



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CRIMINAL CASE NO. 4 OF 2007**

REPUBLIC.....PROSECUTOR

VERSUS

CHARLES NDORO CHAKA.....ACCUSED

**JUDGEMENT**

The accused **CHARLES NDORO CHAKA** 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 information were that:

***“On the night of 16<sup>th</sup>/17<sup>th</sup> December 2006 at about 1.00 a.m. at Jorori Village Musulwa location of Kwale District within Coast Province murdered MORRIS NDORO CHAKA”***

The accused was arraigned before the High Court in Mombasa on 19<sup>th</sup> February 2007 and the information was read out to him in the presence of his lawyer. The accused entered a plea of **‘not guilty’**. The State called a total of eight (8) witnesses in support of their case. The brief facts of the prosecution case were that on the night of 16<sup>th</sup>/17<sup>th</sup> December 2006, the deceased was asleep in his house with his two younger brothers R.N. **PW1** and J.N. **PW6**. The deceased’s wife **RUTH MORRIS PW4** told the court that she was not in her home on the material night as she had traveled to her home in Shimba Hills to attend a funeral. During the night **PW1** and **PW6** told the court that at about 1.00 A.M. they heard the door being pushed open. A man demanded money from the deceased. The deceased was then ordered out of the house and **PW6** heard him cry out saying **‘mama nauliwa’** meaning **‘mother I am being killed’**. Then a man came to the bedroom and ordered **PW1** and **PW6** to cover themselves. They obliged. Then the two young boys were ordered to leave the deceased’s house and go back to their parent’s home. As they left they noticed the deceased lying on the floor with clothes covering him, which clothes were on fire. **PW1** and **PW6** went outside and passed the remainder of the night in a nearby ditch. When day broke at 6.00 A.M. they ran to their home and told their parents what had happened. **PW3 RHODA NYORO**, the mother of the deceased, rushed back to the scene but found the deceased already dead. The matter was reported to the sub-chief and then to police from Kwale Police Station who came and removed the body to Msambweni District Hospital mortuary. The accused who was identified by **PW1** and **PW6** as one of the persons who attacked and killed the deceased was also arrested at the scene and taken to Kwale Police Station. Upon completion of police investigations into the matter the accused was charged.

At the close of the prosecution case this court did rule that the accused had a case to answer and he was

duly called upon to give his defence in compliance with S. 306(2) of the Criminal Procedure Code. The accused elected to make an unsworn defence in which he denied any involvement in the death of the deceased.

The crime of Murder is defined thus in S. 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 in order to sustain or prove a charge of murder the prosecution must prove firstly that the deceased met his death as the result of an unlawful act or omission of a third party the **‘actus reas’** of the offence and secondly that the unlawful act or omission was done with malice aforethought which constitutes the **‘mens rea’** or the mental element of the offence of murder. In this case the person alleged to have lost his life is the deceased namely **‘Morris Ndoro Chaka’**. The fact of the death of the deceased cannot be in any doubt. **PW4** the wife of the deceased told the court that upon being informed that her husband had been killed she went to the Msambweni Hospital mortuary where she saw and identified his body. **PW3** the deceased’s mother and **PW2 NYAE NDORO**, a brother to the deceased both tell the court that upon arrival at the scene on the morning of 17<sup>th</sup> December 2006 they found the body of the deceased lying dead inside his house with wounds on the head and burns to the torso and fingers. **PW1** and **PW6**, both eyewitnesses to the incident told the court that as they left the house on the material night they left the deceased lying in the living room with wounds to his head and a bundle of clothes burning on top of his body. **PW7 CHIEF INSPECTOR CHARLES MUTUA** told the court that he visited the scene of crime on 17<sup>th</sup> December 2006 at about 8.00 A.M. He found the body of the deceased inside the house. He describes the scene thus:

***“The body had deep cuts on he head and was partly burnt on the upper part around the shoulders and the head. The face was recognizable and had some blood-stains. There were partly burnt clothes on the body”***

