



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF AT KAKAMEGA**  
**CRIMINAL (MURDER) CASE NO. 8 OF 2008**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**WYCLIFFE MAKOKHA.....ACCUSED**

**JUDGMENT**

**Introduction**

The accused person herein, Wycliffe Makokha is before this court on one count of Murder contrary to section 203 as read with Section 204 of the penal code. The particulars of the offence are that on the 23<sup>rd</sup> day of December, 2007 at Ihaya Village Lubinu Sub- Location, East Wanga Location in Mumias District within Western Province jointly with others not before court murdered Ibrahim Anyonyi Mosi. The accused denied the charge. The case has been going on since then the prosecution called 5 witnesses.

**The prosecution case**

The only eye witness in this case is Alfred Chamanga who testified as PW4. His evidence was as follows;-

On the 23.12.2007 PW4 (Alfred) had visited the home of the deceased who was his maternal uncle, arriving at the home at about 3.00pm. The deceased ran a hotel business and according to Alfred on arrival. The Deceased told him, that he (deceased) had sent the accused to buy him some items. The deceased had given the accused kshs.1000/= and the accused was to buy the items from Mumias. The accused is a cousin to Alfred.

Because the accused had not brought the items the deceased had sent him for, Alfred and the deceased left together at about 7.00 pm for the accused's home which was only 50 metres away. On arrival at the accused's home, Alfred and the deceased found the accused in the company of Abdalla Juma and another person called Juma. The deceased asked the accused to give him the items he (accused) had been sent to buy but accused just kept quiet. Then Abdalla Juma asked the deceased and Alfred what it was they wanted at that time, and proceeded to ask them to leave. Abdalla, accused and the other man called Juma then pushed both Alfred and the deceased out of the house of the accused.

Once outside, Alfred and the deceased started walking away, but after about 15 metres, the accused Abdalla Juma and Juma followed and got hold of the deceased who was walking behind Alfred. They three men started struggling with the deceased. Alfred started screaming. As the three held the deceased they were shouting "thieves thieves". Alfred started screaming both when he saw what was happening to the deceased. The deceased also started screaming for help, though he (deceased) was overpowering the three.

At that point according to Alfred the accused who was walking behind, Abdalla and Juma, lifted a panga which he had with the aim of cutting the deceased, but Alfred screamed as he sought to know from the accused whether indeed he wanted to cut the deceased. It was then that the accused dropped the panga (Alfred said he had seen the panga beside the door in the accused's house) and Abdalla immediately picked it up and cut the deceased on the leg. There was moonlight, but it was not until someone came with a torch and shone it at the deceased's body that Alfred knew which part of the deceased's body had been cut.

Alfred's scream's brought the deceased family members among them Linet Anyonyi the deceased's wife and Lillian Anyonyi, the deceased's daughter to the scene.

Upon being cut on the leg, the deceased fell down. Efforts were made to take him to the nearby health centre for treatment but he died before he got to the hospital.

PW2, Linet stated that when she got to the scene, she found when the deceased had already been cut on the left foot. She stated she found the accused Abdalla and Juma at the scene and that Abdalla was armed with a panga. After being informed that it was Abdalla who had cut the deceased, she enquired from Abdalla why he had done so, but instead of answering, Abdalla tried to cut her on the breast but the panga fell down, Later, Abdalla both Abdalla and Juma ran away. On the following day the police went to the home and took away the body of the deceased. On the 24.12.2007 Linet identified the body of the deceased to Dr. Florence Wanangwe (PW1) who carried out the post mortem examination. On the same day.

Dr., Wanangwe testified that the deceased had a cut wound on the left foot measuring 4.5cm in length and the cut involved arteries and veins. Dr. Wanangwe formed the opinion that the cause of death was external bleeding secondary to bleeding on the left foot. The post mortem report was produced as P exhibit 1.

PW3 Lillian Anyonyi a daughter to the deceased (Lillian) testified that on 23.12.2007 at about 7.00 pm the deceased left home for the accused's home to collect balance of some money he(deceased) had given to accused for purchase of some food items. Soon thereafter, Lillian heard noises and together with Linet they rushed to the scene only to find the deceased lying on the footpath near the house of the deceased. The time was about 8.00pm. From the record Linet talked of 1.00pm as the time the deceased left his home to go to the accused's home and 8.00pm Lillian stated she saw a cut on the leg of the deceased who was bleeding profusely. She stated that she was able to see the cut wound with the help of moonlight. Lillian also stated that though she was not aware of any dispute between the deceased and the accused the accused neither delivered the items, nor refunded the money. Lillian identified the panga PMFI 2- Linet was not asked to identify the panga, but Alfred did so.

PW5 was number 45402 cpl Charles Nyaramba of Musanda police patrol base. He testified that in 2009 he received a file from Sgt Pius Sifuna touching on this matter. He testified of what was contained in the witness statements.

PW5 produced the panga as P Exhibit 2. Later the accused was arrested and charged with the present offence.

