



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA.**

**CRIMINAL CASE NO. 2 OF 2013.**

**REPUBLIC .....PROSECUTOR**

**VERSUS**

**WINSTONE IMBUKWA IMBWAKA.....1<sup>ST</sup> ACCUSED**

**CYRUS IMBUSI MUSHIRA.....2<sup>ND</sup> ACCUSED**

**NICKSON SHITANDAYI SHIVACHI.....3<sup>RD</sup> ACCUSED**

**BENSON MUSHIRA LIYAI.....4<sup>TH</sup> ACCUSED**

**J U D G M E N T**

**Introduction**

1. WINSTONE IMBUKWA IMBWAKA, CYRUS IMBUSI MUSHIRA, NICKSON SHITANDAYI SHIVACHI and BENSON MUSHIRA LIYAI are charged with the 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 3<sup>rd</sup> of July, 2012 at Mukulusu village, Murhandha location, kakamega East district within Western province, they jointly murdered GEOFFREY MOI. They pleaded not guilty to the charges and the case has been fully heard.

**The Prosecution Case**

3. The prosecution summoned five (5) witnesses to prove their case. PW1, Morris Otunga Shibakali testified that on the day of the incident 3<sup>rd</sup> July, 2012 at around 1.00 p.m. he was taking his cattle to the river and on the way he heard screams from the deceased’s home. He rushed to the scene and passed through one Joshua Luseno’s home.

4. As he approached the deceased’s home he saw six (6) people coming from that home and they were all armed. He posed and saw them passing. He recognized all the six (6) persons. He saw WINSTONE IMBUKWA carrying a panga, IMBUSI had a panga and a rungu in both hands, HABSHY was carrying a slasher, SHITANDAYI had a panga, SHIAKALI had a panga and a rungu, BENSON LIYAI had a panga.

5. After they passed he went to the deceased’s homestead and found the deceased on the ground. There were people already at the house. The deceased had been cut six (6) times and was bleeding profusely. He (PW1) asked the deceased what had happened and the deceased told him he had been attacked and the attackers had run away using the road leading to Joshua’s farm/home. PW1 then saw the mother of the

deceased coming from the maize farm. They then took the deceased to Kakamega General Hospital where he succumbed to the injuries.

6. PW2, Boniface Lubusu testified that on that day the 3<sup>rd</sup> July, 2011 at about 1.00 p.m. he was in his farm when he heard his brother scream for help. He rushed home and found his brother who had been seriously cut with a panga. He recalled seeing Winny carrying a slasher, Imbusi carrying panga, Shitandayi a panga. He testified that he was the first person to arrive at the scene and he was able to see the six people. He testified that he witnessed the 1<sup>st</sup> accused person cutting the deceased on the hand, second accused cut deceased on the back, third accused cut him on the leg and 1<sup>st</sup> accused again cut the deceased on the head. He made mention of one Ishiakhali and another person who is not in court.

7. PW2 stated further that when he saw the people cutting his brother he ran for safety and after they left he took the deceased to hospital where he passed away. He added that the people who attacked his brother were well known to him as they all lived in the same village.

8. PW3 Mayemuila Mutola Malale testified that on the 3<sup>rd</sup> July, 2011 at around 1.00 p.m. people came to their home. They were armed. He knew about four (4) of them. He saw Winny who was carrying a panga, Imbusi had a panga 3<sup>rd</sup> accused had a panga and 4<sup>th</sup> accused also had a panga. He saw the four people cutting his son (deceased) with the panga and as he screamed they threatened him and he had to run for safety inside the farm. When his other son, PW2, came the attackers were already leaving. When he asked the deceased why he was attacked the deceased told him he did not know. He knew the accused persons because they were from the same village.

9. Dr. Dickson Mchana Mwaludindi produced the P3 form on behalf of Dr. Roseline Malangachi. He told the court that Dr. Roseline had worked with him for over four years and that he was familiar with her handwriting, signature and competence. He testified that the autopsy was conducted on the 19<sup>th</sup> July, 2012 after two witnesses identified the body.. He read through the PM report which showed that the body was of an African male of good nutrition and measuring 5 “7” inches long and had been preserved for a period of six days. Externally the body was pale and had five cut wounds:-

- a) On the back.
- b) On the left shoulder.
- c) On the side and on the left shoulder.
- d) Above the left eye.
- e) On the right forearm.

10. The doctor formed the opinion that the cause of death was excessive bleeding arising from multiple cut wounds. She filled a burial permit and appended her signature name and designation and stamp. The postmortem report is marked as PExh1.

11. PW5 No. 83213 PC ABDI DEK SHERIFF MOHAMED was made aware of the report of murder on the 7<sup>th</sup> July, 2012 at 8.00 a.m. He recorded statements of the witnesses, went to the mortuary where the post-mortem was conducted and took the post mortem report to the station. Together with IP Otieno went and arrested the accused persons. He did not visit the scene. He did not know whether it is the accused who cut the deceased.

