



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KISII**  
**CRIMINAL CASE NO. 77 OF 2009**

REPUBLIC.....PROSECUTOR

- VERSUS -

BENSON NYAKEMWA ARAMBE alias CLEMENT ARAMBE.....1<sup>ST</sup> ACCUSED

TIMOTHY OMWOYO ONGONDO.....2<sup>ND</sup> ACCUSED

**JUDGMENT**

By information dated 22<sup>nd</sup> June, 2010 and filed in court on 6<sup>th</sup> July, 2010, the state charged the two accused, **Benson Nyakemwa Arambe** alias **Clement Arambe** and **Timothy Omwoyo Ongondo**, hereinafter “**the 1<sup>st</sup> and 2<sup>nd</sup> accused**” respectively with the murder of **Fredrick Ogachi Buge**, deceased. It was alleged that on 30<sup>th</sup> November, 2009 at Bosunya village in Emesa sublocation, of Boochi Borabu Location Kenyena District within Nyanza province, they jointly murdered **Fredrick Ogachi Buge**. They were charged under section 203 as read with Section 204 of the **Penal Code**. When called upon to enter a plea to the information on 6<sup>th</sup> July, 2010 before me they all returned a plea of not guilty and their trial subsequently ensued.

PW1, **Dr. Cheruiyot Kipngeno** testified that on 14<sup>th</sup> December, 2009 he conducted a post mortem on the body of the deceased. The body was identified to him by **Tom Birundu** and **Henry Kenyanya**. Externally, he observed that the body had deep cut wound on the right parietal region, posteriorly extending 6 cm stitched with Nylon and a bruise on the right chest wall anteriorly oval shaped. Internally, he observed Haematoma on the left chest wall but with no rib fracture . On the head he observed depressed linear skull fracture, right subdural Haematoma and Haematoma in the brain. He opined that the deceased passed on as a result of cardio respiratory arrest due to severe head injury secondary to trauma. He thereafter prepared the post mortem report, signed and stamped it. He tendered the same into evidence.

Cross-examined by **Mr. Moracha**, learned counsel for the 1<sup>st</sup> accused, he stated that he performed the post mortem after fourteen days. He did not find any presence of changaa in the body of the deceased. His report was conclusive as to the cause of death. The oval injury could have been caused by trauma. Considering the nature of injuries, he was of the opinion that the weapon used must have been blunt.

Cross-examined by **Mr. Anyona**, learned counsel for the 2<sup>nd</sup> accused, he stated that it was possible that the injuries could have been caused by a sharp object. He did not know that the deceased had been admitted in the hospital prior to his death. Even if the deceased was so admitted, he did not treat him. Therefore his opinion was not prejudiced.

PW2, **Henry Nyabuto Karen** testified that on 21<sup>st</sup> November, 2009 he was in the house of **Nyaboke** partaking changaa in the company of the deceased. Suddenly the 1<sup>st</sup> accused bust into the house and sat next to **Nyaboke**. Though it was at night, the house was lit with a tin lamp and he saw the 1<sup>st</sup> accused very well. 1<sup>st</sup> accused immediately put off the light and they were attacked by the 2<sup>nd</sup> accused and one, **Nyamenjo Ogaro** with sticks. They ordered them to kneel down and put their hands up. The 1<sup>st</sup> accused stood on top of the table and started assaulting them as well without telling them why he was beating them. When done, the 1<sup>st</sup> accused ordered the 2<sup>nd</sup> accused and **Nyamenjo** to open the door for them. Immediately the door was opened, he dashed out. He was pursued and hit again but managed to escape home. The following day he contacted the deceased who told him that he was feeling unwell. They decided to go to hospital. Whereas he went to Nyabuterere medical facility, the deceased went to Magena dispensary. On 23<sup>rd</sup> November, 2009, he visited the deceased at Magena dispensary and found that he was not responding well to treatment. He was later transferred to Kisii level 5 hospital and on 30<sup>th</sup> November, 2009, he passed on. The witness pointed out the accused in court as the ones who had assaulted them.

