REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL CASE NO. 26 OF 2014

(Formerly Kisii High Court Criminal Case No. 112 of 2011)

REPUBLIC ....PROSECUTOR

VERSUS

WILIAM CHACHA MAGISE...ACCUSED

JUDGMENT

1. **WILIAM CHACHA MAGISE,** the Accused person herein, was arraigned before the High Court at Kisii on 15/12/2011 and faced an information of murder of **JACKSON MOGENDI MWITA** (hereinafter reffered to as '**the deceased'**). The particulars of the offence were as follows:-

> ***"On the 8th day of December 2011 at Getongoroma village in Kuria East District within Migori County in the Republic of Kenya murdered JACKSON MOGENDI MWITA"***

2. The Accused person denied committing the offence and the case was set for hearing but before that happened at Kisii the case was transferred to this Court on the opening of a new High Court station in 2014. The prosecution of the case however did not take off up to 18/04/2016 where three witnesses turned up in Court and testified and that was it. Any subsequent attempt to avail any other witnesses was futile and the prosecution was forced to close its case with the testimony of the three witnesses. The witnesses were the wife of the deceased one **MARY NYASEBA MOTOTIRO** who testified as **PW1** whereas a son to the deceased one **DANIEL MARWA MOGENDI** testified as **PW2. No. 206635 AP Cpl. RICHARD WAFULA** of Matari AP Post in Kuria East testified as **PW3**. For the purposes of this judgment I will refer to the said witnesses according to the sequence in numbers in which they testified before the trial court except otherwise stated.

3. The three witnesses availed the prosecution's case as follows: In the early morning of 08/12/2011 at around 07:00am or thereabout, the deceased, while in the company of PW2 (his son) and WILSON MOTOTIRO (son and not a witness) went to plant trees on the boundary of their farm. The side of the farm they were planting the trees bordered the accused person's parcel of land. As the planting went on the accused person surfaced armed with a club with a metallic nut fitted at its front end (rungu). The accused person asked the deceased why he was cultivating his land and before the deceased could answer the accused person hit him with the club on the head. The accused person collapsed and fell down instantly as the accused person ran away. That occurrence was witnessed by PW2 and PW3. PW3 was an Administration Police officer who owned a parcel of land around where the incident occurred and he was riding his bicycle going to his farm. The incident occurred right ahead of him and he loudly asked the accused person why he was killing the deceased in his presence. He immediately put his bicycle down and attempted to chase and arrest the accused person but mid-way he thought of assisting the deceased since he knew both the accused person and the deceased quite well. On returning to where the deceased

was, he found that the deceased was unconscious. PW1 had also rushed to the scene on hearing PW3 asking loudly and found the deceased lying on the ground while injured on the head. PW1 and PW3 took the deceased to hospital where the deceased passed on the following day. PW3 later arrested the accused person and handed him over to the police.

4. PW2 corroborated the evidence of PW3. He also witnessed the accused person hit his father, the deceased, with the club on the head. He was just next to him as he was the one giving him the seedlings to plant after the deceased dug the holes on the ground. A post mortem examination was conducted on the body of the deceased and the deceased was later on buried. The prosecution then closed its case.

5. On being placed on his defence the accused person opted to and gave a sworn defence where he denied committing the offence and contended that there was no sufficient evidence against him including but not limited to that of the death of the deceased. He called no witnesses.

6. At the close of the defence case Counsel for the accused person submitted briefly and mainly reiterated what the accused person stated in praying that the charge be dismissed for want of proof. The State relied on the evidence on record.

7. It is on the basis of the above evidence that this Court is called upon to decide on whether or not the accused person is guilty of the information of murder.

8. The offence facing the accused persons is an information of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**, Chapter 63 of the Laws of Kenya. For the prosecution to secure a conviction on the charge of murder, it has to prove three ingredients against an accused person. Those ingredients are as follows: -

> ***(a) Proof of the fact and the cause of death of the deceased;***
>
> ***(b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the Accused which constitutes the '****actus reus'* ***of the offence;***
>
> ***(c) Proof that the said unlawful act or omission was committed with malice afterthought which constitutes the*** *'mens rea'* ***of the offence.***

I will now consider the above issues as follows: -

(a) <u>Proof of the fact and cause of death of the deceased:</u>

9. As to whether the deceased indeed died, the prosecution availed PW1 and PW2 in such proof. PW1 was even aware that a post mortem examination was conducted on the body of the deceased. I am hence satisfied that indeed the deceased herein died.

10. On the cause of the death of the deceased, PW2 and PW3 stated that it was the accused person who hit the deceased on the head as he was well and working on his farm and from that hit, the deceased fell down and never was he to raise again. That was direct and corroborated first account evidence. No medical evidence was however produced in this case on the cause of death of the deceased. In very exceptional circumstances, the cause of death may be presumed even in the abscence of any medical evidence. I find that this was one such case given that the deceased on being hit collapsed and was left for the dead.

