



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 45 OF 2015**

**REPUBLIC.....PROSECUTOR**

**=VRS=**

**JOSEPH MOGAKA OSORE.....ACCUSED**

**JUDGEMENT**

1. The accused is charged with Murder contrary to Section 203 as read with Section 204 of the Penal Code.
2. The particulars of the charge are that on 29<sup>th</sup> July 2014 at Bonyamagere village in Nyamira North District within Nyamira County he murdered Mayenga Kirungu.
3. The accused pleaded not guilty to the charge.
4. To prove its case, the prosecution called seven witnesses and briefly the sum total of their evidence was that on the material day the deceased who was drunk and who was a stranger in that area strayed into the homestead of the accused person in the mistaken belief that it was the home of his kin Yunia Nyangata Kerongo (Pw2) and Julius Kerongo (Pw3). It is not clear what happened next but there is evidence that the deceased was apprehended and his hands were tied with a mosquito net. Then people started shouting “mwizi, mwizi”! meaning thief, thief.! Phillip Scorpion Nyaribo (Pw1) heard the shouts and went to see what was happening. So did Charles Mong’are Sabena (Pw4) and Kennedy Burujara (Pw3) a village elder. Phillip Scorpion (Pw1) inquired what the deceased had stolen but there was no response from the crowd but the accused was saying the deceased had gone to his home with intention to steal. Then the deceased said he was drunk and that he had mistaken it for the house of Kennedy Kerongo (Pw2). Phillip Scorpion (Pw1), the village elder together with other members of the public who included the accused decided to take the deceased to Kennedy Kerongo’s (Pw2) home to confirm if it was true. On arrival there a few people entered the homestead while Phillip Scorpion, the accused and a few other villagers were left guarding the deceased. It was as they were waiting for the others to bring Julius to confirm if he knew the deceased that the accused slashed him with a panga killing him instantly. By the time Kennedy (Pw3) took Yunia (Pw2) to the place he had left the deceased and the others it was too late. Although Yunia (Pw2) identified him as her relative he could not talk. He was bleeding on the neck and mouth and was already dead. According to the witnesses the accused fled after slashing the deceased. The matter was reported to the police and shortly afterwards a team of police officers went to the scene and the body was taken to Nyamira District Hospital Mortuary. On 4<sup>th</sup> August 2014 one Dr. Hudson Onguti performed a post mortem on the body of the deceased. His opinion was that the cause of death was bleeding from major vessels in the neck due to a deep cut wound. The accused was subsequently arrested and charged with this offence.
5. The accused gave unsworn evidence. He stated that on the material day he was at Kipsigis lumbering timber. He stated that he did not know the deceased or anything about this case; that he was picked from home and brought to Nyamira then taken to Kisii where he was charged. He contended that he did not know the victim at all.
6. In summing up Mr. Bwonwong’a, Learned Advocate for the accused urged this court to find that the charge against the accused was not proved beyond reasonable doubt. He contended that the evidence of the witnesses was inconsistent and contradictory. He wondered how the witnesses could have identified the accused yet it was dark and they did not have a torch. He contended that the post mortem form that was produced was a photocopy and it did not have the name of the deceased. He urged this court to acquit the accused.
7. Miss Okok, Learned Counsel for the prosecution did not submit. She indicated that the prosecution would place reliance only on the evidence on record.
8. The issues for determination by this court are: -
  - a. **Whether the accused killed the deceased.**
  - b. **If he did whether it was by an unlawful act and;**

**c. Whether it was of malice aforethought.**

9. Even independent of the post mortem form which obviously has a typographical error, there is evidence that the deceased died and that he was killed. Not just one but witnesses (Pw1, Pw2, Pw3 and Pw4) attested to this. Pw1, Pw3 and Pw4 testified that the deceased was fine when they found him although he seemed drunk. It was them who took him to the home of the said Julius Kerongo to confirm if what he was saying – that it was there he had intended to go – was true. Pw2 (Yunia) confirmed that he was indeed their relative. It is also on record that the deceased did not just die but that he died as a result of injuries inflicted on him that night. Out of the four witnesses only Pw1 (Phillip Scorpion) was an eye witness to the incident leading to the deceased's death. He had been left guarding him when the others (Pw3 and Pw4) went to call someone from Kennedy Kerongo's house. Although this was evidence of a single witness, I am satisfied that Pw1 positively identified the accused person as the one who slashed the deceased. Pw1 knew the accused very well as they were relatives and even lived in the same village. He knew the accused's home which is where the shouts that night led him. He found the accused and a number of other villagers restraining the deceased whose hands were tied with a mosquito net. Pw1 as well as Pw3 and Pw4 even spoke to the accused when he said the deceased had gone to his homestead to steal. They had even more opportunity to identify him when they walked with him to the home of Julius Kerongo. If there were any inconsistencies or contradictions in the evidence of the prosecution witnesses those were minor and did not affect the cogency of the evidence. The accused fled the scene after slashing the deceased which give rise to an inference of guilt. His alibi – that he was in Kipsigis – at the time it is alleged that he committed the offence – was not convincing at all. Firstly, it was mounted in an unsworn statement which means he could not be cross examined. Secondly it was raised so late in the proceedings hence denying the prosecution a chance to dislodge it and thirdly it could not stand the test of the evidence of the prosecution witnesses which as I have stated was very cogent, credible and reliable. It is my finding that the evidence that the accused killed the deceased is watertight.

10. I am further satisfied that the accused killed the deceased by an unlawful act. When he slashed the deceased they were waiting for confirmation that the deceased was speaking the truth. They had left the accused's homestead and the deceased's hands were tied and he was not a danger or threat to anyone. The accused slashed him while his hands were still tied. There can be no defence to this crime and indeed the accused did not raise any.

**11. Section 206 of the Penal Code** sets out the circumstances by which malice aforethought is established. The accused in this case slashed the deceased with a panga and by a single blow inflicted upon him injuries that were so severe that he died instantly. All this because he suspected the deceased was a thief, a suspicion proved to be false. That single blow, the nature of weapon used and the resultant injuries prove that there was an intention to cause the death of the deceased or to do grievous harm to him.

I am satisfied that not only did the accused cause the death of the deceased by an unlawful act but that he did it of malice aforethought. The ingredients of murder were proved beyond reasonable doubt and I find the accused guilty of murder contrary to Section 203 as read with Section 204 of the Penal Code and convict him accordingly.

**Signed, dated and delivered in Nyamira this 28<sup>th</sup> day of March 2019.**

**E. N. MAINA**

**JUDGE**