



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUSIA**  
**CRIMINAL CASE NO. 5 OF 2019**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**STEPHEN EKEYA.....ACCUSED**

**JUDGMENT**

1. Stephen Ekeya is charged with an offence of murder contrary to section 203 as read with section 204 of the Penal Code.
2. The particulars of the offence are that on the 2<sup>nd</sup> day of February 2019, at Kamnoit sub location in Teso South sub County of Busia County, murdered Edwin Edukat.
3. The prosecution case is that the accused and the deceased were brothers. A disagreement arose between them which escalated to a fight. The deceased sustained fatal injuries.
4. Stephen Ekeya, the accused, denied the offence and pleaded an alibi.
5. The issues for determination are:
  - a) Whether the accused was present at the scene of the offence when the said offence was committed;
  - b) Whether the accused inflicted the fatal injuries to the deceased; and
  - c) Whether the offence of murder was established.
6. It is trite law that when an accused person pleads an alibi, the burden of proving the falsity, if at all, of the defence of alibi lies with the prosecution. In the case of **Victor Mwendwa Mulinge vs. R [2014] eKLR** the Court of Appeal while addressing alibi defence stated:

**It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution; see *Karanja vs. R [1983] KLR 501* ... this Court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought.**

In the instant case I will endeavour to establish whether the prosecution has discharged its onus.

7. Peter Okware (PW1) testified that at about 2.30 p.m. on 2<sup>nd</sup> February 2019, while fetching water he heard shouts of “Thief! Thief!” He looked in the direction of the noise and saw the accused coming from the compound of the deceased through the fence. He had a machete. The accused went into his compound and emerged carrying a child to the road. A double cabin vehicle arrived and the two boarded.

8. The evidence of this witness which placed the accused at the scene of the offence was not in any way challenged.

9. In his defence the accused contended that at the time of the offence he was at Machakusi Secondary School administering examinations. He called Silas Okwakao Emase (DW2) who supported this claim.

10. This alibi defence cannot possibly be true owing to the evidence of Peter Okware (PW1) that went unchallenged and that of sergeant Samson Kibiwott (PW2). This officer testified that the accused had surrendered at Kotur police station and handed over a machete. He collected him from the station on 3<sup>rd</sup> February 2019 and took him to the DCI office, Teso North.

11. I therefore find that the prosecution evidence on record displaced the alibi defence of the accused.

12. When Peter Okware (PW1) went to the home of the deceased after the accused had left, he found him outside his house with blood all over. The deceased told him that his brother cut him. He repeated the same at the hospital.

13. It is trite law that a conviction can be founded on the evidence of a single witness. The Court of Appeal in **Abdullah Bin Wendo vs. Rex 20 EACA 166**, stated as follows:

**Subject to certain well-known exceptions it is trite law that a fact may be proved by a testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt from which a Judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness can safely be accepted as free from the possibility of error.**

14. The evidence of Peter Okware (PW1) was buttressed by that of Sgt. Samson Kibiwott (PW2) who testified that the accused surrendered to the police on allegations of fighting with his brother. He also surrendered a machete.

15. In order for a conviction for the offence of murder to be founded on the evidence on record, the prosecution must prove the existence of malice aforethought. In **Black’s Law dictionary, 10th Edition** malice aforethought is defined as:

**The requisite mental state for common-law murder, encompassing any one of the following (1) the intent to kill (2) the intent to inflict grievous bodily harm (3) extremely reckless difference to the value of human life (the so-called “abandoned and malignant heart”), or (4) the intent to commit a dangerous felony (which leads to culpability under the felony-murder rule).**

16. Section 206 of the Penal Code gives instances when malice aforethought may be proved. It provides:

**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.**

17. From the evidence on record, I find that the prosecution has not proved the offence of murder against the accused. I acquit the accused of the charge of murder. However, the prosecution has proved beyond any reasonable doubt the lesser offence of manslaughter. I accordingly reduce the charge of murder to that of manslaughter. I find him guilty and convict him of the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code.

**DELIVERED and SIGNED at BUSIA this 16<sup>th</sup> day of December, 2020**

**KIARIE WAWERU KIARIE**

**JUDGE**