12. The prosecution closed its case at this juncture.

### **The Defence Case**

13. At the conclusion of the prosecution case, the accused persons were placed on their defence. Each of

the accused persons chose to give sworn statements but did not call any witnesses.

14. DW1 Winston Imbwaka Imbukwa testified that on the 3<sup>rd</sup> July, 2012 he had left home for Ileho where he worked upto four p.m. He got home at 5.30 p.m. ate his evening meal and slept. On 4<sup>th</sup> July, 2012 he remained at home/local area and heard that someone in the locality had been injured and taken to hospital but he did not enquire on the matter. It was only in the night of 3<sup>rd</sup> April, 2013 while he was asleep that he was woken up by police who arrested him and took him to Kakamega Central Police station where he stayed for two (2) days before being charged. He knew the deceased person.

15. He testified that PW1 who is his uncle had warned him that he would fix him because of a land dispute. He explained the circumstances surrounding the dispute that had led to a grudge between his family and the family of PW1.

16. DW2 SILAS IMBUNI MMBALIA testified that on the 3<sup>rd</sup> July, 2012 he had gone to work within Murhanda until 5.00 p.m. when he went to his home had his supper and slept. He maintained that the allegations of murder were false and pointed a finger at PW1 whom he worked with in the year 2011 and who refused to pay him. He claimed that PW1 warned him that since he was hard headed he would fix him. He told the court that he was also arrested on the 3<sup>rd</sup> /4<sup>th</sup> January, 2013 and was taken to Kakamega Central Police Station where he was placed in the cells. He told the court that he knew his co-accused. His home was 250 meters away from the deceased's home.

17. DW3 NICKSON SHITANDAYI SHIVACHI told the court that on the 3<sup>rd</sup> July, 2012 he was at Kakamega Forest working on his piece of land until 4.00 p.m. He later learnt that one villager had been assaulted that day but he did not follow up further. He was arrested on the 3<sup>rd</sup> January, 2013. Before his arrest he was always at home except when he went out to work. He knew his co-accused and maintained that the allegations before the court were not true.

18. DW4 BENSON LIYAYI MUSHILA testified that on the 3<sup>rd</sup> July, 2012 at about 1.00 p.m. he was on duty working on a construction site within Kakamega. He left work at 5.00 p.m. and went home but did not hear of any strange happenings in the area. He slept and the following day he resumed work. He was arrested on the 23<sup>rd</sup> January, 2013. Before the arrest he was always at home after the work. He denied the charges.

19. None of the accused persons called any witness.

### **Analysis and Determination**

20. The court has carefully considered both the prosecution and defence evidence and also noted the contents of the submissions filed by the defence counsel. The offence of murder is defined under section 203 of the Penal Code as follows:-

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

This definition gives rise to four (4) crucial ingredients of the offence of murder all of which the prosecution must prove beyond a reasonable doubt in order to prove the charge. These are:-

- 1) The fact of the death of the deceased.
- 2) The cause of such death.
- 3) Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused persons and lastly;
- 4) Proof that the said unlawful act or omission was committed with malice aforethought.

21. On the first and second issues there is no controversy. It has been shown by the prosecution that the deceased died on the 3<sup>rd</sup> day of June, 2012. PW1 testified that he found the deceased on the ground, having been cut severally and was bleeding profusely. They took him to hospital where he succumbed to the injuries. This is the same testimony that was given by PW2 and PW3 and also confirmed by the accused persons who come from the same area with the deceased. They all testified that they heard the deceased was attacked and that he had died.

22. Dr. Mchana who testified as PW4 produced the post mortem report which was prepared by his colleague Dr. Roseline. The said report was not disputed. From the post mortem report the body of the deceased had five (5) cut wounds on the back, left shoulder, above the left eye and on the right forearm. The doctor's opinion was that the cause of death was excessive bleeding arising from multiple cut wounds. The prosecution thus proved these two ingredients to the required standard.

23. The third ingredient which the prosecution must prove is that the deceased died as a result of the unlawful acts or omissions on the part of the accused person. In this regard, the prosecution must prove that the accused persons had formed a common intention to kill the deceased. According to BLACK'S LAW DICTIONARY, SEVENTH EDITION, an intention is the purpose or design with which an act is done. It is the fore knowledge of the fact, complied with the desire of it, such knowledge and desire being the cause of the act, inasmuch as they fulfil themselves through the operation so far as, it exists in idea before it exists in fact, the idea realizing itself in the fact because of the desire by which it is accompanied.

