



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

**CR(MURDER) CASE NO.12 OF 2011**

**REPUBLIC .....PROSECUTOR**

**VERSUS**

**PATRICK SOSIO ANDALA .....ACCUSED**

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

**Introduction**

1. The accused person herein was arraigned before this Court on 28/02/2011 charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code, the particulars being that on the 15<sup>th</sup> day of December 2010 at around 19.00 hrs at Buteheri village Shiswa sub location, Murhanda location in Kakamega County within Western province he murdered Antony Musindayi Andala. When the accused appeared for plea on 02/03/2011, he denied the charge.
2. The Prosecution called 8 witnesses in its effort to prove the charge facing the accused person and at the close of the Prosecution case, the accused person was found to have a case to answer and was put on his defence. He gave sworn testimony and called no witnesses.

**The Prosecution Case**

3. On 15/12/2010 at about 3.00 p.m, Francis Andala Ambani was at his home in Buhei village of Shinyalu division Kakamega County when the accused who is one of his sons came home riding on a bicycle. The accused went straight to his house without saying anything to the father. The accused entered his house through one door and came out through another door and then entered PW1's house where he met his sister Brenda PW2 and started telling her and her other sister Scholastica, PW3 to leave the home because according to the accused the two girls were bothering his wife. The accused person went back to his house after talking to Brenda and then went to where PW1 was and told him that the two girls should leave the home because they were interfering with his wife. PW1 stated further that the accused told him that, that very day he (accused) would kill somebody. The accused also told PW1 that PW1 would see when accused returned home that evening.
4. PW1 also testified that at about 7.00 p.m that day the accused returned home. Then PW1 heard screams from Brenda and Scholastica. PW1 saw accused hit Brenda on the head using a metal rod – PMFI – 1. The accused then turned and followed PW1 and when PW1 asked the accused what it was he wanted the accused responded by saying he would kill him and went ahead and hit PW1 with a stick on the shoulder and also stabbed him on the right side of the lower chest.
5. The screams by the girls attracted Anthony Musindayi Andala. As soon as Antony Musindanyi Andala who is the deceased arrived, the accused announced that it was the deceased he was looking for. The accused knocked the deceased down and hit him with the same metal rod he had

- used to hit Brenda. The deceased became speechless. Other family members and neighbours rushed to the scene but the accused ran to his house and disappeared through the back door into the darkness.
6. The deceased was taken to hospital at Kakamega but he was referred to Moi Teaching and Referral Hospital in Eldoret. The deceased died some 3 days after the attack .
  7. During cross examination, PW1 stated that the accused always carried 2 metal pieces with him and that as a result PW1 had made a report to the area assistant chief. PW1 stated that the accused always bragged that the metal pieces were his weapons and that before the material day the accused had hit one of his younger brothers named Kizito with one of the metal rods.
  8. PW1 further stated that after the accused person was arrested there was peace in his homestead because he could now sleep. PW1 also stated that since the accused was his son he could recognize him even in the night.
  9. Brenda Alikwa Andala, PW2 confirmed the testimony of PW1 that when the accused returned home at about 3.00 p.m, he started quarrelling everyone in the home on allegations that they were troubling his wife. That when the accused hit her on the head, she ran into her father's house. That she saw the accused hitting PW1 with a metal rod. She also testified that when the deceased came to PW1's aid the accused hit him and the deceased fell down. Brenda then ran and reported the matter to the village elder one Zacharia Likhayo.
  10. When Brenda was cross examined, she denied ever annoying the accused's wife. She also testified that the accused hit her with fists near the eye but that he hit PW1 with the metal rod. Brenda also testified that after the attack the accused left the metal rod behind as he escaped.
  11. Morris Lukaya Andala testified as PW3. He stated that at about 7.00 p.m on 15/12/2010 while he was at home listening to the radio, he received a telephone call from his brother Andrew (not called as a witness) who informed him that the accused was causing trouble in the home. Morris rushed to the scene immediately and on arrival he was informed by Brenda that the accused had assaulted her, Scholastica as well as PW1. Morris took the deceased to Kakamega hospital but was referred to MTRH, Eldoret where he spent 2 days in the ICU before he succumbed to the head injuries. During cross examination, Morris admitted that he did not witness the accused person hitting anybody.
  12. Josphat Ashona Andala PW4 and a brother to both deceased and accused identified the deceased's body to Dr. Macharia who did the post mortem examination. Scholastica Alingwa Andala testified as PW5 and supported the testimony by Brenda and PW1 that the accused went wild and attacked everyone in the home. During cross examination, Scholastica could not say whether or not the accused was drunk on the material evening. She denied that Brenda and herself were annoying the accused person's wife. She also denied that the family members attacked the accused while he was trying to defend himself. Scholastica also stated that after the incident the accused escaped across the river but on the following day he was brought home by youths on the orders of the area assistant chief.
  13. Dr. Dixon Mchana, PW6 produced the post mortem report on behalf of Dr. Macharia who is a Pathologist at MTRH Eldoret. According to the post mortem report, PExhibit 1 the deceased suffered a fracture on the left side of the skull with bleeding in the brain. The examining doctor formed the opinion that the deceased's death was caused by pressure on the brain due to the head injury. Dr. Mchana also testified that the likely weapon used to inflict injury on the deceased was blunt and heavy. He also rejected a theory advanced by the defence that somebody who is unconscious could get injury on top of the head if such a person fell.
  14. PW7 was Number 61280 Sgt Jacinta Mwani of Ongata Rongai Police Station in Nairobi but previously of Kakamega Police Station. She testified that on 16/12/2010 at about 09.20 hrs the accused was taken to Kakamega Police Station by members of the public among them PW1. After hearing the history of the case from the members of the public PW7 booked the suspect in custody but because he had been badly beaten she escorted him to Kakamega Provincial General Hospital for treatment. On 20/12/2010, PW7 was informed by PW1 that the deceased had died while undergoing treatment at MTRH. PW7 stated that though she was the Investigating officer, she did not visit the scene. She however stated that from her investigations, she confirmed that the family relationships were not mutual because of constant family disputes.
  15. Number 45571 Police Constable Daniel Owino testified as PW8 and stated that he was the officer who attended the Post mortem examination conducted by Dr. Macharia at the MTRH on