Cross-examined by **Mr. Moracha**, he stated that he had been drinking for 3 ½ hours but was not yet drunk. It was the deceased who had asked him out. The 1<sup>st</sup> accused entered the house at 8 p.m. He was alone and there was tin lamp in the house which was on. It took 2 minutes for the 2<sup>nd</sup> accused to enter the house after the 1<sup>st</sup> accused. Both accused and **Nyamenjo** assaulted them repeatedly. **Nyaboke** was screaming all the time and asking the accused and **Nyamenjo** why they were assaulting them but received no response. There was no grudge between them though.

Cross-examined by **Anyona**, he responded that the deceased was his nephew. They found other people in the changaa den who later left. **Nyaboke** had 4 or 5 children who were in the kitchen at the time but never came to the main house during the incident. Both accused and **Nyamenjo** used walking sticks to assault them. He had reported the assault to **Nyangusu** police station but was never issued with the P3 form. He denied that he was drunk and never saw the accused clearly. They were not dancing with **Nyaboke**.

PW3, **Clement Orangi Ontungo** testified that he was a clan elder. On 22<sup>nd</sup> November at about 8 a.m he received a report that the deceased had been beaten and went to see him in hospital the following day. He found him at Magena dispensary unconscious. The deceased was later transferred to Kisii level 5 hospital. On 30<sup>th</sup> November, 2009 he received a report that the deceased had passed on.

PW4 **P.C. Kipkosgei Lagat** was on 15<sup>th</sup> December, 2009 at Magena police Patrol base when he together with **PC Geoffrey Kuira** received a phone call from OCS, Nyangusu police station instructing them to proceed to Mosta bar within Magena shopping centre and arrest a suspect. It was about 5.30 p.m. They proceeded there and were directed by an informer to 1<sup>st</sup> accused whom they arrested and escorted to Nyangusu police station.

Cross-examined by **Mr. Moracha**, he responded that the person they arrested was **Benson**

**Arambe.** Those are the names he gave them upon arrest. They had asked him for his Identification card which he declined to give. However, he was not surprised that his names are not **Benson Arambe.** He could nonetheless identify the 1<sup>st</sup> accused in court as the person they had arrested. With that the prosecution closed their case.

At the close of the prosecution case I ruled that the prosecution had established a prima facie case to warrant the accused being put on their defence. They all elected to give unsworn statements and called no witnesses.

The 1<sup>st</sup> accused stated that he never committed the offence. The case was a fabrication. On 15<sup>th</sup> December, 2009, he left his house and went to cut timber. At about midday he took the cut timber to his store at Magena. Thereafter he went looking for a person who owed him Kshs. 11,600/=. He came back and entered Mosta bar and joined friends and started drinking. After about 3 hours, AP's from Magena entered the bar and asked for him. He identified himself and was ordered to accompany them to Nyangusu police station. At Nyangusu, he was placed in the cells and was later informed that he had been involved in the death of the deceased. He denied the allegation and on 31<sup>st</sup> December, 2009 he was brought to court and charged by which time he had been in police custody for 24 days. He knew PW1 who owed him Kshs. 8000/=. He refused to re-pay him and that is why he had framed him with the case. As he was preparing to have PW1 arrested over the debt, he was arrested instead. Otherwise he did not know the co-accused.

On his part, the 2<sup>nd</sup> accused testified that he did not know the charges facing him. On 2<sup>nd</sup> June, 2010, he woke up and went to his farm to plant onions. At about 2.30 he went to Nyangusu supermarket to buy pesticide. As he was boarding a vehicle home, 3 people accosted him. They were police officers. They were in the company of his uncle, **Josphat Morara Okongo** with whom he had disagreed over a boundary. He was handcuffed and taken to Nyangusu police station. He was placed in custody and the uncle was asked to bring witnesses regarding the boundary dispute. Later he was brought to court and charged. He did not know his co-accused. PW2 framed him with the case because he had disagreed with PW2's wife's sister whom she had married. When she left, she went to stay with her sister and PW2. He followed her there but was told by PW2 that the lady had left for her parent's home. After 2 days, he was told that 3 cows and a calf belonging to PW2 had been stolen. A chief's baraza was called and PW2 accused him of having organized the theft. There was thus bad blood between the two which persisted until he was arrested.