24. In ARCHIBOLD'S criminal pleading, Evidence and practice, 2002, at page 1537 paragraphs 17-34 and 17-35, it is stated, inter alia, that "foresight of the consequences which it must be proved that the accused intended (in murder, death or really serious bodily injury), is no more than evidence of the existence of the intent, it must be considered, and its weight assessed, together with all the evidence in the case, foresight if consequences maybe a fact from which the jury may think it right to infer the necessary intent" further at paragraph 17-35 the author states " the probability of the result is an important matter for the jury to consider and can be critical in their determining whether the result was intended," unless of course require some further explanation, it is to be noted here that intent is something very different from motive or desire.

25. From the above, and as stated in Halistory's Laws of England, Vol 11 page 17 at paragraph 11 " the elements of a crime are brought about intentionally where a person brings them about with the desire to do so. A person intends the commission of a crime only where it is his aim or purpose to bring about its constituent elements."

26. For the above prepositions, I am guided by the house of lords decision in the case of R-vs- Moloney [1985] 1 ALL ER 1025 where the court held inter alia, that " the mental element in murder consists of an intention to kill or cause really serious injury and not merely foresight that death or serious injury will be a probable consequences of the accused's voluntary act." The case of R-vs- Hancock & another [1986] ALL ER 641 the Court of Appeal of England discussed a similar issue and adopted the Principles in the moloney case (supra).

27. Now returning to the instant case, can it be said that the 4 accused formed a common intention to kill the deceased? From the evidence, the incident took place in broad day light at about 1.00pm. At the time, Mayemula Mutola Malale, PW3 and who is father to the deceased was at his home when the four accused arrived in the home in a group, armed with pangas and rungs. They did not waste any time and went straight to where the deceased was and started cutting him. According to PW3, each of the accused was armed with a panga. The deceased suffered serious cut wounds on the back and neck behind the left shoulder, on the side of the left shoulder and other extensive injuries above the left eye and on the right forearm. The deceased bled profusely and Dr. Mchana who presented the port mortem report told the court that the cause of death was excessive bleedings arising from those multiple cuts.

28. Though PW2 got to the scene soon after the deceased had been seriously cut he was able to see all the 4 accused armed with pangas and slashers. Both PW3 and PW2 had to run for their lives because the

accused threatened to cut them as well.

29. PW1, Morris Otunnga Shibakati also met the 4 accused together with 2 others coming out of the compound of the deceased, armed with pangas. PW1 had heard the deceased screaming for help just before he ran to the home whereupon he met the accused coming out of the compound where the deceased was found lying down with cuts all over his body and bleeding profusely.

30. From all the above, I am satisfied that all the 4 accused were properly identified at the scene as they randomly and seriously assaulted the deceased. It was day time and the parties knew each other well as they were neighbours. Whatever the motive for the attack was is immaterial. As the accused moved together and descended on the deceased together cutting him seriously, their unknown intention was either to kill or to cause previous harm, to the deceased. Their acts were unlawfully and it is those acts that resulted in the death of the deceased.

31. In their defences, the accused alleged that they were framed, and more so because it took a long time to arrest them. They also alleged that there were grudge between them and the family of the deceased. While accepting that there was an inordinate delay in apprehending the accused, I do not accept the allegation by the accused that they were framed. I have carefully considered their own conduct after hearing news of the death of the deceased who was a neighbour and it leaves a lot to be desired. In my considered view, the defence of alibi raised by each accused have been displaced by the evidence adduced by the prosecution. In short, the third element of the offence of murder has been proved by the prosecution to the required standard.

32. The final issue for determination is whether the prosecution has proved that in killing the deceased the 4 accused had malice aforethought. Section 206 of the Penal Code defines malice aforethought in the following terms:-

**“206. Malice aforethought**

Malice aforethought shall be deemed to be established by evidence proving anyone 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.”

33. In the instant case, it is not in doubt that by inflicting such serious injuries on the deceased, the 4 accused had the intention to cause the death of the deceased or to do grievous harm to him. Secondly, each of the accused must have known and together they must have known that their savage attacks on the deceased would probably either cause the deceased's death or him grievous bodily harm. The deceased in fact died as a result of the attack on him by the accused.

34. In summary, therefore, I am satisfied that in carrying out the attack on the deceased, the 4 accused did so with malice aforethought as their common intention was to kill or cause grievous harm to the deceased.

**Conclusion**

35. In conclusion, and having said the above, I find and hold that the prosecution has proved the charge of murder jointly against all the 4 accused. I find each one of them guilty as charged and convict them accordingly under section 322(2) of the Criminal Procedure Code.

It is so ordered.

Judgment delivered, dated and signed in open court at Kakamega this 13<sup>th</sup> day of October, 2017

**RUTH N. SITATI**

**JUDGE**

In the presence of;-

Mr. Ngetich.....for state

Mr. Amasakha for Mr. Osango (present).....four all four accused

Polycap.....Court Assistant