11. Such a finding is not unique in law. The case of **<u>Wahih & Another =vs= Uganda (1968) EA 278</u>** attests to that**.** In that case the then Court of Appeal of Eastern Africa in dismissing an appeal against a conviction based on the presumption of the cause of death in the absence of medical evidence presented itself thus: -

> ***"Mr. Kakooza's first submission was that the learned Judge had not given sufficient weight to***

the medical evidence and he argued that the appellant should not have been convicted in the absence of medical evidence as to the cause of death. It may be added that, for the same reason Mr. Deobhakta who appeared for the Republic' was not disposed to support the conviction. Of course, such evidence is always desirable and usually essential, but there are exceptions. There have, for example, been general cases in East Africa where persons have been convicted of murder, although the body of the victim was never found and the case against the appellant depended entirely on circumstantial evidence. There may be other cases where medical evidence is lacking but where there is direct evidence of an assault so violence that it could not but have caused immediate death. On the other hand, where there is medical evidence and it does not exclude the possibility of death from natural causes, the task of the prosecution is very much harder and only in exceptional circumstances could a conviction for murder be sustained. We think this is such an exceptional case. The condition in which this body was found buried, with the elastic rightly round the neck and the hands tied behind the back, with the other evidence in the case, points irresistibly to a unlawful killing. We think any other supposition would be quite unreal." (emphasis added).

12. The decision in **Republic =vs= Michael Mucheru Gatu (2002) eKLR** also followed the above binding decision.

13. This Court therefore presumes that the cause of the death of the deceased was the injury on the head secondary to an assault. The other limb is likewise answered in the affirmative.

14. I will now turn to the second ingredient as to ascertain whether the death of the deceased was the direct consequence of an unlawful act or omission on the part of the accused person. There is no doubt that it was the accused person who attacked and inflicted the fatal injury on the deceased. The evidence of PW2 and PW3 clearly attests to that. The attack happened in daylight. PW2 and PW3 were just close to the deceased and each clearly saw the accused person hit the deceased on the head. Both PW2 and PW3 also knew the accused person so well. PW2 was the son of the deceased and their farm bordered that of the accused person. PW3 was also a neighbour who had a farm within that area. He had served as an officer at the local police post before he was transferred but used to continue working on his farm as before. He is the one who later on traced the accused person to his working place, which was at a nearby secondary school, arrested him and took him to the Ntimaru Police Station. That evidence outtweighs the accused person's defence which mainly centrered on the abscence of the evidence of the death of the deceased. I hence have no hesutation in findig that it was the accused person who, by way of an unlawful and unjustified act, caused the death of the deceased. The second limb is also answered in the affirmative.

15. On the third ingriedient, I as well have no hesutation in finding that no malice aforethought was proved in this case. The incident was an isloated one. There was no evidence of running bad blood between the family of the deceased and that of the accused person. Even the aspect of the land dispute was not brought out clearly as to suggest any preconceived intention to cause harm or death. The accused person also hit the deceased only once.

16. The foregone finding is guided by **Section 206** of the **Penal Code** which defines ***'malice aforethought'*** and the following decisions of the Court of Appeal. In the case of **Joseph Kimani Njau vs R (2014) eKLR,** the Court of Appeal in concurring with an earlier finding of that Court (but differently constituted) in the case of **Nzuki vs R (1993) KLR 171,** held as follows: -

> ***"Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused;-***
>
> ***i. The intention to cause death;***
>
> ***ii. The intention to cause grievous bodily harm;***
>
> ***iii. Where the accused knows that there is a serious risk that death or grievous bodily harm***

will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.

It does not matter in such circumstances whether the accused desires those consequences to ensue or not in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed ***<u>The mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder. (See Hyman vs. Director of Public Prosecutions (1975)AC 55</u>".*** (emphasis added).

17. In the case of **<u>Nzuki vs. Republic (1993)KLR 171</u>**, the accused person had dragged the deceased out of the bar and fatally wounded him with a knife. There was no evidence as to their having been any exchange of words between Nzuki and the deceased neither was there any indication as to why Nzuki went into the bar and pulled the deceased straight out and stabbed him. It was rightly observed in that case that the prosecution was not obliged to prove malice but just as the presence of motive can greatly strengthen its case, the absence of it can weaken the case. The Court of Appeal in allowing an appeal and substituting the information of murder with manslaughter observed: -

"There was a complete absence of motive and there was absolutely nothing on record from which it can be implied that the appellant had any one of the intentions outlined for malice aforethought when he unlawfully assaulted the deceased with the fatal consequences. Other than observing that the appellant viciously stabbed the deceased and in so doing intended to kill or cause him gracious harm, the trial court did not direct itself that the onus of proof of that necessary intent was throughout on the prosecution and the same had been discharged to its satisfaction in view of the circumstances under which the offence was committed. Having not done so, we are uncertain whether malice aforethought was proved against the appellant beyond any reasonable doubt. In the absence of proof of malice aforethought to the required standard, the appellant's conviction for the offence of murder is unsustainable. His killing of the deceased amounted only to manslaughter."

18. As the foregone analysis does not therefore support a conviction in respect of the information of murder, the accused person is hence found not guilty of the murder of the deceased and he is hereby acquitted. However, it is clear that the deceased lost his life as a result of the actions of the accused person, but of course without any malice aforethought.

19. In view of the provisions of **Section 179(2)** of the **Criminal Procedure Code**, Chapter 75 of the Laws of Kenya and looking at the evidence on record and as analysed hereinbefore, this Court finds the accused person guilty of the offence of **Manslaughter** contrary to **Section 202** of the Penal Code and he is accordingly convicted accordingly.

20. These are the orders of this Court.

DELIVERED, DATED and **SIGNED at MIGORI this 20th day of April 2017.**

A. C. MRIMA

<u>JUDGE</u>