21/12/2010. Later that same day PC Owino recorded his statement while at the MTRH.

### **The Defence Case**

16. At the close of the Prosecution case the Court ruled that the accused person had a case to answer and put him on his defence. In his sworn statement the accused stated that before his arrest, he was a boda boda rider, and that he had a wife and 3 children. He recollected waking up at about 5.00 a.m on 15/12/2010 and leaving for work within Kakamega town. He returned home at about 8.00p.m, took a bath and then entered his house. He then heard a knock at the door. As soon as he got out of his bedroom, he was attacked and had to scream for help from neighbours and family members. During the attack he was injured at 4 different places on the head and also lost a tooth. He produced the treatment notes from Kakamega Provincial General Hospital as DExhibit 1. The accused added that one of the people who attacked him was Likala Morris Andala, PW3.
17. The accused stated that on 16/12/2010, he went to Kakamega Police Station and reported the incident. At the Police Station the OCS ordered that he be taken to Kakamega Provincial General Hospital for treatment. The accused stated that while he was at the Police Station his family members turned against him and alleged that he had killed the deceased.
18. The accused also stated that before his arrest, his relationship with the family was good and peaceful though PW1 did not like the wife he had married and that his father disowned him because of the wife he had married. He also said that he did not have any grudge with the deceased. He also stated that his sisters, Brenda and Scholastica also disliked his wife and that on the 15/12/2010 the two sisters wanted to attack his wife.
19. The accused contended that it was his father who created the rift between him and his brothers. He denied planning to kill the deceased. He also denied injuring PW1 and his two sisters. The accused also contended that this case against him was a frame-up by his father.
20. The accused was cross-examined at length by the Prosecution and he stated that when the attackers came into his house, they beat him and put off the light. He could however not say what weapons his attackers were armed with. He also said he did not know what killed his brother though medical evidence showed the deceased died from a rungu attack on the head. The accused then closed his case.

### **The Final Submissions**

21. Counsel filed and exchanged their final written submissions. Counsel for the accused submitted that in assaulting the deceased, the accused person was acting in self defence after family members attacked him on the material day. Counsel urged the Court to acquit him.
22. On the other hand, Counsel for the State submitted that the Prosecution had proved the case of murder against the accused person and that the motive for the ruling was that his entire family was against his wife. Counsel for the State also submitted that the whole of the Prosecution evidence was corroborated and consistent. He also submitted that the question of self-defence does not arise in this case since none of the family members is shown to have provoked or attacked the accused before the accused fatally hit the deceased on the head with a metal bar.

### **Analysis and Findings**

23. From the whole of the evidence on record the issues that arise for determination are the following:-
  1. whether the deceased died and whether the Prosecution has proved the cause of the deceased's death beyond reasonable doubt;
  2. whether the deceased died as a result of an unlawful act or omission by the accused person and
  3. whether in committing the killing of the deceased, the accused person had the necessary malice aforethought as defined under Section 206 of the Penal Code.

I now proceed to consider each issue as hereunder.

### **Whether the deceased died and the cause of his death**

24. There is ample evidence on record to show that the deceased died. All the Prosecution witnesses testified to that fact. PW4 Josphat Ashiona Andala testified that he was one of the two people who identified the body of the deceased to the doctor for post mortem examination before the body was given to the family for burial. PW6, Dr. Dixon Mchana who produced the post mortem report on behalf of Dr. Macharia who carried out the post mortem report at the MTRH stated that the cause of death of the deceased was pressure on the brain due to injury on top of the head. Dr. Mchana also told the Court that the injury was caused by a blunt and heavy weapon. In my considered view therefore the Prosecution has proved beyond reasonable doubt that the deceased died and that he died from an injury on top of his head which injury was caused by a blunt and heavy object.

