



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**MURDER NO.4 OF 2012**

**REPUBLIC .....PROSECUTOR**

**VERSUS**

**JOHN MJUKA OSURI.....ACCUSED**

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

The accused was charged with the Offence of Murder Contrary to Section 203 as read with Section 204 of the Penal Code. The particulars are that on the 19th day of January 2012 at Nyamira Sub-Location of Siaya County within Nyanza Province murdered **C M O**.

In proving their case the prosecution called 5 witnesses. **PW1 DR. BOB OTIENO** produced the postmortem report on behalf of Dr. Muturi who had performed the post-mortem on the deceased's body. It was concluded that the cause of death was multiple injuries to the head and chest caused by blunt trauma.

**PW2 D A K** a minor aged 9 years old gave sworn evidence and told the court that on the material day in the evening he was with the deceased who was his grandmother when accused person came and took firewood three times despite the protest from the deceased. In the process the accused took a panga and cut the deceased as well as hitting her with a stick. The accused also poured down the vegetables that was being cooked. The witness then hid under the table until the accused left. He went with his brother **PW3** to seek assistance at the home of one Kwara. Later the area chief came and the deceased who was by now injured was taken to hospital but she died while undergoing treatment.

**PW3 D O** also a minor of 12 years was at home cooking together with the deceased and **PW2**. He confirmed that the accused came looking for firewood. He was half dressed as he did not have a shirt. The deceased told him not to take the firewood but instead he descended on her and cut her using a panga. Afterwards they sought the assistance from the village elder. Unfortunately the deceased died while undergoing treatment.

**PW4 N O O** is a neighbour to the deceased. He said that he was notified of the assault to the deceased by **D PW2**. He went to the scene and found the deceased lying down. She was in a pool of blood. He called the area chief who came with a taxi but unfortunately she died while undergoing treatment.

**PW5 BEATRICE EUNICE AMOLO** is the Assistant Chief of Nyamunya sub-location. When she received the information vide a telephone call she took a taxi and went to the scene. She found the village elder together with the family members. The deceased was bleeding from the head and hands. She was taken to Yala level 4 hospital but she died in the cause of treatment.

**PW6 SGT. JOEL KIPTOO** was the investigating officer. He went to the scene with PC Mwangi and PC Mwaura after receiving the report. The accused had already been arrested by the assistant chief and was being held at the station. He carried out investigation and charged the accused. He further said that the accused's wife was at the hospital taking care of a sick child.

When put on his defence the accused gave sworn evidence. He said that on the material day he had gone to see his wife at Yala level 4 hospital where she was taking care of their sick child. When he came back in the evening he went to fetch water and firewood from her mother's house which was about 300 meters from his house. This was around 7 p.m. She said that she was already drunk when he left with the firewood. He said that he was later arrested by the assistant chief for assaulting the deceased. He said that one of the children told him that the deceased had been assaulted and he called the assistant chief who took her to hospital. He denied the offence.

Having heard both the prosecution and the defence case the question is who killed the deceased person? The primary witnesses to the prosecution case is PW2 and PW3, the two brothers who were with the deceased on the fateful night. Both gave account of how the accused came looking for firewood from the deceased's house and despite her protest the accused took the same anyway. They said that the accused then took a panga and cut the deceased on the head and that he also used a stick to hit her.

Is there any possibility that the two were lying? The sum total of PW2 and PW3's evidence clearly suggest that it is the accused who came to their house that evening. Although it was around 7 p.m. I do not think that it was too dark for them not to have recognised the accused person who lived with them. This was a relative. In any event it appears that he came more than once to collect the firewood and it was during the 3rd time that he assaulted the deceased.

The issue of firewood is further confirmed by the accused who said that he went to the deceased's house to look for firewood so as to cook for his 2 children as his wife was at the hospital nursing the other sick child. Although there was no production of the panga and the stick it is apparently clear from the postmortem report that the deceased died as a result of the injuries sustained during assault.

I have equally heard the accused's evidence and I do not agree with his line of argument that he just picked the firewood from the deceased and left. Neither do I find any evidence to suggest that the deceased was drunk. It has not been suggested that there was any grudge or bad blood between the deceased and the accused or at any rate with PW2 and PW3.

The key ingredient of murder is malice aforethought which is defined under Section 206 of the Penal Code as:

**“(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;”**

By forcefully taking the deceased's firewood, taking a panga and a stick to hit her the accused clearly had an intention of harming the deceased. Unfortunately his action led to the deceased's death. Indeed there was no reason for the accused to have attacked the deceased who was defenseless. The two boys aged 9 and 12 respectfully were not a match to him and neither was the 70 years old grandmother. His defence holds no water.

For the foregoing reason I do find that the prosecution has established its case beyond any shadow of doubt and I proceed to convict the accused person accordingly.

**Dated, signed and delivered this 30th day of July, 2015**

**H. K. CHEMITEI**

# **JUDGE**