



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL CASE NO. 4 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

MOSES KISIANO MALOBA ALIAS SHIANO1ST ACCUSED

BONIFACE MALOBA ALIAS CHARLIE2ND ACCUSED

JUDGMENT

1. **Moses Kisiano Maloba** alias **Shiano** and **Boniface Maloba** alias **Charlie** are 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 11th day of November 2012, at **Bulanda** village, in **Mayenje** sub-Location of **Busia** County, murdered **Alexander Elijah Ogolla**.

3. The prosecution case was that on the 11th day of November 2012, the first accused went to the home of the deceased and after the deceased had asked him why he had sold all his land, he retorted that he was not going to beg for land from him (deceased). The first accused started to insult the deceased. He went away and returned with a hoe. He hit the deceased with it. The second accused arrived on a boda-boda bicycle and he ordered the first accused to continue beating the deceased. The second accused joined his co-accused and hit the deceased on the head with a brick. The second accused then picked the broken pieces of the hoe and left with his co-accused. The deceased succumbed to the injuries.

4. The first accused opted to keep mum while the second accused in his defence the accused denied any involvement in the offence. He blamed his co-accused.

5. The issues for determination are:

- a) Whether each accused was involved in injuring the deceased;
- b) Whether there was any justification; and
- c) Whether the offence of murder was established.

6. Esther Naliaka Elijah (PW1) is the widow of the deceased herein. Her evidence is that the deceased was a paternal uncle to both accused persons. The first accused visited their home and the deceased enquired as to why he had sold all the land and yet he was now married. The first accused retorted that he was not going to beg for land from him.

7. The deceased got to his house and took a seat and went and sat under a mango tree. The first accused used obscene language to insult him. He went away and returned with a hoe. He hit the deceased with it.

8. It was at this juncture that the second accused entered the scene. He went there on a bicycle boda-boda. He urged the first accused to continue beating the deceased. He also picked some two bricks and hit the deceased on the head with them. The duo left the deceased lying there.

9. Brian Ogolla (PW2) is the son of the deceased. He testified like his mother (PW1). Another witness who testified that was present during the incident was Naliaka Mutamisi Nandi (PW5). She said the deceased was her father in-law. Her evidence was that she witnessed the incident. She was attracted outside by a quarrel between the deceased and the first accused. The first accused had a hoe. Accused two urged the first accused to hit him again. She however said she did not witness the first blow.

10. The evidence of Esther Naliaka Elijah (PW1) and that of Brian Ogolla (PW2) had some contradictions. In her evidence PW1 said at the time of the incident her co-wife known as Namuma was not present for she had been hospitalized. She also said that she had left for church in the morning at 6.00 a.m. and returned home at 8.00 a.m. Her son on the other hand testified that her mother did not go to church that morning and that Namuma was present during the incident. These contradictions in my view are not material for they were on peripheral matters. In any case, if there were doubts as to whether they are credible, these doubts were erased by the evidence of Naliaka Mutamisi Nandi (PW5). Her evidence corroborated that of Esther Naliaka Elijah (PW1) and that of her son, Brian Ogolla (PW2) as to who inflicted the fatal injuries to the deceased. I therefore make a finding that both accused persons were involved in causing the death of the deceased.

11. Though there was scanty evidence as to the nature of the quarrel between the first accused and the deceased, it would appear it was a heated argument. We may not know what the deceased may have said to provoke the anger of the first accused for him to arm himself with a hoe. For an offence of murder to be established, the prosecution had a duty to prove malice aforethought. Section 206 of the Penal Code 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.

In the instant case the prosecution did not discharge its onus. The offence of murder was not therefore proved to the required standards.

12. The evidence on record however proved beyond any reasonable doubts the offence of manslaughter contrary to section 202 of the Penal Code. I find each accused guilty of this lesser offence and accordingly convict each one of them.

DELIVERED and SIGNED at BUSIA this 30th day of April, 2019

KIARIE WAWERU KIARIE

JUDGE