



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT MIGORI**  
**CRIMINAL CASE NO. 9 OF 2014**  
**(FORMERLY KISII HCCR CASE NO. 79 OF 2010)**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**DUNCAN MUGESI MASERA ..... ACCUSED**

**JUDGMENT**

1. On 17<sup>th</sup> September 2010, this court was informed that Duncan Mugesi Masera (“the accused”) had murdered Alfred Manyinyi (“the deceased”) contrary to **section 203** as read with **section 204** of *Penal Code (Chapter 63 of the Laws of Kenya)*.
2. The prosecution case was that on 15<sup>th</sup> July 2010 at Bohorera village, Masaba location, Kuria West District, the accused was riding a motorbike at a high and dangerous speed when he accidentally fell off. The deceased together with others rushed to assist him but when the deceased tried to give the accused advice, the accused removed a knife from his jacket and stabbed him in the stomach. The deceased was taken to hospital where he died on 2<sup>nd</sup> September 2010. The accused pleaded not guilty and the prosecution called 8 witnesses to prove the charge against him. I completed the trial under **section 200** of the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)* after it had commenced before Sitati J.
3. In order to secure a conviction for the offence of murder under the provisions of **section 203** and **204** of the *Penal Code*, the prosecution must prove beyond reasonable doubt the following ingredients;
  - a. Proof of the fact and the cause of death of the deceased.
  - b. That the cause of the deceased’s death was a result of the direct consequence of the accused’s unlawful act or omission.
  - c. Proof that the unlawful act or omission was committed with malice aforethought as defined by **section 206** of the *Penal Code*.
4. The first element of the offence that is the fact and cause of death was established by the prosecution. On 15<sup>th</sup> July 2010 at about 6. 45pm, the deceased, Thomas Nyamohanga (PW 1) and Philip Marwa Mwita (PW 2) were coming from Masaba Market. PW 1 and PW 2 testified that while they were walking when a motorbike came from behind them. He the rider hooted and when they looked behind they saw him fall off. They all rushed to assist him. PW 1 testified that as they

- lifted the motorbike, the deceased asked, “*Kwa nini nyinyi vijana wa siku hizi mbona hamuendeshi piki piki kwa upole*” meaning, “*Why do you young people of today not ride your motorbike carefully.*” On hearing that comment, PW 1 testified that the young man suddenly removed a knife from the left side of his jacket pocket and stabbed the deceased in the stomach.
5. PW 2 testified that after they helped motorbike rider, he heard the deceased tell him, “*Nyinyi waendeshaji piki piki musiwe mukiendesha piki piki kwa njia hii*” meaning, “*You motorbike riders should not be riding motorbikes like this.*” He testified that the motorbike rider and the deceased had an exchange. He heard him tell the deceased, “*I know you very well. You are Manyinyi and it is because you have a job in Nairobi.*” He also heard the motorbike rider say, “*Today I will kill somebody*” whereupon the deceased told him, “*Remember I am your father’s age mate and talking to me like that is a sign of disrespect.*” PW 2 testified that he saw the motorbike rider suddenly remove a knife from the left hand side pocket and stab the deceased.
  6. The deceased fell down and the young man ran away leaving the motorbike behind. PW 1 and PW 2 raised alarm causing people to come to the scene of the incident. Among those people who heard the screams was Christina Nyanwsi Rioba (PW 3), the mother of the deceased, who at her nearby home. She found people already there and her son lying on the ground. He asked her to remove her *leso* and tie his stomach so that he could be put on a motorbike and be taken to hospital. She observed that he had been stabbed on the left side of the stomach.
  7. John Mwita Rioba (PW 4), a brother of the deceased, also responded to the alarm. He rushed to the roadside where his brother had been stabbed. He found PW 1 and PW 2 helping to take him to the hospital. They told him what happened. He followed the deceased to hospital but before reaching there he went to make a report of the incident at the Masaba Administration Police Post.
  8. PW 7, Dr Aggrey Idagiza Akidiva, performed the postmortem on the deceased’s body on 10<sup>th</sup> September 2010 after it was identified by PW 4. PW 7 observed that the deceased had a stab wound on the left lower back side. He observed that there was an incision wound on the left side of the abdomen which on internal examination had penetrated the left kidney. He noted that the cardiovascular system had collapsed. He concluded that the cause of death was a result of hemorrhagic shock due to the stab wound on the kidney. He opined that injury was caused by a sharp object.
  9. The testimonies of PW 1, PW 2, PW 3 and PW 4 confirm that the deceased was stabbed on his left side of the abdomen. Their observations were consistent with the findings of PW 7 that there was a stab wound that penetrated the kidney. I therefore find and hold that the deceased died and he died as a result of a stab wound inflicted on his left lower back side with a sharp object. The stab wound pierced his kidney and resulted in hemorrhagic shock which resulted in his death.
  10. The next question for consideration is whether the accused is the person who stabbed the deceased. In his unsworn statement, the accused stated that he had nothing to do with incident of 15<sup>th</sup> July 2010. He further stated that he did not know how to ride a motorbike and had never ridden one before. He recalled that on 16<sup>th</sup> July 2010 he was at home and at about 9.30 am, he was visited by a police officer who arrested him and took him to Kehancha Police Station. He stated that he was not told why he was being arrested.
  11. The accused blamed PW 1 for his woes. He stated that on the second day while he was in custody, he was taken to a room where PW 1 and PW 2 were and told to sign a document he was not familiar with. He knew PW 1 as a neighbour in the village. The accused stated that his father bought a plot of land from a neighbour for Kshs. 50,000 and as the eldest son, he was told to take care of the land on which he cultivates tobacco. PW 1 told him to return the plot as he had paid the previous owner Kshs. 20,000. When he refused to part with the land, PW 1 threatened him and told him that he will never till the land again. He accused PW 1 and PW 2 of causing to suffer.
  12. PW 1 and PW 2 saw the accused stab the deceased in broad daylight. PW 1 testified that he knew

