



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

**CRIMINAL CASE NO. 27 OF 2012**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**FREDERICK GEORGE MUKHANA.....1<sup>ST</sup> ACCUSED**

**BENSON ODUOR PANYA.....2<sup>ND</sup> ACCUSED**

**JUDGEMENT**

**Background**

Frederick George Mukhana and Benson Oduor Panya, the 1<sup>st</sup> and 2<sup>nd</sup> accused persons respectively, are jointly charged with the murder of Robert Ochieng Makokha. The offence is alleged to have been committed on 7<sup>th</sup> April 2012 at Dandora Phase 4 in Njiru District within Nairobi County. Each accused denied this charge necessitating full hearing of this case. Hearing commenced on 4<sup>th</sup> March 2015. Mr. Omollo, who initially represented the 2<sup>nd</sup> accused, took up the brief for the 1<sup>st</sup> accused after the court requested him to do so following withdrawal of Mr. Gichuru. Ms Macharia represented the Republic. After calling a total of eight witnesses, the prosecution closed its case. The defence called the two accused persons who testified on oath.

**Charge of murder**

The law governing the crime of murder is section 203 of the Penal Code. It defines this offence in the following manner:

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

The prosecution, led by the Director of Public Prosecutions, bears the burden of proving this crime. The standard of proof is that of beyond reasonable doubt. To reach that threshold there must be sufficient evidence to proof of the following ingredients:

- i. That an act of death of the deceased occurred
- ii. That the death resulted from unlawful act or omission by the accused before the court
- iii. That the accused possessed malice aforethought (intention) when causing that death.

**The prosecution evidence**

John Vincent Onyango, PW1, told the court that on 6<sup>th</sup> April 2012 at 8.00pm he was at a kiosk (hotel as

he called it) in Dandora having his meal when the girl attending to him told him to go outside and see what was happening. He went out and found the two accused persons and the deceased arguing. He went back to continue with his meal. He heard the trio fighting and went out again to see what was happening. He found the deceased having fallen down and the two accused persons walking away. He saw no visible injuries on the deceased. He assisted the deceased and placed him inside his brother's (PW2) house. He called the accused persons but they did not stop.

PW1 further testified that he went to a bar called The Base to call John Omondi Makokha, PW2, who was deceased's brother. He found the two accused having arrived at The Base. He informed PW2 what had happened. PW2 went to the scene and saw the deceased bleeding on the mouth. He also saw a cut on the deceased's head. PW2 said the deceased told him that he had fought with the two accused persons who had kicked him and caused him to fall on a metal door. The deceased was taken to St. James Nursing Home in Dandora for treatment. He died later that night while undergoing treatment.

Alexander Mutia, PW5, a clinical officer at St. James Nursing Home told the court that he was on duty on 6<sup>th</sup> April 2012 at around 10.00pm at the Nursing Home when a patient was taken there. He said he was told the name of the patient as Robert Makokha. PW5 said the patient was unconscious when he arrived at the Nursing Home and was smelling of alcohol. PW5 observed bruises on the left upper eyelid, swollen upper lips and an injury on the occipital region of his head. PW3 diagnosed the deceased with intoxication leading to a coma. PW5 administered intravenous drip on him. At around midnight the deceased died.

The matter was reported to the police who collected the body and took it for preservation at the City Mortuary. The two accused persons were arrested and charged with causing the death. On 14<sup>th</sup> April 2012 Dr. Njau Mungai, PW4, performed the post mortem on the body of the deceased at the city mortuary after the same was identified to him. The doctor found multiple bruises and lacerations on the deceased's upper body, hands, head and ears. The doctor formed an opinion that the cause of death was due to head injury as a result of a blunt trauma.

Further evidence by CPL Francis Mbugua, PW6, is that in company of another police officer they visited the home of someone he called Mukana where blue jeans, T-shirt and long trousers stained with blood were recovered. He said the blue jeans belonged to 1<sup>st</sup> accused while the long trousers belonged to the 2<sup>nd</sup> accused. He said he did not see the two accused persons in that home and did not know how they were connected with the house.

### **Defence case**

On their part, the accused persons told a long story concerning how they spent that day. They were drinking throughout the day in company of the deceased, PW2 and PW2's wife Rose. They said they had been in PW2's home taking alcoholic drinks; that they left the place and went to the Base and continued drinking; that they returned to PW2's home to drink more alcohol and that while there as they waited for Rode to come and sell to them, the 1<sup>st</sup> accused went outside to talk on the phone; that he saw the 2<sup>nd</sup> accused come out from the house running and told him that the deceased had threatened to beat him; that the deceased stood at the door, pushed the door by force and on letting go of the door, it swung back and hit him hard on the face knocking him down. They said they left the deceased outside and went to the Base to inform PW2.

Further evidence by the accused is that after informing PW2 they went to another place to drink but were called by PW2 who claimed that they had beaten the deceased. They went back to PW2's house where they found PW2, deceased and one Alex Oloo; that PW2 asked the deceased to confirm if it was true the accused had beaten him but he did not say anything; that the deceased started beating the 2<sup>nd</sup> accused; that PW2 started beating both the deceased and the 2<sup>nd</sup> accused; that 1<sup>st</sup> accused intervened to stop the fight; that in a bid to remove the deceased from the house PW2 held him but both fell as a result of which the deceased was hit on the head on the ground.

