



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUNGOMA**  
**CRIMINAL CASE NO.14 OF 2013**

REPUBLIC..... PROSECUTOR

VERSUS

MESHACK KHISA WERE..... 1<sup>ST</sup> ACCUSED

JENIFER NANJALA WERE..... 2<sup>ND</sup> ACCUSED

**JUDGEMENT**

1. The accused person Meshack Khisa Were was charged alongside his mother Jenifer Nanjala Were with murder contrary to section 203 as read with 204 of the Penal Code.

The particulars of the offence are that on the 14<sup>th</sup> day of June, 2014 at Lumboka village in Bungoma South District within Bungoma County together they murdered Joseph Stanley Were.

2. The 2<sup>nd</sup> accused Jenifer was acquitted at the close of the Prosecution Case for lack of evidence.

3. The Prosecution Case in brief is that the accused, the deceased and others not before Court were sons from a Polygamous family where there were claims of favouritism by their father in division of land. It was alleged that the deceased was favoured and on the material day sons of the 2<sup>nd</sup> accused i.e. the 1<sup>st</sup> accused, Aaron & Meshack attacked the deceased inflicting upon him fatal injuries. The other 2 are at large, the accused and his mother were apprehended and charged.

4. The Prosecution relied on the evidence of 6 witnesses as follows

**PW1 Margaret Nelima Wekesa.** She was an aunt to the deceased and on the 12<sup>th</sup> of June 2013 at 7p.m she returned a call from one Emmanuel when she was informed of a quarrel between the caller and the deceased. The caller, Emmanuel wanted her intervention. On 12<sup>th</sup> of June she came by Emmanuel who explained that their difference was due sugarcane proceeds. She later spoke to one Stanley who informed her that he had reported the matter to the police. On 14<sup>th</sup> of June, 2013 while at Lunakwe dispensary attending a meeting her sister arrived and informed her that her son had been cut. Shortly thereafter a bike arrived carry the deceased. She saw him bleeding from the mouth. He was swollen and his legs hanging. She directed he be taken to St. Domiano hospital. Later she learnt of his death.

**PW2 Emmanuel Were** stated that on 14/6/2013 at about 9.30a.m. while working at one Wafula Basiliano's he heard screams, together with others he headed to the scene. He found 2 boys beating another. One boy was down. The two beating the other were Emmanuel & Aaron. The one down was Stanley. Those fighting and the witness were his step brothers. He asked them to stop but they insulted

him. They had a hoe, a stick and a machete. He asked people around to help but they refused to intervene as it was a family feud. He could not intervene alone.

**PW3 Dr. Philip Kosgey** of Bungoma referral hospital is the one who produced the post mortem report on behalf of his colleague Dr. Obondo who was away in school. The post mortem related to Joseph Stanley Were who was allegedly beaten by his brothers and seriously wounded. The deceased was 37 years. He gave the following information.

**Externally** the deceased had

- Bruises on the right thigh, the face and abdomen
- He had fracture of the right shoulder

**Internally**

- He had a ruptured liver
- And a subdural haematoma.

He gave cause of death as subdural haematoma secondary to trauma.

**PW4 Mark Wanyonyi**

On 14/6/2013 at about 9a.m. he left his house going to working at a sugarcane plantation. As he was about to reach Lumboka market he heard screams and went towards the direction. He witnessed Meshack and Aaron beat the deceased. He saw Emmanuel and Jennifer arrive and they equally assaulted the deceased. He then screamed attracting other people. Emmanuel attacked the deceased and left. He learnt that Stanley had been taken to hospital and later died.

**PW6 PC Ezekiel Abel Manduka** of Bungoma police station. He was the Officer on duty on 14/6/2013 when he received news of a person admitted to hospital. He went in the company of one other Officer and found the person already dead. He returned to the police Station where he found 1<sup>st</sup> accused detained. He recorded in the OB and started investigations. He recorded statements and visited the scene of crime. He received exhibits from Mateka AP Camp, a jembe and a panga. He later arrested the accused and his mother and both were charged.

During investigations he learnt that the deceased had been beaten by 4 people two of whom were before Court.

Emmanuel and Aaron remained at large. Although the exhibits were not blood stained they were used to assault the deceased.

5. The Court found the 1<sup>st</sup> accused Meshack Khisa to have a case to answer and he was placed on his defence. He gave a sworn statement and had a police Officer produce the OB of the 14<sup>th</sup> of June, 2017 as his witness.

