



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 32 OF 2014**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**ANDREW JUMA MUINDI.....ACCUSED**

**JUDGMENT**

1. 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 were that **on the 12<sup>th</sup> day of December 2012 at Sikhendu area within Trans Nzoia County murdered Alex Mutoro**.
2. The accused denied the charged and the prosecution called a total of 5 witnesses to establish its case. At the conclusion of the prosecution case, this court found that the accused had a case to answer. He gave unsworn testimony in his defence and did not call any witness.
2. Before analysing the matter it shall be appropriate to summarise the facts and evidence as presented during trial.
3. **PW1 Edward Wamalwa** testified that he had a ceremony on 11<sup>th</sup> December 2012 where his son who had undergone circumcision according to the Bukusu customs was “passing” out. He had many guests who included relatives and neighbours.
4. In the said ceremony he had prepared alcohol which included “Busa and Changaa”.
5. He went to sleep at around 9.00 pm . At 3.00 a.m some youths came who included the accused and demanded alcohol. According to him they were already drunk. He served them alcohol and told them to leave. At around 4.00 am he heard people screaming. A boy told him that he had been beaten and his shirt taken while he escorted Stella and Mary who were leaving for Uganda. He went to check on Mary who had remained with the assailants. He went together with the deceased.
6. As they approached the rowdy youth the accused became wild and had 2 knives. He tried to stab him but was rescued by the deceased who was stabbed in the process by the accused. He fell down. He was stabbed on the chest. The accused took off with his father. The police were called thereafter. The knife was never recovered.
7. **PW2 Samuel Juma Wamalwa** stated that PW1 was his uncle. He was also in the circumcision ceremony. He said that at around 3.00 am people came singing and saying that they had arrived at “Telcom” the nickname of PW1 who used to work with Telcom. They demanded alcohol.
8. At 5.00 am he told one Ambrose to escort Stella and Mary. Ambrose came back and told him that he had been beaten. He went to the scene together with the deceased. The accused became violent and was armed with a knife. The accused parents equally came. The deceased was stabbed and he screamed. He was stabbed on the chest and they found him bleeding. He reported to the police who came and took the body.
9. **PW3 Dr Okumu Moses** produced the post mortem report on behalf of one Dr. Odhiambo who opined that the cause of death was cardiopulmonary arrest secondary to severe internal bleeding.
10. **PW4 P.C. Sammy Kimenyi** carried out the investigations and preferred charges against the accused. According to him the accused was among the group who had kidnapped a girl and in the process became violent and stabbed the deceased who had tried to rescue Samwel. He ran away thereafter.
11. **PW5 Ambrose Wafula Ben** testified that he was at the ceremony when at around 3.00 am some already drunk men (8 of them) came asking for alcohol. They drunk and left. At around 5.00 am he escorted his nieces who were going to Uganda. Mary Nandako and Ann Nambuye. On the way he met the men who had left the house earlier after being served with alcohol. They robbed him his shirt and Kshs

1600. One of the girls took off. Nobody came to his rescue as he raised alarm.

12. He rushed back and notified PW1 and PW2 whom they decided to search for the other girl. They found 2 of them as the rest had left. They attempted to stab PW2 but the deceased intervened. He did not get to know among the 2 who stabbed the deceased. He took off thereafter. The matter was reported at Kitale police station. He could not recognise who stabbed the deceased.

13. When put on his defence the accused gave unsworn evidence. He acknowledged that he attended the circumcision ceremony that took place at his neighbourhood together with his friends. He took alcohol till 3.00 am when he left. As he left he had screams 200 metres from the scene but he did not get to know the reason. At about 500 metres, he was attacked and his left hand and ribs were injured. His friends disappeared and his father arrived at the scene and he was injured as well. After 3 days he died while undergoing treatment at the hospital.

14. The accused was then taken to Cherengany Nursing home. He later heard that someone else had died as a result of the fight. Those who injured his father were charged. Later he was arrested by the area chief and the charges preferred against him.

### **Analysis and Determination**

15. The court has heard the witnesses and the evidence presented on both sides. The court has equally perused the submissions by the learned counsels for the state and the accused.

16. No doubt the incidence occurred at the wee hours of early morning. The circumcision ceremony that took place is not disputed by the parties. Equally, the free flow of alcohol (Busaa and Changaa) was not disputed.

17. At the same time, the presence of the accused at the home of PW1 that night was not controverted.

18. The events leading to the deceased death appear clear and straight forward at least from the prosecution standpoint.

19. PW5 was escorting her 2 nieces who were heading to Uganda early that morning. According to him, he was robbed of his shirt and Kshs 1600/-. He raised alarm but nobody came to his rescue and was forced to rush back home. PW1 and Pw2 found pw5 and headed back to the scene. It appears that there was altercation where the accused tried to stab PW1 but the deceased who came to his rescue was stabbed instead.

20. The circumstances surrounding the fight is not obviously disputed in the unsworn evidence of the accused. The accused however state that he did not know what the fight was all about. His father was injured and died subsequently as he underwent medication at Kitale County Referral hospital. Infact 3 people had been arrested regarding the same.

21. Was the accused armed? According to PW1, PW2 and PW3 he was armed with a knife. Evidence was led to suggest that he had 2 knives. One of them fell down and he took the second one to stab PW1 but instead stabbed the deceased.

22. The postmortem results showed that the cause of the injuries was as a result of severe internal and external injuries. "Penetrating stab wound on the left side of the chest."

23. Although PW5 did not recognise between the accused and his colleague who stabbed the deceased, PW1 was categorical. Although the source of lighting came from the moonlight, its the considered opinion of this court that it was not very difficult for the witnesses to know and identify each other. At any rate, they had just shortly before that been served with alcohol. As earlier stated, the accused did not deny being at the scene.

24. There was no evidence of a general fight as was being suggested by the accused in his unsworn evidence. There was no evidence that the cause of his father's injuries and the resultant unfortunate death was as a result of any fight.

25. In my considered view therefore, the accused person was armed with a knife if not knives. He and his colleagues had already attacked PW5 and when he went to rescuing the niece, the accused became violent. His use of the knife was premeditated. He obviously knew that it was going to cause maximum injuries.

26. There was no evidence to suggest that there was provocation or at all or that he was acting in self defence. Having earlier robbed PW5 of his shirt and cash, this in my view was an extension of the fight he had stated. His friends however took off and left him alone. On the same note there was no evidence that the stabbing was occasioned by anyone else except the accused.

27. In conclusion, I find that there was mens rea on the part of the accused and the prosecution has discharged that burden. The malice was clearly to arm any of the rescuers including PW5. He did accomplished at the cost of the deceased.

28. Consequently I find that the accused caused the death of the deceased herein and I proceed to convict him pursuant to the provision of Section 203 of the Penal Code.

**Delivered, signed and dated at Kitale this 30<sup>th</sup> day of January, 2019.**

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**H.K. CHEMITEI**

**JUDGE**

**30/1/19**

**In the presence of:**

**Mr. Kakoi for the Respondent**

**Accused – present**

**Court Assistant – Kirong**

**Judgment read in open court**