The 2<sup>nd</sup> accused confirmed the evidence of the 1<sup>st</sup> accused and added that PW2 was annoyed with the deceased and wanted to beat him but the two accused intervened. He said he was assaulted by PW2 with a soda bottle and he left.

### **Analysis and determination**

On the issue of death of the deceased, I have considered the evidence of Alexander Mutia, PW5, clinical officer who treated the deceased at St. James Nursing Home Dandora. He told the court that the deceased died at midnight on 6<sup>th</sup> April 2012 which would be 7<sup>th</sup> April 2012. PW5 had resuscitated the deceased and administered intravenous drips on him. Dr. Njau Mungai, PW4, conducted the post mortem on the body of the deceased on 18<sup>th</sup> April 2012 and confirmed him dead. His opinion was that the deceased died as a result of head injury. I have no doubt in my mind that the death of the deceased has been proved beyond reasonable doubt. The death was unlawful as there is no evidence to prove otherwise.

On the identity of the person or persons who caused this death I have considered the evidence of prosecution and that of the defence. All the witnesses save John Vincent Onyango, PW1, were not present at the scene according to the evidence of prosecution witnesses. PW1 told the court that he was alerted by the girl he referred to as Nyar Gem (not a witness) that there was an altercation outside. PW1 said he found the deceased and the two accused persons struggling. He also said he found them arguing. His evidence is captured as follows:

**“I went out and found people struggling outside. It was the deceased whose name I cannot remember. The others were Mukhana and Oduor. These are the three who were arguing. I found them arguing. I went back to eat. They started fighting when I went in. I went out and found the deceased having fallen down. There was no one around as the other two had left. I took deceased and placed him inside his brother’s house..... I did see any injury on him.”**

On cross examination PW1 stated that:

**“This happened at 8.00pm. They were near me when I went out after Nyar Gem told me. When I went out I saw both accused and deceased standing outside. I did not go out. I looked through the door to see what was happening. They were talking in Luhya. I continued eating and I heard sound of iron sheets where the three were standing, I was about to finish my food. I went outside and found deceased lying on the ground. The two accused were going away. I do not know what made the deceased lie on the ground. I do not know what happened to the deceased..... I did not talk to deceased. I found him outside. He was groaning when I found him. Nothing was coming from his mouth.”**

This evidence does not state as a matter of fact that PW1 witnessed what happened. It does not show convincingly that the accused persons and the deceased were fighting and if so how the fight started.

PW2 told the court that on arriving at his house he found his brother the deceased on the floor inside the house. PW2 stated that **“He told me they had fought with the two accused who had kicked him and he fell on a door metal. The door curtain had been torn.”** On cross examination, PW2 said: **“Robert was bleeding on the head and mouth. I asked him what had happened. He told me the accused persons had found him listening to music and had beaten him using kicks on the ribs..... Robert said he had been kicked and he fell on the iron sheet door which cut him on the head.”**

I have carefully considered this evidence and the evidence by the accused that the deceased was hit by the door and fell down. I have also considered their evidence that PW2 beat both the deceased and the 2<sup>nd</sup> accused. I have taken into account that the accused persons have no duty under the law to prove their innocence. I find the evidence unclear. The witnesses contradicted themselves and going by the evidence of PW1 it is not clear whether he witnessed exactly what happened. The witnesses spent almost the entire day drinking. It is no wonder that they could not recall the events clearly and contradicted themselves. PW2 for instance testified to having slept from late afternoon to 8.00pm when he was woken up to be informed that the deceased had been injured.

I have also considered the evidence of doctor Mungai, PW4, who performed the post mortem. He said the deceased had multiple bruises and lacerations on the hands and arms, face, scalp, nose and upper ear. The doctor was categorical that he did not see any injury at the back of deceased's head. PW5, Alexander Mutia, said this in reference to the deceased: **"I was told he was called Robert Makokha a male of 36 years. He smelled of alcohol. He had no shirt. He had bruises on left upper eyelid and swollen upper lips. He had an injury on occipital region. He has bruises on upper body. I made a finding of intoxication leading to a come and gave him intravenous infusion 5%."**

It is obvious this evidence from two different people with some medical knowledge does not agree especially on the issue of the head injury. The injuries on the hands are not explained by evidence. How did the deceased sustain them given that there is no evidence to establish how he sustained them.

With care I have examined all the evidence and I find there are many doubts as to the sequence of events. It is not clear how the deceased sustained all the injuries on his body. It is not clear how one witness Dr. Mungai could find no injury to the back of the head and another witness, Alexander Mutia, could find an injury on the occipital region of deceased's head. With this kind evidence, it is my view that it would be a miscarriage of justice to make a finding that the prosecution has proved its case beyond reasonable doubt.

I also find that the prosecution has not proved beyond reasonable doubt that the accused persons or any of them possessed the requisite malice aforethought to murder the deceased. The contradictions and lack of clarity in the evidence lead to reasonable doubts in mind that it is probable that the accused persons did not assault the deceased occasioning him injuries that led to his death. Where doubts in a criminal case occur, the accused person benefits from those doubts.

While I find the act of death proved beyond reasonable doubt, I do not find the other two ingredients of murder proved and for that reason I enter a finding that the accused persons, Frederick George Mukhana and Benson Oduor Panya, are not guilty of the murder of Robert Ochieng Makokha. Consequently, I order their immediate release from custody unless for any other lawful reason they are being held in custody. It is so ordered.

**Dated, signed and delivered this 22<sup>nd</sup> day of July 2015.**

**S. N. MUTUKU**

**JUDGE**