**PW7** collected the body and took it to the mortuary. The relatives at the scene who included **PW1**, **PW6** and **PW3** all identified the body as that of their kin Morris Ndoro. There can be no doubt from this evidence that the dead body of the deceased was found inside his own house. In case of any doubt there is the evidence of **PW8 SGT. MICHAEL ODUOR** an officer attached to the scenes of crime section in Mombasa, told the court that he went to the scene at Jorori Village where he took six (6) photographs of the body of the deceased. The said photographs were duly produced in court **Pexb4** and the court had an opportunity to view the scene. They were all graphic depictions of the gruesome death which the deceased met. There were what appeared to be deep cut wounds on the head with heavy loss of blood. There was burn marks on the top part of the body the head, the shoulders, the back and the fingers of the right hand was also burnt. The doctor did not testify in this case and no post-mortem report was produced in court. However even in the absence of such medical evidence it is clear that the deceased did not die of natural causes. Indeed his wife **PW3** told the court that the deceased was alive and in good health on 16<sup>th</sup> December 2006 when she left home. The photographs clearly corroborate the evidence of the witnesses that the deceased was attacked and cut on the head and thereafter set alight. It was these acts which led to his untimely death. The cause of death of the deceased cannot be in any dispute. The acts of cutting him about the skull and setting him alight were the unlawful actions that caused his death.

The next crucial question is whether it was the accused charged in court who committed or actively participated in the said acts leading to the death of the deceased. From the evidence it is apparent that the deceased and the accused were brothers. **PW3** who was a mother to both of them confirms this. Indeed in his statement in defence the accused confirms that the deceased was his brother. **PW1** and **PW6** both testified that on the material night after taking supper in their own home with their parents, they both went to sleep at the house of the deceased who was their elder brother. They found the deceased at home and by 10.00 p.m. they all retired to bed. Both **PW1** and **PW6** testify that at about 1.00 A.M. they heard the door to the house in which they were sleeping being pushed open. They heard a man demand for money

from the deceased. **PW1** told the court that though it was too dark to see he was able to identify the voice of one of the men who had entered the house as that of his elder brother '**Charles**' (the accused herein). **PW1** confirms that it was the accused's voice which he heard demanding money from the deceased (the importance of this fact will become apparent later on). **PW1** further states that after the fire was lit to burn the deceased he was able to see and identify the accused by the flames of that fire. He told the court that he also recognized the old worn denim cap which the accused was wearing at the time. The evidence of **PW1** is corroborated in all its material aspects by **PW6** who was also an eye-witness to the incident. **PW6** also told the court that he was able to recognize the voice of his elder brother Charles (the accused) and that he was able to confirm his identity by seeing him with the aid of the light from the flames which were engulfing the body of the deceased. **PW6** also told the court that he knew it was the accused due to the cap which he often wore. The accused was not a stranger to either **PW1** or **PW6**. He was their elder brother whom they both knew very well. I have no doubt that they would be in a position to positively identify his voice as no doubt they had heard him speak several times before. Both eye-witnesses identify the cap they saw as a cap which the accused often wore. Once again due to their familiarity with the accused I have no doubt that they would be in a position to identify his clothing including the cap he often wore. The said cap was produced before court as an exhibit **Pexb1**. It was an old worn denim cap. It was easily distinguishable from other such caps as it had a hole in the top. Both witnesses were brothers to the accused and would have no reason to implicate the accused if he was not actually present at the scene. **PW6** though a minor gave his evidence in a clear and consistent manner. He remained unshaken under cross-examination by **MR. MUSHELLE**, counsel for the accused. He struck me as an honest and truthful witness.

Defence counsel did cross-examine **PW1** on the question of whether when making his report of the incident to his parents he named the accused as one of those involved. **PW1** was candid enough to admit that he did not name the accused in the report he first made to his parents. He explained that he omitted to name the accused as he was fearful due to threats made by accused. **PW6** stated:

***"We told our parents that Morris [the deceased] had been invaded by thugs. I did not mention accused's name as I was still fearing the threat he had made. I mentioned the name of accused when we returned to the deceased's house. I did that when my father asked me in anger if I did not know the robbers"***

It must be borne in mind that **PW1** had just witnessed what his brother the accused was capable of doing. He had left his other brother wounded and set ablaze by the accused and another. He had every reason to be fearful and his failure to name the accused immediately was therefore quite reasonable and understandable.

**PW2 NYAE NDORO** told the court that he is a brother to the accused and on the night in question he slept at the home of the accused. At about 8.00 p.m. the accused went away and left **PW2** in the house. It was not until 5.45 A.M. that night that the accused knocked on the door signaling his return and **PW2** opened the door for him. The following morning 17<sup>th</sup> December 2006 **PW2** received the news that his elder brother Morris had been killed. The evidence of **PW2** reveals that the accused was out of his house at 1.00 A.M. on the night of 16<sup>th</sup>/17<sup>th</sup> December 2006. The accused in his defence claims that he slept in his house that night. However he makes no mention of **PW2** nor does he give any explanation why **PW2** would lie about this. I find that the evidence of **PW2** is not challenged in any meaningful way and proves that the accused was out and about on the material night. There is therefore every probability that the accused was at the home of the deceased at 1.00 A.M. when **PW1** and **PW6** saw him. From the evidence on record I am satisfied that the accused was involved and in fact played an active role in the murder of his deceased brother. There is unchallenged evidence from two eye-witnesses placing him at the scene and in his defence the accused does not in any way displace this evidence.

