



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUSIA**  
**CRIMINAL CASE 5 OF 2007**

REPUBLIC.....PROSECUTOR

VRS

JOSEPH OKENDA.....ACCUSED

**JUDGMENT**

The accused Joseph Okenda faces a charge of murder contrary to section 203 as read with section 204 of the Penal Code. It is alleged that in the night of 5<sup>th</sup> and 6<sup>th</sup> February 2007 at Rikandogo Village in Marachi Central Location in Busia District, he murdered Peter Abone Ouma. He pleaded not guilty to the offence.

This case was heard by my sister Lady Justice Wanjiru Karanja who heard all the eight prosecution witnesses. I took over the case under section 200 (3) of the Criminal Procedure Code. I put the accused on his defence and heard the defence case.

PW1 identified the body of his deceased brother to the doctor who performed the post mortem. PW2 is the Assistant Chief of Bukhalakele Sub-location. He was informed by the village elder that the accused had stabbed the deceased. It was around 2.00 a.m on the 6<sup>th</sup> February, 2007. He arrested the accused the same night and recovered the murder weapon. He later handed him over to the police. PW3 testified that on the 5<sup>th</sup> February 2007 around 8.00 p.m, he went for a disco at a place where there were mourners. Around 1.00 a.m there was a fracas between one Boniface Odour and one Apondi which was contained on the intervention of PW3. Later on the accused came holding a blood stained knife which he showed to PW3 telling him that he had stabbed someone. PW3 went home and slept. Later in the night, he learnt that accused had stabbed the deceased. PW3, the accused and other young men were arrested and taken to the police station by PW2.

PW4 was at home with friends during the burial preparations for his grandmother. He testified that the accused went away after some fracas with other mourners. After a short while, the accused came with a blood stained knife and said he had murdered someone ("*mtu fulani*"). Police arrested the accused later and the knife was recovered. PW5 was a minor aged 13 years. He gave evidence upon affirmation. He said he was at the mourning meeting where a fight between him and one Apondi broke out. PW5 and others ran to a nearby road and stood there. While there, he saw the accused fighting the deceased and stabbed him with a knife. PW5 and his friends left the place and went home to sleep. Police found them sleeping and arrested them. The murder weapon had been recovered by police. They were released after recording statements.

PW6 was at his grandmother's "*matanga*" (burial meeting). At some stage two groups of young men started fighting. He identified some of them as the accused namely Joseph Okenda, PW5 Boniface and PW3 Kevin. He saw the accused come with a knife and stab the deceased on the back. After stabbing him, the accused said he had finished him. The accused pulled off the knife and wiped out the blood using some leaves, put it in his pocket and walked towards his home. Before he left, the accused informed PW6's parents that he had stabbed somebody. Police came later and arrested the accused. The night was bright with moonlight at the material time according to PW6.

PW7 was also at the "*matanga*". He witnessed the fracas and later saw the deceased fall down after being stabbed with a knife. PW7 was arrested by police together with other people. PW8 just like

PW1 identified the body of deceased to the doctor who performed the post mortem.

PW9, Dr. Clifford Asava conducted the post mortem and produced the form. He formed the opinion that the cause of death was cardio-pulmonary arrest due to cardio-tamponade following to a penetrating chest injury.

The accused in his defence said that on the material day, he was at his grandmother's "*matanga*" around 8.00 p.m accompanied by Erick Wangura (PW4), Boniface Oluoch (PW5), Victor Mutimba (PW6) and Kevin Nyamwanya (PW3). His colleagues quarreled with other people and a scuffle ensued. The accused asked them to go home. As the accused and his friends were walking away, they were confronted by the rival group and beaten up. The accused escaped and went home. He was arrested the following morning together with Eric and Bonifance who are his cousins. The others were to be released later but accused was charged with the offence. He denies committing the offence.

In this case, there were two eye witnesses PW5 and PW6. they told the court that they were together with the accused at the "*matanga*" when a fight arose between one Boniface and Apondi. The accused left the home shortly and came back. The accused fought with the deceased as the two witnesses watched and then stabbed deceased with a knife. PW3 and PW4 said that the accused went to where they were holding a blood stained knife. He said that he had killed someone. Some of the witnesses were arrested from their homes the same night and interrogated before being released. PW2 the Assistant Chief arrested the accused and recovered the murder weapon. The weapon was identified in court by the witnesses PW2, PW3, PW4, PW5 and PW6. The clothes the accused wore that night were also recovered and identified in court. The doctor PW1 formed the opinion that the cause of death was excessive bleeding from the stab wound.

The accused admitted being at the scene which was at his grandmother's home where burial arrangements were being made. He admitted there was a fracas between his colleagues and later between two groups where he was involved. Although he denies the offence, I did not believe his defence. The evidence of PW3, 4, 5 and 6 is overwhelming. Two of the witnesses saw him commit the offence. It was at night but there was bright moonlight according to PW6. This light enabled PW5 and PW6 to see the accused stab the deceased. These witnesses were cousins and friends of the accused who knew him very well. They could not have confused him with any other person. The accused found PW3 and PW4 where they were and holding the blood stained knife, he told them that he had killed someone. I rule out any possibility of a mistaken identity as suggested by the defence.

The defence in their submissions intimated that PW3, PW4, PW5 and PW6 were not reliable witnesses because they had been arrested together with accused and later released.

During cross-examination of in the defence of the accused, there was no intimation that there was any grudge between the accused and the witnesses to justify any frame-up. The accused indeed referred to them in his defence as his friends and cousins.

The failure by the investigating officer to testify in this case is not fatal on the prosecution's case. There is evidence of arrest of accused by PW2. The same witness also recovered the murder weapon and other exhibits. He also handed over the accused to the police. There is therefore a nexus between the commission of the offence, the arrest and the prosecution of the accused.

It is my finding that the prosecution have proved that the accused did the act which caused the death of the deceased.

The final issue to be decided is whether the accused had malice aforethought when he killed the deceased. The prosecution's evidence is that there was a fracas followed by a fight at the scene. It started with individuals and later became a group affair. The accused in his defence said there were two groups fighting as they were going home. The accused did not plead provocation or self defence. There is evidence that he left the "*matanga*" shortly and returned after a while. This must be the time he went to arm himself with a knife. When he came back, he stabbed the deceased with the knife. The act of arming himself with a dangerous weapon and the infliction of the severe chest injury using that weapon leads to an inference that the accused knew his action would kill the deceased. I find that the prosecution have proved malice aforethought on the part of the accused. He is therefore guilty of murder as charged and is convicted accordingly.

**F. N. MUCHEMI**  
**JUDGE**

Dated, Delivered and Signed this 4<sup>th</sup> day of February 2010.

In the presence of the accused, his counsel Ms Maloba and the state counsel Mr Onderi.