Following the closure of the defence case, their respective counsel opted not to make final submissions and instead prayed for a date for judgment.

On his part, **Mr. Gitonga**, leaned state counsel submitted that one common thread joining the testimonies of the accused was that PW2 had a grudge against them. That evidence ought to be disregarded as the evidence on record was consistent and incriminating. Much as they denied knowing each other, nonetheless the two were at the scene of crime.

There are basically two issues for determination in this case; one, whether the deceased was murdered and two, whether he was so murdered by the accused.

Murder is deliberate and premeditated killing of a person(s) by another or others. This is as opposed to accidental killing of another person(s) by another or others which ordinarily my amount to manslaughter

or no offence at all depending on the circumstances. What constitutes murder is that the killing must be accompanied by malice aforethought. Malice aforethought according to section 206 of the **Penal Code** is deemed to be established if any of the following events are established; an intention to cause the death of or do grievous harm to any person, knowledge that what one is doing or omitting to do may cause death or grievous harm, intent to commit a felony or an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed a felony.

In this case, there is no doubt that, the deceased passed on. According to the post mortem report tendered in evidence by PW1, the deceased died as a result of cardiorespiratory arrest secondary to severe head injury secondary to trauma. However PW1 was not certain as to what could have caused those injuries. There was however evidence though uncorroborated that the deceased was assaulted in the house of **Nyaboke**, who apparently ran illicit brew den to wit, chang'aa drinking den. According to PW2 they had been assaulted jointly with the deceased on 22<sup>nd</sup> November, 2009. According to this witness, the deceased invited him for changaa drinks at **Nyaboke's**. They went there and for three hours they indulged in the drink. At about 8 p.m the 1<sup>st</sup> accused suddenly bust into the house and without any provocation started beating them up having blown off the tin lamp. He was then joined by the 2<sup>nd</sup> accused and **Nyamenjo Ogaro**. They were all beaten in darkness and when done, the 1<sup>st</sup> accused ordered the door to the house opened. The deceased and this witness then managed to escape home. The following day they all went to hospital for treatment. However, the condition of the deceased deteriorated and on 30<sup>th</sup> November, 2009, he passed on.

From the foregoing, there is no doubt that the deceased was killed with malice aforethought. Whoever beat him intended to commit grievous harm and indeed managed to do so. He also intended to commit a felony. So that two ingredients of malice aforethought were met in this case. That means therefore that the deceased was murdered. It matters not that the deceased passed on nine days later after the incident. He died as a result of the injuries he sustained from the beating. There is no evidence however that between 21<sup>st</sup> and 30<sup>th</sup> September, 2009 there were other factors that intervened and which would have caused the death of the deceased.

Was the deceased however murdered by the accused? On the scanty evidence on record, I am reluctant to hold so. First and foremost, there is no evidence that PW2 knew the accused. The incident allegedly happened at night. The question of visual identification of the assailant(s) by PW2 becomes relevant. It is only this witness who has testified to the accused and another having jointly assaulted him together with the deceased. No other witness was called to corroborate his evidence. Ofcourse it is trite law that a fact may be proved by the testimony of a single witness. However, this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. See **Abdalla bin Wendo .v. Republic (1953) 20 EACA 166** and **Roria .v. Republic (1967) EA 583**. Had this case been one of recognition perhaps different considerations would have applied.

No doubt the conditions obtaining in the house of **Nyaboke** at the material timewere difficult and could not have favoured a correct identification of the accused if at all in the commission of the offence by PW2. The sole person purporting to identify the accused was PW2 who had been drinking for 3 plus hours. He had been drinking the lethal drink of changaa. It is possible that as a result of the drink his faculties were impaired . It is possible therefore that he was drunk and not in a position to see the attackers sufficiently to be able to identify them subsequently. Secondly, he claimed that the house was lit by a tin lamp which was on the table. The witness did not say that the tin lamp was emitting bright light. It is common knowledge that a tin lamp hardly emits bright light. Again according to this witness **Nyaboke's** house had three rooms. It is not clear from his evidence where the tin lamp was located. It may well be that it was located in another room considering that they were drinking an illicit brew and would rather that they are not seen. If the tin lamp was in another room, that may have compounded

further the ability of PW2 to see the accused. Assuming however that the tin lamp was in fact in the room where they were, PW2 did not say exactly where it was located in relation to where they were. It is possible therefore that it might have been in an area where the beam of its light was not showing directly on the face of the assailants as to enable PW2 to see them. Further it was alleged that the tin lamp was on a table. However the height of the table was not disclosed in evidence. It is possible that the table might have been so high or so low as to make the identification of the assailants impossible by the light emitted from the tin lamp.

