



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CRIMINAL CASE NO. 4 OF 2012**

REPUBLIC.....PROSECUTOR

VERSUS

ISSA OMAR SHEDE.....ACCUSED

**JUDGMENT**

The accused **ISSA OMAR SHEDE** has been charged with the offence of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE**. The particulars of the offence were that:

**“On the 25<sup>th</sup> day of January, 2012 at Voi Registration of Persons office, Taita Taveta County murdered ABRAHAM MGANGA NYAMBU.”**

The accused who was first arraigned in court on 26<sup>th</sup> January, 2012 entered a plea of ‘*Not Guilty*’ to the charge and his trial commenced before me on 6<sup>th</sup> June, 2012. The prosecution led by **MR. TANUI**, learned state counsel called a total of ten (10) witnesses in support of their case. **MR. NYANGE** Advocate acted for the accused.

The brief facts of the case were narrated by **PW1 CELESTINA CHAO** and **PW2 EDWIN MRAMBA** who were both eyewitnesses to the incident. They told the court that on 25<sup>th</sup> January, 2012 at about 9.00 a.m. they were both on duty at the Voi Registration of Persons office together with Abraham Nyambu (the deceased herein) who was a colleague. At about 9.30 a.m. the accused walked into their office. He greeted and shook hands with both **PW1** and **PW2** but did not greet the deceased. **PW1** and **PW2** both heard the accused ask the deceased why he (the deceased) was troubling him. The deceased replied ‘*vipi*’ i.e. ‘*how*’. Then both **PW1** and **PW2** who had continued with their duties heard the deceased shout ‘*Nafa*’ i.e. ‘*I am dying*’. Upon looking up they saw the accused pulling a knife out of the left shoulder of the deceased. The deceased was bleeding from the left shoulder where he had been stabbed. Both **PW1** and **PW2** ran out of the office calling for help. **PW3 DOMINIC NYAMBU** responded the calls for help. He put the deceased in his vehicle and rushed him to Voi Hospital where he unfortunately succumbed to his injuries twenty minutes later. **PW8 GORDON ONYANGO** told the court that he was working in the same compound as a plumber. He also responded to the cries for help and managed to wrestle the knife from the accused. He then helped to put the **accused** into a vehicle for onward transmission to be taken to hospital. The accused was arrested at the scene and taken to the police station and upon completion of police investigations he was charged with the offence of murder.

At the close of the prosecution case the accused was found to have a case to answer and was placed onto

his defence. He gave a sworn defence by which he denied any and all involvement in the death of the deceased. It is now the duty of this court to determine whether the charge of murder has been proved beyond a reasonable doubt as required in law.

The offence of murder is defined by section 203 of the Penal Code as follows:

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

Therefore in order to prove the charge of murder the following three ingredients must be satisfactorily established

1. The fact and cause of death of the deceased.
2. That the deceased met his death as the direct result of an unlawful act or omission on the part of the accused.
3. That said unlawful act or omission was committed with malice aforethought.

In this case both the fact and cause of death of the deceased are not in any doubt. **PW6 POLLINA WAKIO** the deceased's widow and **PW5 ABRAHAM NYAMBU** a nephew to the deceased both testified that upon receiving news of the incident they rushed to Voi Hospital where they found that the deceased had died. They both testify that they noticed a stab wound on the left shoulder of the body. **PW5** told the court that he did identify the body of the deceased to the doctor for the post-mortem. Both witnesses who knew the deceased well identify him as 'Abraham Mganga Nyambu'.

