malisa" (just finish). They asked that the door be opened but the person inside the house said he will not open and if anyone went in he will finish him. They knocked the door open and entered. They found accused with a tin lamp. He was armed with panga, knife and rungu. They saw the deceased lying down on the floor bleeding. In the house it was only the accused and deceased. The accused then escaped. He (witness) together with others called police and deceased was taken to hospital. On being cross-examined by Mr. Wamalwa for accused he replied that he saw the accused with a tin-lamp and not a mobile phone torch. He stated that accused had been employed by deceased for one year.

**PW 5 Salome Nerima Kewino** a member of the Nyumba Kumi accompanied PW 4 Simon Wakhungu to the house of accused where they had received information there was a problem. On arrival they knocked the door and the accused who was in the house said the person inside was thug. They heard a person crying that he was dying. **Simon PW 4** hit the door open and on entering saw the deceased lying down bleeding. She raised an alarm and accused escaped. On being cross-examined by Mr. Wamalwa for accused, she stated it is accused's sister who had told them that there were people quarreling in accused's house.

**PW 6 Martin Wangila Lubigu** the village elder was called by accused's sister Nangila who informed him that some people had ambushed the accused at his home. He and 2 others vigilantes went to the home on arrival they heard a person crying inside accused's house. They pushed the door open and found accused armed with a panga and deceased lying down crying. He observed the deceased and saw he had several injuries. He was taken to Bungoma Hospital. Accused escaped from the scene.

**PW 12 IP Selina Ayabei** visited the scene and recovered blood-stain mud from the house of the accused. She also recovered a blood-stained shirt and long trouser accused was wearing. She forwarded the items together with blood sample of accused to the government Analyst. **PW 11 Richard Kimari Langat** analysed the DNA profiles and confirmed that the blood sample on the mud wall and that on the trouser accused was wearing matched that of the deceased, Evans Wafula.

The accused gave sworn evidence. He testified that on 8<sup>th</sup> May, 2016 at 9.00 p.m. he was attacked by people while at his house. He ran to the police station where he reported the matter. He slept at the police station till the next day when he was told his houses had been burnt on

allegation that he had killed the deceased. He stated that the evidence of PW 1 Eric were lies and that it is not true that he was found with the deceased in the house. He stated that deceased was among the people who had attacked him.

On being cross-examined by Mr. Thuo for state, accused testified that when he was attacked he hit one of the attackers with a fist because he had wanted to take Ksh.440,000/- for which he had sold maize, beans and coffee.

Mr. Wamalwa counsel for the accused filed written submissions. He submitted that this is case where the accused fought with the deceased as a mode of defence against this person and property. Counsel submitted that although the deceased died on his way to hospital as a result of injuries sustained in the fight inside the accused's house the accused did so in self- defence not knowing that he injured the deceased badly.

The accused is charged with the offence of Murder Contrary to Section 203 of the Penal Code which provides: -

***Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.***

The elements of the offence of Murder which the prosecution must prove beyond reasonable doubt are

- 1) *The fact and cause of death.*
- 2) *The unlawful act of omission that caused the death.*
- 3) *The existence of malice aforethought*
- 4) *That it is accused who caused the unlawful act or omission that caused the death.*

**PW 4 Dr. Harun Ombongi** produced a postmortem filled by Dr. Raymond which showed that the deceased had a stab wound on right shoulder, left shoulder, left arm and right leg. He also had a wound at the base of neck and fracture of the 4<sup>th</sup> rib. He formed opinion that the cause of death was due to sever head and chest injury due to both blunt and sharp trauma.

The other element the prosecution must prove is whether it is accused who inflicted the injuries.

All the prosecution witnesses testified how upon receiving information that there was noise from the house of accused, they went there and confirmed the same. They requested accused to open the door which was locked, but he declined. The door was then forcefully opened. Inside the house they found accused and deceased who was lying down with injuries. Accused then escaped. The deceased was taken to hospital where he was confirmed dead.

The accused in his defence admit that he was in his house when he was attacked by unknown people. He ran to the police station where he made the report, about the ambush. When cross-examined by Mr. Thuo for the state, accused stated: -

***“On 8<sup>th</sup> May, 2016 at 0 p.m. I was at home when I was attacked. I hit one with a first and pushed one and I left the room. I do not know if it is deceased who I hit. I saw the deceased with Salome and Makokha, Tumbo. I only hit Evans with a fist. It is not true that I recorded that I hit him with a jembe twice on the head. They wanted to take my Ksh.440,000/- form my business. I had sold maize, beans and coffee.”***

It is, therefore, not in dispute that the deceased was injured while in the house of accused, while accused maintains that he was attacked by propel.it is prudent that at time before the other people came into the house he was only with the deceased. The deceased sustained injuries while with accused before other prosecution witnesses arrived. The deceased upon arrest was wearing clothes which were blood-stained. The clothes were subjected to DNA analysis to confirm the blood-stains on the clothes accused was wearing matched that of the deceased.

After considering the evidence, I am satisfied that it is accused and no other person who inflicted the injuries on the deceased.

The other element the Prosecution must prove is the existence of malice aforethought. Section 206 of the Penal code provides circumstances where malice aforethought would be deemed to have been established. Section 206 provides: -

- 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 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 happen.***
- (c) an intent to commit a felony.***
- (d) an intention by the act or omission to facilitate the flight or escape from custody or any person who has committed or attempted to commit a felony.***

From the injuries inflicted, it is evident that the intention was to cause grievous harm or death of the deceased. I am satisfied that malice aforethought has been established.

The accused in his defence stated that he was being attacked and was doing so in his defence. He alleged that the people who attacked him included the deceased, and that they wanted to rob him of Kshs 440,000. From the evidence the prosecution witnesses they entered the house and found accused with only the deceased. The allegation that they were in a group that included the deceased that had gone to attack him is not true. I do find that the accused was never attacked as he alleges.

After considering all the evidence I am satisfied that the prosecution has proved the case against the accused. I, therefore, find **Abraham Sindani Makasi** guilty of Murder Contrary to Section 203 as read with Section 204 of the Penal Code and convict him accordingly.

**DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 30TH DAY JULY, 2021.**

**S N RIECHI**

**JUDGE**