The execution of the plot was first and furious. According to PW2, the 1<sup>st</sup> accused entered the house and sat next to **Nyaboke**. Immediately he blew off the tin lamp and started beating the deceased and PW2. Two minutes later he was joined in the fray by the 2<sup>nd</sup> accused and **Nyamenjo**. Now if the tin-lamp was blown off immediately the 1<sup>st</sup> accused entered the **Nyaboke's** house, how could PW2 have been able to identify the accused, more so 2<sup>nd</sup> accused and **Nyamenjo** who seem to have both entered the house in darkness. It is also strange and indeed incredible that the accused would walk into a house where people are enjoying themselves over a drink and without cause, provocation or apparent reason attack the deceased and PW2 indiscriminately. It is too incredible to be true.

PW2 alleged that **Nyaboke** screamed asking them why the accused were assaulting his customers, but received no answer. However, for reasons which this court is unable to fathom, crucial as her evidence was towards resolving this case, she was never called by the prosecution as a witness. She was a crucial witness who could have shed light on what actually transpired in her house on that day. She would have corroborated the evidence of PW2. She was therefore crucial and vital witness. Why was she not called? Was it out of fear by the prosecution that her evidence would dismantle entirely its case. This court is entitled to draw an inference that given the circumstances of this case, the prosecution's failure to call this vital witness was out of realization that her evidence was most likely to be adverse to the prosecution case. See the case of **Nguku .v. Republic (1985) KLR 412**, where it was held that where a party fails to produce certain evidence, a presumption arises that the evidence, if produced would be unfavourable to that party. This presumption is not confined to oral testimony but can also apply to evidence of a tape recording which is withheld.

Before we leave the house of **Nyaboke**, PW2 did not also say, for how long he had observed the accused to enable him identify them. From the look of things, it must have been for a fleeting moment for when 1<sup>st</sup> accused allegedly got into **Nyaboke's** house within no time he blew off the tin lamp. That could not have accorded the witness sufficient time to see the assailants.

Upon leaving **Nyaboke's** house, he deceased and PW1 went their separate ways. Although PW2 claims to have reported the incident to the police, I do not believe him at all. Therefore there is no evidence that they reported the incident to the police for appropriate action. There is no evidence at all that they mentioned the names of the accused to anybody as the people who had assaulted them. To date PW2 has never taken action against the accused over the alleged assault. The deceased did not pass on immediately. Nor is there evidence that he ever went into a coma. He had opportunity therefore to name or state to his wife, children, parents, relatives if at all he had any, or whoever cared to listen the people who were responsible for his sickly state. None of the two did so. If indeed it was true that the accused actually assaulted them, why did they not complain to the Police, Provincial Administration or even relatives for appropriate action? Considering the foregoing and the defences advanced by the accused that the case was a frame up, I am satisfied that those defences are plausible.

The investigating officer too was not called to testify and justify why he thought that the accused were culpable. There are too many loose ends in this case which perhaps the investigating officer will have

helped by his evidence to tie them up.

Having tested the evidence of the single witness of the identification through inquiries as to the nature of the light available, the sort of light, its size and its position relative to the accused and PW2, as stated in the case of **Maitanyi .v. Republic (1986) KLR 198**, I am satisfied that the conditions obtaining could not have made for the identification of the accused.

In the premises I hold and determine that the accused did not murder the deceased. Accordingly, they are all acquitted of the information.

**Judgment dated, signed and delivered** at Kisii this 8th April, 2011.

**ASIKE-MAKHANDIA**

**JUDGE**