



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**MILIMANI LAW COURTS**  
**HIGH COURT CRIMINAL CASE NO 92 OF 2014**  
**REPUBLIC.....PROSECUTOR**  
**VERSUS**  
**JOSEPH MAINA NDERI .....ACCUSED**

**JUDGEMENT**

1. The accused **JOSEPH MAINA NDERI** was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the Penal Code the particulars of which were that on 28<sup>th</sup> day of September, 2014 at Kinyanjui Estate Dagoretti District within Nairobi County murdered **WILLIAM LITUNYA AMBUNDA**.

2. On 7/10/2014 he made his first appearance in court before Justice R. Korir and on 14/10/2014 a plea of not guilty was entered for the same before Mutuku J. After several appearances before different Judges within the Criminal Division, on 7/11/2016 his trial commenced before me and continued up to 20/11/2017 when the accused gave his sworn statement of defence.

**PROSECUTION CASE**

3. **PW2 CORP. JOHN SILUNDA** testified that on 28<sup>th</sup> September, 2014 while on duty at Riruta Police Station received a lady reportee who reported that her brother had been murdered by his wife. He recorded the same on the OB and together with **OCS INSP. CHARLES OUMA** and **PC SOITA** proceeded to the scene where they found the body of the deceased lying in a ditch with a stabbed wound on the chest. Upon inquiry at the scene he was informed that the deceased's wife had previously moved out of his house only to come back forcefully and when the deceased declined to accept her back she went away and later on returned with the accused who stabbed the deceased on the chest with a knife.

4. It was his evidence that the wife of the deceased who was present at the scene led then to the accused where they conducted a search for the murder weapon but did not recover the same but recovered an identity card belonging to the accused. He called the scene of crime officers who proceeded to the scene and the body taken to City Mortuary where post mortem was conducted. Using the details on the identity card of the accused he was traced to Kawangware where he was arrested. It was his further evidence that the accused stabbed the deceased once having been called by the wife of the deceased.

5. **PW1 PC GATHECHA JOSEPH** a scene of crime officer visited the scene and confirmed that the

same had a stabbed wound on the left side of the neck, cut on the knees and bruises near the ear and neck. He took photographs at the scene which he produced in evidence. **PW3 DR. PETER NDEGWA** performed post mortem examination on the body of the deceased who had ellipsoid penetrating stab wound left supraclavicular area, upper lobe of left lung stabbed and as a result thereof formed opinion that the cause of death was exsanguinations due to severe chest injury due to penetrating stab wound.

6. **PW4 SGT. JAMIN AKAVERE** re-arrested the accused from Kawangware Market from members of the public. **PW5 PETER AKUNO** identified the body of the deceased to **PW3** for purposes of postmortem examination. **PW6 PC VINCENT SIRO** investigated the matter and confirmed that the deceased was stabbed by the accused outside his house. From his investigations he was able to establish that the victim was quarreling with his wife one Lucy which led to a fight. The deceased wife then sought the help of the accused who responded and stabbed the deceased with a knife before running away from the scene. This was confirmed by the said Lucy who stated to him that she sought their assistance of the accused but was surprised to see him stab the deceased. The accused was eventually examined by **DR. SHAKO** who confirmed that he was fit to stand trial.

7. It was **PW 6's** further evidence that the accused was interrogated by a gazetted officer and he confirmed having stabbed the deceased accidentally since he was trying to defend himself. It was his evidence that the accused was called by Lucy's daughter came and found the deceased and the said Lucy fighting and that the accused fled from the scene.

### **DEFENCE CASE**

8. When put on his defence, the accused stated that he was arrested at Kawangware where he was working as a loader and that they were arrested three of them only to be charged with an offence he did not commit. He stated that his name in the identity card was JACOB NDERI MAINA and that his identity card was taken by a police officer called JOHN. In cross-examination he stated that he did not know his identity card numbers.

### **SUBMISSIONS**

9. On behalf of accused, it was submitted by Mrs. Nyamongo that there was no eye witness who saw the accused stab the deceased with the knife. It was further submitted that the initial report made to PW2 was that the deceased had been murdered by his wife and that the initial reportee the sister of the deceased among other vital witnesses who included the wife of the deceased, their seven (7) year old daughter, the landlady, Happiness Kisare, Josea, Dennis, Bett Ndune and Nancy Wanjiku Njoroge were never called in as witnesses.

10. It was further submitted that the name of the accused person was an issue in this matter. It was submitted that it was not clear whether the accused was **JOSPEH MAINA NDERI** or **JACOB MAINA NDERI**. It was therefore submitted that there was a wrong person in the dock for a crime committed by a different person. It was submitted that the doubt in the name of the accused person means that the prosecution case was not proved beyond reasonable doubt.