At the close of the prosecution's case Mr. Elung'ata came for the accused submitted that the prosecution had not established a prima facie case against the accused person to warrant the accused person being put on his defense. The state, represented by Mr. Ng'etich on the other hand submitted that the state had established a prima facie case against the accused and urged the court to put him on his defence. After a careful analysis of the evidence,. The court ruled that the accused person had a case to answer and put him on his defence pursuant to the provisions of Section 306(2) of the Criminal Procedure Code.

### **The Defence Case**

Witness testified that on 23/12/2002, which was a Sunday, he went to church as usual. He returned

home at about 10.50am and stayed at home all day long until about 10.39a.m when he heard someone knocking on his door. When she enquired who it was, Linet told her that she was the one. When he opened the door, he saw Linet crying and told him that Abdalla Bwakali had cut her husband and also cut her husband and also cut her. After informing him of the incident, Linet asked for the accused bicycle so the deceased could be taken to hospital. According to the accused. Linet was bleeding from the chest.

The accused stated further that he took his bicycle and went straight to where the deceased was lying on a footpath between the accused's home and the deceased's home. At the scene, the accused said he found Lilian who told him that the deceased had been attacked as he went to buy salt for his wife Linet. The accused stated he helped to take the accused to hospital using his own bicycle but the deceased did not make it to hospital. Thereafter a report of the incident was made to the deceased's family as well as to the village elder.

The accused stated further that on 24/12/2007 he went back to the scene where the deceased had been attacked and while there the police came and sought to know who had cut the deceased; after which they took the body away to the mortuary. At about 6.00pm on 24/12/2007, he was arrested from his home by the village elder, one Dickson Outa who was accompanied by William Juma, Herbert Nanyubo, Christopher Muse and Chamang'a (not PW4). He was escorted to Luchena police post and on 25/12/2007 he was taken to Mumias police station before subsequently being charged with the present offence. The accused alleged that he was kept at Mumias Police station for 2 months before being arraigned in Court on 18/02/2008.

The accused denied murdering the deceased. He denied being sent by the deceased to buy some food staff for him (deceased)

### **Issues for Determination**

After a careful analysis of the evidence on record the issues that arise for determination are the following:-

- a) Whether the deceased died.
- b) Whether the deceased's death was as a result of an unlawful act or omission on the part of the accused
- c) Whether the Prosecution has proved that there was malice aforethought on the part of the accused.

In order to answer the above questions, and bearing in mind the evidence on record, the Court has to look at the provisions of Section 206 of the Penal Code with a view to satisfying itself that indeed there was malice aforethought on the part of the accused. Section 206 of the Penal Code defines malice aforethought as follows:-

“206. Malice aforethought 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 cause 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.”

Thus, the Prosecution need prove only one of the above to assure itself of success in this case.

### **Analysis and Finding**

The evidence on record clearly shows that the deceased died. PW1 did the post mortem examination after Linet identified the body to her on 24/12/2007. Lilian also stated that her father died even before he got to the health centre for help. Alfred also testified that the deceased died as he was being rushed to hospital. In a nutshell the death of the deceased is not in doubt. What is in contested is whether it is the accused who caused the deceased's death through some unlawful act or omission.

So the more troublesome issue is whether the Prosecution has proved that the accused unlawfully caused the deceased's death. Though the accused does not deny being present at the scene at some point he contends that he only got news of the deceased's death at about 10.30pm on 23/12/2007 when Linet knocked on his door asking to use his bicycle to take the deceased to hospital. On the other hand, Alfred testified that the accused, Abdalla Juma and another person called Juma attacked the deceased after the deceased had asked the accused to give him the foodstuffs he had sent him to buy earlier in the day on 23/12/2007. Alfred stated that though the accused first tried to cut the deceased he stopped doing so in the nick of time after Alfred asked him whether indeed he wanted to cut the deceased and in the process dropped the panga which was picked up by Abdalla Juma who proceeded to cut the deceased on the left foot, severing the veins and arteries.

While appreciating that it is not always safe to make a finding of guilty on the strength of only one identifying witness I am satisfied that the accused was at the scene together with Abdalla Juma and Juma all of whom had a common intention to cause the death of or to do grievous harm to the deceased. All the three grabbed the deceased and started shouting thieves, thieves before eventually cutting him on the left foot though the motive may not be apparent. I am satisfied that the accused and his accomplices attacked the deceased after the deceased demanded to be given the food stuffs he had sent the accused to buy for him. The silence by the accused upon being asked to give out the items in my view suggested that the accused and his accomplices were prepared to do battle with the deceased and that is why they ordered him and Alfred to leave the house then they were followed and attacked.

I am satisfied that Alfred saw what happened and I have no reason to doubt his testimony. The accused and his accomplices who are still at large were well known to Alfred, Linet and Lilian who all saw the accused at the scene. I have carefully considered the accuseds defence of alibi and found that the same does not shake the evidence of the Prosecution in any material way.

For the above reasons, I find the accused person, Wycliff Makokha guilty of murdering the deceased and convict him accordingly under Section 322(1) of the Criminal Procedure Code.

Orders accordingly.

Judgment delivered, dated and signed in open Court this 17<sup>th</sup> day of September 2015.

**RUTH N. SITATI**

**JUDGE**

In the presence of:-

Mr. Omwenga (present)for State

Mr. Elungata (present)for the Accused

Mr. Solomon Lagat ...Court Assistant