



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CRIMINAL CASE NO. 1 OF 2010**

REPUBLIC.....RESPONDENT

VERSUS

BORA NJEI.....ACCUSED

**JUDGMENT**

The accused **BORA NJEI** 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 charge were that:

**“On the night of 31<sup>st</sup> of December, 2009 at Tiribe village Mkongani Location Kwale District within Coast Province, murdered MLONGO MATARI.”**

The accused who was represented by **MR. ONJORO** Advocate entered a plea of ‘*Not Guilty*’ to the charge. The prosecution led by learned state counsel **MR. ONSERIO** called a total of nine (9) witnesses in support of their case. The brief facts were that on the night of 31<sup>st</sup> December, 2009 at about 8.00 p.m. the deceased ‘*Mlongo Matari*’ was within her homestead in Tiribe village together with her daughters-in-law **NYAMVULA BORA BOKO (PW2)** and **FATUMA MAIWE PW3**. At about 8.00 p.m. the two women heard the deceased cry out for help saying that ‘*Bora Njei*’ was killing her. They rushed out of their houses to check and found the deceased with serious cut wounds to her head and hands. The two younger women began to shout for help. **PW4 ABDALLA BAKARI MWAFFUNDI** responded to their cries. He rushed to the homestead and found the deceased lying critically injured with cut wounds to her head. **PW4** got his motor cycle and rushed the deceased to Kinango Hospital where she was admitted. The deceased unfortunately succumbed to her injuries whilst undergoing treatment. The matter was reported to police who commenced investigations. The accused was eventually arrested and 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 an unsworn defence in which he denied any and all involvement in the death of the deceased. The court must now analyse the evidence on record and determine whether the charge of murder has been proved beyond a reasonable doubt.

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

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

Therefore the prosecution in order to satisfactorily prove a charge of murder must produce evidence to show the following three ingredients of the offence.

1. Proof of the fact and cause of death of the deceased.
2. Proof that the deceased’s death was caused by some unlawful act or omission on the part of the prosecution.
3. Proof that said unlawful act or omission was committed with malice aforethought

Regarding the fact and cause of death of the deceased there can be no controversy. **PW2** and **PW3** both daughters-in-law of the deceased narrated how they responded to her cries for help and upon rushing outside found the deceased critically injured with deep cut wounds to the head and arms. The extents of injury are evident in the photographs of the body which were produced as exhibits in court by **PW5 CHIEF INSPECTOR MAXWELL KIPLUMO** as **Pexb2**. Both witnesses who knew the deceased very well since they all lived together in the same compound identify her as ‘*Mlongo Matari*’. Evidence of the cause of death is given by **PW9 DR. NGALI MBUUKO** a pathologist attached to the Provincial Coast General Hospital in Mombasa. **PW9** testified that he conducted an autopsy on the body of the deceased. He confirms that the body had deep cut wounds to the head which led to fracture of the skull. There was also a deep cut to the left shoulder and an internal examination revealed that part of the brain lobe had been totally sliced off. The doctor opined that the cause of death was “*injury to the brain due to sharp trauma to the head.*” He filled and signed the post mortem report which was produced before the court as an exhibit **Pexb1**. This was expert medical evidence and was neither challenged nor controverted by the defence.

Having satisfactorily proved the first ingredient the prosecution must also prove beyond reasonable doubt that it was the accused who so attacked and killed the deceased. There was no eyewitness to the actual attack on the deceased. Neither **PW2** nor **PW3** saw the person who cut her up. Both of them only came out of their houses after hearing the deceased call out for help. **PW1** admits under cross-examination that:

**“It is true I did not see who cut up the deceased.”**

On her part **PW3** states that she saw a man but she too admits that:

**“I saw a man run into the maize plantation and hide there. I could not identify the man as it was night. I could not identify his clothes .....**”

Thus there is no evidence from any witness which places the accused at the scene of the crime.

The only reason why the accused has been linked to this offence is because it is stated by both **PW2** and **PW3** that the deceased cried out saying that ‘*Bora Njei*’ was killing her. The accused by his own admission is named ‘*Bora Njei*’. This then would amount to a ‘**dying declaration**’ which in law admissible evidence of a fact in issue. However, even where there exists a dying declaration, such a declaration cannot alone amount to sufficient evidence to convict an accused. The court is under an obligation to critically interrogate any evidence of a dying declaration in order to determine whether it meets the legal standard of proof being beyond a reasonable doubt.

This incident occurred at night. Both **PW2** and **PW3** state that it was 8.00 p.m. It was therefore dark. How possible would it have been for the deceased an elderly woman to see and identify her attacker in the dark? The situation would have been somewhat different if for example the accused had already been seen within the compound prior to the attack. This was not the case here. **PW2** in her evidence says that the moon was out on the night in question. However, she has not bothered to describe the quality nor the strength of light being emitted by the moon. Was it a bright full moon or was it just moonlight emitting shadowy images? It is telling that even despite the existence of this moonlight **PW2** was herself unable

to see and identify the man whom she claims she saw run into the maize plantation. **PW3** goes on to state that:

**“I saw a man run into the maize plantation on the material night. It was night time and I could not identify him.....”**

If **PW3** could not identify the man, was it reasonable to expect that the deceased who was under attack and had been critically injured would have been able in those circumstances to make a clear and a positive identification? The deceased would have probably been more concerned with protecting herself from being slashed.

On the question of a possible motive both **PW2** and **PW3** mention that the accused brother known as ‘*Hamisi Njei*’ had previously threatened the deceased. This would present a possible motive on the part of this Hamisi Njei and **not** on the part of the accused. The accused cannot be held culpable because his brother held a grudge against the deceased and had threatened the deceased.

From my analysis of the evidence on record, I find that the evidence on identification falls short. The dying declaration on its own cannot be sufficient. The prevailing circumstances make it difficult to rule out a mistaken identify. The benefit of doubt must be accorded to the accused. I therefore find that the ‘*actus reus*’ has not been proved as against the accused person. For this reason I do enter a verdict of not guilty and I hereby acquit the accused of this charge of murder. Accused is to be set free forthwith unless otherwise lawfully held.

**Dated and delivered in Mombasa this 18<sup>th</sup> day of December, 2013.**

**M. ODERO**

**JUDGE**