The question arises as to why the accused would attack and kill his brother in such a gruesome manner. Has the element of '**mens rea**' been proved? There is evidence from **PW3** the mother to both accused and deceased that the accused had earlier been convicted and imprisoned for six (6) years for

theft and had left his belongings to the deceased to look after. Upon his release from prison the accused demanded from the deceased Kshs.40,000/- in lieu of his goods. The matter was adjudicated by the local chief who ruled that the accused should be paid only Kshs.18,000/-. **PW3** told the court that the accused was not satisfied with this. No doubt he still wanted the full Kshs.40,000/- he had initially demanded. Indeed this explains why the accused burst into the deceased's house that night and demanded his money. Clearly he was determined to collect this money by any means possible. The story of this disagreement between the brothers is confirmed by **PW1**. He states that he was aware of a problem between the two brothers over the money demanded by the accused. **PW3** was the mother of both the accused and the deceased. She had no reason to come to court and lie against the accused. She had no reason to favour one brother as against the other. This question was put to **PW3** under cross-examination and she replied:

***“The accused is my son. The deceased was also my son. I am here to tell the truth. I will not favour any side”***

Once again my own observation was that **PW3** was an honest and truthful witness. Like any mother she was torn by the disagreement between her two sons, but there was nothing to indicate that she favoured one son above the other. The disagreement over money provided the motive for accused to attack and kill his brother. No doubt he was dissatisfied by the lower sum offered to him as compensation for his goods. He was out to seek retribution and his way of achieving this was to kill his brother.

I have considered the defence raised by the accused which in my view was a blanket denial. The accused claimed to have been asleep in his house at the material time yet **PW2** has told the court that the accused did not sleep in his house that night. The defence raised in my view casts no doubt on the evidence adduced by the prosecution witnesses. The accused in his desire to prove a point took it upon himself to attack and burn his brother due to a disagreement over money. The accused could have sought recourse through family, local administration and even the courts if necessary. His action was clearly unlawful and led to the loss of an innocent life. I am satisfied that all elements of the offence of murder have been proved. There remains no doubt of the involvement of the accused in this crime and I do hereby convict him of the charge of murder as charged.

**Dated and Delivered in Mombasa this 19<sup>th</sup> day of April 2011.**

**M. ODERO**

**JUDGE**

In the presence of:

Mr. Mushelle for Accused

Mr. Onserio for State

**MR. ONSERIO:** I have no previous records. Let the accused be treated as a first offender.

**MR. MUSHELLE IN MITIGATION:** Accused is a first offender. He is very remorseful. He has been in custody since December 2006. He is married with 2 children. He prays for utmost leniency.

**COURT:** Sentence reserved pending pre-sentence report from Probation Department.

Mention 13<sup>th</sup> May 2011.

**M. ODERO**

**JUDGE**

**19.4.2011**

COURT: Probation Report not ready. Mention 13<sup>th</sup> June 2011.

**M. ODERO**

**JUDGE**

**13.5.2011**

13.6.2011

Before: Hon. Lady Justice M. Odero  
Court Clerk – Mutisya  
Mr. Onserio for State  
Mr. Mushelle for Accused

COURT: I have considered the statement in mitigation made by Mr. Mushelle Advocate on behalf of the accused. I have also considered the pre-sentence report filed by the Probation Department. The accused committed a most heinous act against his own brother. The bone of contention between the two was a debt. The accused had the option of having the matter resolved through elders, local administration or the law. Instead he chose to take the law into his own hands and killed his own brother under very gruesome circumstances. The accused shows no remorse for his action which has no doubt impacted very negatively on his entire family. I find that a deterrent sentence is appropriate. I do hereby sentence this accused to serve a term of forty-five (45) years imprisonment.

Right of Appeal explained.

**M. ODERO**  
**JUDGE**  
**13/6/2011**

In the presence of:  
Mr. Mushelle for Accused  
Mr. Onserio for State