DW1 the accused stated that on the 14<sup>th</sup> of June, 2013, he had been weeding his maize and at about 10.30a.m. he decided to return home when he came by the deceased, he asked the deceased for his jembe, which the deceased had borrowed on 11<sup>th</sup> of June. The deceased requested him to go for the same. On the way the deceased turned against him, attacking him with a panga, having placed down a jembe he had with him. The panga missed him, he wailed seeking for help and other people came to assist. He was rescued and left. Of those who helped were Aaron, Job & Wekesa. He then rushed with Aaron to report the incident to the village elder and sub-chief but missed them, he then reported to Mateka AP. He took the panga and jembe. As he had sustained injuries he was referred to Bungoma district hospital. He then

went and took to report to Bungoma police station. While at the hospital he saw Stanley Were with his wife later he learnt Stanley had died. The altercation was in relation to their father's land. Accused had no land then as he was fresh from school and had not married. Their father distributed land to those who were married. There was a feeling that the deceased was favoured. He suggested that those who rescued him may injured the deceased.

**DW2 AP Geoffrey Monde Wanzala** of Mateka police post. He produced a copy of the OB record indicating that at about 11.21a.m. on 14/6/2013 Meshack Were reported a threat by a step brother one Stanley Were and he was advised to report the incident to Bungoma police.

6. Having considered both the Prosecution and defence case the issues for determination are;

*a. Whether the deceased herein was murdered and if so*

*b. Whether the Prosecution have linked the crime to the accused*

*c. Whether all the necessary ingredients of the offence of murder have been proved.*

7. PW3 the doctor who produced the post mortem report and PW5 the witness to the post mortem adduced evidence indicating that the deceased died. PW5 identified the body, PW3 certified him dead and gave cause of death. All other witnesses including the Accused do confirm so and I therefore find as a matter of fact that the deceased died.

8. The death of the deceased was caused by an injury sustained on the head as a result of an assault. PW2 testified that he saw the accused and one Aaron beat the deceased about 500m away from where he was working, he moved closer. The two and the deceased were his step-brothers. He was insulted and did not separate the parties. The deceased was beaten on the chest, head, neck and was bleeding from the mouth. This happened about 9.30a.m. PW4 on the other hand says he witnessed the beating after 9a.m. He saw the accused and one Aaron beating the deceased who was down. He saw them punch and box him. Later he saw Emmanuel and Jennifer arrive. He did not help as Emmanuel wanted to attack him. PW6 the investigating Officer gathered information that the deceased was beaten by 4 people one being the accused.

9. All the Prosecution witnesses point a finger at the accused and his two brothers still at large, as those who beat the deceased.

In my view the above is confirmed by the accused himself although he claims that the deceased is the one who assaulted him he faults those who rescued him and this line of defence does not sell. Indeed in my view the accused reported the incident although in a skewed way knowing very well that they had seriously wounded the deceased. Evidence on record is that they assaulted the deceased around 9.30a.m. yet the report was made at 11.21 a.m. about 2 hours later. Although the accused alleges he was assaulted there was no proof of injury as neither a P3 form was produced in evidence nor the report at Mateka indicated injury.

It is clear that the accused and his brothers had a grudge against the deceased. The accused admitted the same.

10. At this juncture it is safe to find that the accused and others at large assaulted the deceased inflicting serious injuries upon him which turned out to be fatal.

11. The Prosecution however had to prove the other necessary ingredients of the offence of murder.

Section 203 of the Penal Code states;

***“Any person who of malice aforethought causes the death of another person by an unlawful act of omission is guilty of murder.***

From the above definition there has to be; (i) *malice aforethought*

(ii) *unlawful act or omission* (iii) *death*.

12. In my view although the Prosecution proved that a death occurred and that the accused and others wounded the deceased the other equally important ingredient which is malice aforethought was not proved. We do not know for sure who started the fight is it the accused or the deceased.

There is an admission of bad blood but we do not know the intention behind the altercation and consequently the charge of murder cannot be sustained.

13. However the accused cannot entirely escape as by his actions and that of his accomplices they caused the death of the deceased and I therefore fault him and find him guilty of the lesser offence of Manslaughter and will accordingly convict him of the said offence.

DATED and DELIVERED at BUNGOMA this 21<sup>st</sup> day of September, 2017

**ALI-ARONI**

**JUDGE**