11. The prosecution opted not to file any submissions.

### **ANALYSIS AND DETERMINATION**

12. For the prosecution to sustain a conviction on the charges of murder under **Section 203** of the **Penal Code**, the following ingredients of the offence must be proved beyond any reasonable doubt:-

*(a) The fact and cause of death of the accused.*

*(b) That the said death was caused by unlawful act of omission or commission on the part of the accused person.*

***(c) That the said act of omission or commission was caused with malice aforethought.***

13. The fact and the cause of death of the deceased was proved beyond reasonable doubt by the evidence of the following witnesses:- **PW1 PC JOSEPH GATHECHA** a scene of crime officer visited the scene with **PW6 PC VINCENT SIRO** among other police officers and found the body of the deceased at the scene with stabbed wound on the left side of the neck among other injuries and took photographs at the scene which were produced as the exhibits. **PW2** upon receipt of the report on the death of the deceased proceeded to the scene where he confirmed the said death. **PW5** identified the body of the deceased at the city mortuary to **PW3 DR. PETER NDEGWA** who performed post mortem examination thereon and formed an opinion that the cause of death was exsanguinations due to severe chest injury secondary to penetrating stab wound.

14. On whether the said death was caused by an unlawful act of omission or commission on the part of the accused person:- **PW2 CORP. JOHN SILUNDA** testified that he went to the scene and commenced investigations from which he established that the deceased wife who had earlier left him returned back to the home and a dispute ensued therefrom which resulted into a fight. The said wife then sent their daughter to go call the accused to assist her who proceeded to stab the deceased before running away from the scene.

15. It was his evidence that the deceased wife led him to the house of the accused person where he conducted a search for the murder weapon which he did not find but in the process found the identity card of the accused and that when the accused was arrested he was confirmed that the identify card belonged to him. **PW4 SGT JAMIN AKEVERE** re-arrested the accused at Kawangware Market from the members of the public who had arrested him for the offence of murder for which he had escaped.

16. Whereas there was no direct evidence of a witness who saw the accused stab the deceased, there is the evidence of **PW6 PC VINCENT SIRO** the investigating officer who testified that there was a quarrel between the deceased and his wife one Lucy over a mattress which resulted into a fight. The said Lucy thereafter sent for the accused who came and stabbed the deceased. It was his evidence that the eye witnesses who had recorded their statements with the police moved out of the area when it was later upgraded to unknown places.

17. I have contrasted the evidence of **PW6** against that of **PW4 SGT J. KAVERE** the arresting officer who re-arrested the accused person from the members of the public from Kawangwae area. I have also taken into account the accused defence herein and find that there is enough circumstantial evidence placing the accused at the scene of the commission of the offence herein including the fact that he was known in the area by his witnesses who identified him. His house was searched and his identity card was found thereat which he confirmed to be his at the time of his re-arrest. He was known by the members of the public who had arrested him. His defence that he was arrested while operating as a handcart pusher and loader is contracted with the evidence of **PW6** the investigating officer and is found to be unbelievable and an afterthought and is therefore dismissed.

18. On whether the said act was committed with malice aforethought:- there is evidence that the accused was a friend to the deceased wife. They were all staying in the same area and when the wife of the deceased called him to come to her aid, he came armed with a knife which he had hidden in his gumboots. He went to the scene area drew out the knife and stabbed the deceased before running away from the scene.

19. By coming into the scene armed with a knife and using the same to stab the deceased the accused is considered to have had an intent to commit a felony being to cause actual death and on grievous harm to the deceased thereby bringing his action under the scope of **Section 206 (c) of the Penal Code**. I therefore find and hold that malice aforethought on the part of the accused person was proved beyond any reasonable doubt.

20. Failure to call the eye witnesses who had recorded their statements with the investigating officer is not fatal to the prosecution case since the prosecution is not obliged to call witnesses to satisfy the curiosity

of the defence and further the court can only make adverse inference where the defence applies from the production of those statements to discredit what the said witnesses had stated therein which is not the case in this cause.

21. The final issue for determination is on the name of the accused person herein. As per the charge sheet the accused is known as **JOSEPH MAINA NDERI**. This is the name reflected in this P3 form produced as P.Exhibit No. 4 on which the accused was examined on 1/10/2014 at which time the accused responded to the name of **JOSEPH MAINA NDERI**. On 14/10/2014 the accused took plea under the same name and has at all material times during this trial responded to the name **JOSEPH MAINA NDERI**. He was positively identified at the dock by **PW2** and **PW4** the arresting officer and whereas the accused has stated in his defence that he was **JACOB** and not **JOSEPH** but without providing any documents on record in support of the stated name, I find and hold that no prejudice has been suffered by the accused person as a result of the disputed name as the right person has been tried before this court.

22. I further find no merit on the accused defence that he was not at the scene of the murder but was arrested during a swap by the police at Kawangware Market since this evidence is rebutted by that of **PW4** who re-arrested the accused from the members of the public.

23. Having analysed the evidence produced before me and taken into account the submission by the accused through his advocate, I am satisfied that the prosecution has proved beyond any reasonable doubt all the elements of the charge of murder and hereby find the accused guilty and convict him of the murder of **WILLIAM LITUNYA AMBUNDA** on 28<sup>th</sup> day of September, 2014 at Kinyanjui Estate Dagoretti District within Nairobi County as charged and it is so ordered.

DATED, SIGNED and DELIVERED at Nairobi this 21<sup>ST</sup> day of **MARCH, 2018**.

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**J. WAKIAGA**

**JUDGE**

**In the presence of:-**

*Miss Mwaniki for Meroka for the State*

*No appearance for Mrs. Nyamongo for the Accused*

*Accused – present*

*Karwitha - Court clerk*