- the accused as the son of a neighbour while PW 2 testified that he had known the accused for about 5 years and that he was a motorbike rider. PW 1 testified that on 16<sup>th</sup> July 2010, when he went to see the deceased in hospital, the accused was present at Dr Machage Hospital. The accused was arrested by the police while at the hospital.
13. Cpl. Thomas Ongaga (PW 5) an officer at Isebania AP Camp recalled that on 16<sup>th</sup> July 2010, he was at Masaba AP Camp when he was informed that the victim of an assault had been taken to Migori at Pastor Machage Hospital. He proceeded to the hospital with another officer where he saw the deceased admitted in hospital. As they were leaving PW 1 informed them that they had seen the attacker. The person, who had been admitted in the ward had no injuries, was arrested taken to the assault victim who identified him as the attacker. He was thereafter taken to Kehancha Police Station where he was arrested and his arrest minuted in the occurrence book by the Commanding Officer.
14. The Investigating Officer, PC Dawas Dante, PW 6, testified that on 16<sup>th</sup> July 2010, the accused was under arrest and he was deputized to conduct the investigation into an assault. He duly investigated the matter and caused the accused to be charged for assault at the ***Kehancha Magistrates Court Criminal Case No. 978 of 2010***. On 2<sup>nd</sup> September 2010 he received information that the victim had died whereupon he applied to withdraw the case under **section 87a** of the ***Criminal Procedure Code (Chapter 75 of the Laws of Kenya)***. He recorded statements afresh, requisitioned a post mortem to be conducted by PW 7 and thereafter caused the accused to be charged with murder.
15. This was a case of recognition rather than identification. PW 1 and PW 2 knew the accused prior to the date of the incident. This coupled with the fact that the incident occurred at between 6.30 pm and 7.00 pm negates the chances of mistaken identity. That the accused was arrested on 16<sup>th</sup> July 2010 is confirmed by the testimony of PW 5 and PW 6. The accused's defence that he could not ride a motorbike and that he was not at the scene is disproved by the testimony of PW 1 and PW 2 who put him at the scene and that of PW 2 who stated that he knew him as a motorbike rider.
16. The accused's statement that there was a grudge between him, PW 1 and PW 2 lacks any credit. Both witnesses specifically denied that they had a grudge with the accused. Furthermore, no questions were put to PW 1 and PW 2 in cross-examination to suggest that there was a land dispute between the accused and his family or with the deceased himself.
17. In light of the evidence I have outlined, I find that the accused is the person who assaulted the deceased with a knife. I dismiss his defence that he was not present at the scene or that the case against him is the result of a grudge.
18. The final issue is whether the injury was inflicted with malice aforethought. From the testimony of PW 1 and PW 2, the assault was totally uncalled for. The deceased reacted to a situation where the accused was in an accident. The deceased pointed out to the carelessness of the accused. This in my view could not amount to provocation. The accused did not do anything to call the accused to defend himself by stabbing the deceased.
19. The accused's act that was directed on the deceased's lower abdomen with such force as to cause internal injury. The accused could only have been intended to cause the death of or to do grievous harm to the deceased. I therefore find that the prosecution proved malice aforethought within the meaning of **section 206(a)** of the ***Penal Code***.
20. I note that the information stated that the accused murdered the deceased on 2<sup>nd</sup> September 2010 which is the date of his death. This was not correct as the proper date for purposes of murder is the date of the unlawful act that led to the deceased's death. The date when the unlawful act occurred was on 15<sup>th</sup> July 2010. This defect though is not fatal and did not prejudice the accused

in any way. In any event as it was not raised during the hearing, it the kind of defect that is curable under **section 382** of the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*.

21. For the reasons I have outlined, I find the accused **DUNCAN MUGESI MASERA** guilty of the murder of the **ALFRED MANYINYI** and I convict him.

**DATED and DELIVERED at MIGORI this 23<sup>rd</sup> day of March 2015**

**D.S. MAJANJA**

**JUDGE**

Mr Kaburi instructed by Kaburi and Company Advocates for the accused.

Ms Owenga, Senior Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the State.