



**REPUBLIC OF KENYA**

**High Court at Kakamega**

**Criminal Case 29 of 2010**

**REPUBLIC.....PROSECUTOR**

**V E R S U S**

**JOHN MASANGANJIRA.....ACCUSED**

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

The accused person is charged with the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code**. The particulars of the offence are that the accused *on the 1<sup>st</sup> day of September 2010 at Makhumbi village in Kakamega Central District within Western Province murdered JULIUS AMINO.*

Six witnesses testified for the prosecution. **PW1, DR. JEREMIAH KINUTHIA**, produced the post mortem report on the deceased on behalf of **DR. DUNCAN NYIKULI**. According to the report, the deceased had two cut wounds on the forehead but not penetrating, cut wound left front temporal 4cm long, C shaped cut wound on the occipital region 8cm diameter not extending to the skull, 2 cm long cut wound on the left shoulder, compound fracture right ulnar, leaner fracture on the left front temporal region. According to PW1 the cause of death was cardiopulmonary arrest secondary to severe head injury and sever hemorrhagic anemia.

**PW2, MARK MAINA**, testified that on the 1<sup>st</sup> of September 2010, he was at his home when he heard screams outside at about 3.00 a.m. The children of the accused told him that the accused had been attacked by someone. He went to the accused's house and heard screams coming from the house. There were many people in the compound and PW2 retreated. He went to inform the assistant chief and went with him to the scene. PW2 is a brother to the accused. At the scene he found the accused and somebody whom the accused had apprehended. The deceased was lying on the floor and told them his name. According to PW2 the accused told them that he had been attacked in his house. The accused had injury on the hand, cheeks and head. The relatives of the deceased were informed and went to take the deceased to hospital.

**PW3, CHARLES ALUSIOLA OSINDO**, was asleep in his house that night when he was informed that his uncle, the deceased had been found at Emukumbi village with another person's wife. The deceased was a watchman at a church. PW3 went to the scene. They found the body on the floor at the sitting room in the accused's house. The deceased had a T-shirt only and no trouser. The accused was standing and all his clothes had blood. The deceased was breathing but unconscious. They rushed the deceased to hospital but he died on the way. The body was taken to Kakamega mortuary.

**Pw4, AMBUNDO AMBUNYA** and **PW5, YOHANA OMULAMA**, testified that on the 2<sup>nd</sup> of September 2010 they went to Kakamega Provincial Hospital where they identified the deceased's body to the doctor who performed the post mortem.

**PW6, CHIEF INSPECTOR PAULINE MWANGI**, investigated the case. She got information about the murder on the 1<sup>st</sup> of September 2010 while at the Kakamega Police Station. She went to the scene and found that the accused had already been arrested and was kept at the Shirakwe A.P. Camp. She collected the accused and went with him to his home. According to PW6 the accused returned home at about 1.00 a.m. and found the deceased with his wife. PW6 found a lot of blood on the floor and recovered some clothes inside the accused's bedroom. These were a black long trouser, a white striped under-wear and

one gumboot. They also recovered a panga behind a sofa-set and a green T-shirt which the accused alleged to be his. Blood samples of the deceased were taken and scene of crime officers took photographs but the same were not ready by the time PW6 was testifying. The accused was charged with the offence. The accused told him that he had struggled with the deceased.

In his unsworn evidence the accused testified that he works in Kakamega Town. On the 31<sup>st</sup> of August 2010 there was a harambee for a colleague who had passed on and the burial was to be the following day. He stayed at the harambee up to 1.40 a.m. when he went home on a motor bike. On reaching his house he found his door open and he pushed inside with the motor bike. While inside he was cut on the head and struggled with someone and the panga the person had dropped. It was dark and the accused picked the panga and started defending himself. There was silence but shortly the man held him and hit him on the hands. The accused started shouting and ran out of the house. Neighbours started shouting. He children ran and went to inform PW1 – their uncle. They went back to the house and found someone who was dressed in a dress and white vest on top. The person told them that he was from Ingotse about 15 km away. The assistant chief called the police who went to the scene and took the deceased's body.

Mr. Shilenje counsel for the accused submitted that the prosecution did not prove its case as required by the law. Blood samples and photographs were taken but the same were not produced. No-one saw the accused assaulting the deceased. The prosecution evidence is purely circumstantial and that the deceased's injuries could have been caused by somebody else. When PW2 went to the scene he found a lot of people in the compound. The ownership of the panga was not established and that the two major ingredients of motive and malice afore-thought were not established.

It is clear from the prosecution evidence that the deceased was injured inside the accused's house. The incident occurred between 2.00 and 3.00 a.m. on the night of 1<sup>st</sup> September 2010. From the prosecution evidence nobody witnessed the accused assaulting the deceased. According to PW6, the investigating officer, the accused told her that he struggled with the deceased. It is alleged that the deceased was found with the accused's wife but that evidence is mere speculation. Although the deceased was found without a trouser, this court cannot conclude with finality that the deceased was caught with the accused's wife. It is not clear how the deceased entered the accused's house.

In his unsworn evidence the accused maintained that he returned home at about 1.40 a.m. That line of evidence is similar to what the accused informed PW6. Upon entering his house, the accused was assaulted by somebody who had a panga and it was dark. They struggled and the panga dropped. He picked the panga and defended himself. It is the evidence of PW2 that the accused's children aged between 8 and 10 years went to his house that night stating that they had been attacked by somebody. When PW2 went to the scene he found many people and he retreated. From the prosecution evidence I am not able to conclude that the accused assaulted the deceased after finding him with his wife in his bedroom. The prosecution evidence is mainly circumstantial. The circumstances of the case can be explained in other co-existing circumstances being that when the accused entered his house, the deceased who was with the accused's wife heard the accused coming and started assaulting him. In the process the accused defended himself and the deceased sustained injuries. According to the accused it was dark when the struggle happened.

Given the above circumstances, I do find that the accused is not guilty of the offence of murder as charged. I also do find that the accused is not guilty of the lesser offence of manslaughter as it is possible that when he entered his house the deceased attacked him. There is no evidence that the accused armed himself with a panga and attacked the deceased. The injuries indicated in the post mortem report lend credence to the accused's contention that he struggled with the deceased. It is PW2's evidence that even the accused sustained injuries.

In the end I do find that the prosecution has not proved its case beyond reasonable doubt. The accused is hereby not found guilty of the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The accused is hereby set free and shall be at liberty unless otherwise lawfully held.

***Delivered, dated and signed at Kakamega this 31<sup>st</sup> day of January, 2013***

**SAID J. CHITEMBWE**  
**J U D G E**