### **Whether the deceased died as a result of an unlawful act or omission on the part of the accused**

25. Section 203 of the Penal Code provides that “any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.” Section 202 (2) defines an unlawful omission as “an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health whether such omission is or is not accompanied by an intention to cause death or bodily harm”.

26. In this case, it has been proved that the murder of the deceased arose out of a long standing grudge the accused person had towards his family members for what he described as a dislike for his wife by other family members. There is also clear evidence that it is the accused person who inflicted the blunt and heavy force injury on the deceased’s head and then took flight across the river until he was apprehended the following day.

27. PW1, Francis Andala testified that on the fateful day, at about 3.00pm, he was resting in his compound when the accused person came and demanded that he (PW1) get rid of his two daughters Brenda and Scholastica because the two were interfering with his (accused’s) wife. The accused also told PW1 that if he (PW1) did not comply with the demand the accused would kill Brenda and Scholastica. Brenda also testified that when the accused came home at about 2.00 p.m on the fateful day he started quarrelling and assaulted her on the head. She ran to her father’s house for safety. Later when the deceased came to PW1’s rescue after accused started assaulting PW1, the accused person hit the deceased on the head with a metal bar before dropping the metal bar and running for his life.

28. Scholastica also testified as follows: “On 15/12/2010 I was at home with my mother and my sister Brenda at 7.00p.m, Patrick came and said we should leave the house and get married. He then slapped Brenda on the forehead. He went to his house and brought this metal bar. He came back and started assaulting my sister who started screaming. He knocked down our father and Antony came but Patrick hit him on the head and he fell.” In cross examination, Scholastica stated that, after hitting the deceased Patrick left the rod and ran away. Scholastica stated that it was not true that they attacked him and he was defending himself.

29. In my considered view it is clear that it is the accused person who hit the deceased on the head when the deceased came in to assist PW1 who was being attacked by the accused person. I have also considered the defence by the accused person but I find that his defence is an afterthought which he concocted after he was arrested. I do not believe it and the same has not shaken the Prosecution’s case that on the fateful day, the accused had decided that he would kill somebody and the person who ended up being fatally wounded by the accused person was the deceased.

30. I am therefore satisfied that men rea, an ingredient of murder under Section 206 of the Penal Code has been satisfied as the evidence shows that the accused person herein had set out (over many days) with the intention of causing the death or doing grievous harm to family members who were apparently not happy with the choice of a wife he (accused) had made.

31. I am also satisfied that there was no mistaken identity of the person who hit the deceased with the metal bar. Both Brenda and Scholastica saw him do so and when Morris came to the scene after he heard screams from his father’s compound he was informed by both Brenda and Scholastica that it was the accused person who had hit the deceased with a metal bar. The evidence also

shows that when the accused hit the deceased, the deceased fell down and became unconscious. The deceased never recovered from the blow and he died some 2 days after the incident. In short the evidence squarely puts the accused at the scene of the crime and points at him as the perpetrator of the offence.

**Whether in killing the deceased the accused person had the necessary malice aforethought**

32. Section 206 of the Penal Code provides that 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.

33. In other words, malice aforethought is deemed to be established by evidence showing among other things knowledge that the act or omission causing death or grievous harm will probably cause death or grievous harm to some person whether that person is actually killed or not, although such knowledge is accompanied by indifference whether such death or grievous harm will occur.

34. In the instant case, when the accused came home at about 3.00pm, he swore to PW1 that he would kill somebody. He went away promising action on his return at about 7.00pm. When the accused came back at 7.00pm, he attacked everyone in sight, his sisters, his father and finally the deceased when the deceased came to the rescue of PW1 and the two sisters. PW1 stated the following in part of his evidence in chief: "Then Patrick came and told me the girls were annoying his wife and that on that day he would kill somebody. He told me that he was going away but we would see in the evening.....At around 7.00pm he came back.....He told me he would kill me.....My son Antony Musindanyi Andala heard the screams and came to rescue me. Then Patrick said he was the one he was looking for. He knocked him down and hit him with the same metal rod he used to hit Brenda."

35. Clearly, by hitting the deceased with a metal bar on the head, the accused person must have known that that act alone would cause death or grievous harm to the deceased. That blow on the head caused the deceased to fall down and until he died, the deceased never regained consciousness. In my considered view the action of the accused person against the deceased falls squarely within the ambit of Section 206 of the Penal Code. He cannot escape from it.

**Conclusion**

36. In view of all the foregoing, I am satisfied that the Prosecution has proved beyond any reasonable doubt that the accused person herein PATRICK SOSIO ANDALA is guilty of the murder of ANTONY MUSINDAYI ANDALA. I therefore find him guilty of the same and convict him accordingly under Section 322 (1) of the Criminal Procedure Code.

37. It is so ordered.

**Judgment delivered, dated and signed in open Court at Kakamega this 26<sup>th</sup> day of January, 2016.**

**RUTH N. SITATI**

**J U D G E**

In the presence of:

Mr. Omwenga for the State

Mr. Akwala h/b for Mr. Manyoni for the Accused

Mr. Okoiti - Court Assistant