Proof of the cause of death is also readily available. **PW1, PW2, PW3** and **PW8** all of who witnessed the incident told the court that the accused had been stabbed in the left shoulder. The blood-stained knife which was used to stab him was recovered at the scene and was produced in court as an exhibit **Pexb1**. **PW7 DR. WILSON KYALO** is the doctor who performed the autopsy on the body of the deceased. Upon examination he noted a penetrating wound on the left side of chest near the collar bone measuring 3x2 cm. Upon performing an internal examination he noted that the cartorid artery had been severed and the lung was perforated. The cause of death was found to be “*cardiopulmonary arrest secondary to hemorrhage shock*”. **PW7** filled and signed the post-mortem report which is produced in court as an exhibit **Pexb2**. This expert medical evidence was neither challenged nor controverted by the defence. I therefore find as a fact that the deceased met his untimely end as the result of a stab wound to the left shoulder.

The next question for determination is whether it was the accused who committed the unlawful act of stabbing the deceased leading to his death. As stated earlier there were several eyewitnesses to the incident. Both **PW1** and **PW2** who worked with the deceased testified that on the material date they were with him in their office at the Voi Registrars office. Both witnesses testify that the accused walked into their office. He greeted both **PW1** and **PW2** by shaking their hands but the accused did not greet the deceased at all. Both **PW1** and **PW2** believing that accused was an ordinary customer continued with their work. Suddenly they heard the deceased cry out in pain. In her evidence **PW1** states that at that point:

**“I looked up and I saw the accused pull out a knife from the left shoulder of the deceased. The deceased tried to get up. I ran out shouting.”**

Under cross-examination by defence counsel **PW1** goes on to state:

**“I saw the knife in the accused's hand. I do not know where the knife came from .....**”

On his part **PW2** who was also in the same room testified that:

**“I heard a scream from the deceased. I looked up and I saw blood from the deceased's left shoulder. The accused had stabbed the deceased.”**

Both **PW1** and **PW2** positively identify the accused as the man whom they saw holding the knife, the same man who stabbed the deceased. The parties were all in an office together in close proximity and the incident occurred in broad day light at 9.30 a.m. It must be remembered that the witnesses said that when he entered the office the accused greeted them both. They therefore had ample time and opportunity to see him very well.

Aside from the evidence of the two who were in the room with the deceased, there is also the evidence of **PW5** a plumber who was working in the same compound and who upon hearing the commotion rushed to offer assistance. **PW8** testified that upon arrival at the office he found two men struggling. He states that:

**“I found a crowd at the door. I found two men struggling. One was holding a knife. He had stabbed the other man. I separated the men and the injured man was taken to hospital .....**”

**PW8** goes on to state:

**“I grabbed the knife from the hands of the man who had it. The police later took the knife. This is the knife I saw on that day. It had blood-stains. I took the knife and plunged it into the ground outside the office .....**”

Again it is evident that **PW8** had a clear view of the events. He actively participated in separating the protagonists and he confiscated the knife which he had the presence of mind to plunge into the ground so that it could not harm any other person. **PW8** also positively identifies the accused as the man he found holding the knife. Therefore no less than three (3) eyewitnesses have identified the accused as the man who stabbed the deceased. As stated earlier the incident occurred in broad daylight and all three (3) witnesses had ample time and opportunity to see the accused well. The accused was arrested at the scene thus at no time did the witnesses lose sight of him. There is no possibility of a mistaken identity.

In his defence the accused admits that he did go to the office of the deceased on the material day but he denies having carried a knife and he further denies having stabbed the deceased at all. The accused states that he only spoke to **PW1** to whom he made an enquiry about an identity card. However, if this was so why would **PW1**, **PW2** and **PW8** have told the court of a stabbing incident if no such incident occurred? There has been no allegation of a grudge or bad blood that would cause the three unrelated witnesses to fabricate evidence against the accused. The narration given by the eyewitnesses was consistent and they all remained unshaken under cross-examination. At no time did defence counsel ever suggest to them that no such incident actually occurred. The defence raised by the accused is a brazen denial and does not in any way dislodge the weight of the evidence against him. I reject the defence as a desperate lie. In his final submissions to the court, counsel for the accused raised as an issue the fact that the investigating officer was not called to testify. This in my view was not fatal to the prosecution case. The investigating officer would only be required to fill in some gaps or to explain any anomalies in the case. This was a very straight forward case. The evidence was cogent. There were no anomalies to be explained. Thus I find that failure to call as a witness the investigating officer was not fatal at all.

From the evidence on record I am satisfied that the accused has been reliably and positively identified as the man who stabbed the deceased. The *actus reus* of the offence of murder have been satisfactorily proved against the accused.

Finally this court must determine whether the ‘*mens rea*’ for the offence of murder being ‘*malice aforethought*’ has been proved to exist. It transpires from the evidence that the accused and the deceased were not strangers to each other. **PW6** who is the widow of the deceased told the court that the accused had sold to the deceased a plot which the accused later tried to reclaim. **PW6** told the court that there have been disagreements between the two over the question of this plot. In his defence the accused confirms that he knew the deceased very well and he further confirms that he had indeed sold him a plot. However, the accused denied having ever disagreed with the deceased over this plot or indeed over any other plot. However, it is telling that both **PW1** and **PW2** stated that when the accused came into their

office his words to the accused were ‘*mbona unanitiza*’ i.e. ‘*why are you troubling me*’. Clearly these words are evidence of some problem or disagreement between the two. It is also telling that upon entering the office the accused greeted **PW1** and **PW2** but declined to greet the deceased. He clearly had an axe to grind with the deceased. Malice aforethought is defined by section 206 of the Penal Code as follows:

**“206 Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances –**

**a. an intention to cause death or to do**

**grievous harm to any person, whether that person is the person actually killed or not;**

**b. ....”**

By stabbing the deceased in the shoulder, there is no doubt that the accused intended at the very least to cause him grievous bodily harm. The force with which the stab was executed, leading to the severance of the major carotid artery makes clear the intention of the accused to cause the death of the deceased. I am satisfied that malice aforethought has been proved.

Based on the foregoing, I am satisfied that the charge of murder has been proved against the accused beyond a reasonable doubt. I hereby convict the accused of the offence of murder as charged.

**Dated and delivered at Mombasa this 28<sup>th</sup> day of October, 2013.**

**M. ODERO**

**JUDGE**

In the presence of:

Mr. Jami for State

Ms. Essendi for Accused

Court Clerk Mutisya

Mr. Jami:

The accused may be treated as a first offender.

Ms. Essendi:

I seek time to mitigate.

Court:

Mention 5<sup>th</sup> November, 2013 for mitigation.

**M. ODERO**

**JUDGE**

**28<sup>TH</sup> OCTOBER, 2013**

5/11/2013

Before Hon. Lady Justice M. Odera

Ms. Ogwenyo for State

Court Clerk Mutisya

Court:

Mention 6<sup>th</sup> November, 2013. Hearing notice to Mr. Nyaange.

**M. ODERO**

**JUDGE**

**5<sup>TH</sup> NOVEMBER, 2013**

6/11/2013

Before Hon. Lady Justice M. Odera

Mr. Ayodo for State

In person Accused

Court Clerk Mutisya

Hearing 7<sup>th</sup> November, 2013 for mitigation. Hearing notice to Mr. Nyaange.

**M. ODERO**

**JUDGE**

**6<sup>TH</sup> NOVEMBER, 2013**

7/11/2013

Before Hon. Lady Justice M. Odera

Mr. Ayodo for State

Mr. Nyaange for Accused

Mr. Nyaange:

The accused person is remorseful and sorry for the acts that he committed. He is aged 65 years. The purpose of sentence and imprisonment is to rehabilitate the offender. Bearing in mind his advanced age we plead for mercy and leniency in sentencing. The accused was intoxicated at the time of the offence and he seeks to apologize to the family of the deceased. He is extremely remorseful.

Mr. Ayodo:

I leave it to court.

Court:

In light of the recent 5-Judge Appeal Bench decision the only sentence available is death. The accused is sentenced to death. He has a right to appeal.

**M. ODERO**

**JUDGE**

**7<sup>TH</sup> NOVEMBER, 2013**