



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
OF KISII

Criminal Case 63 of 2005

REPUBLIC PROSECUTOR

VERSUS

MAHIRI MWITA WANGOHA ACCUSED

JUDGMENT

The accused was charged with murder contrary to **section 203** as read with **section 204** of the **Penal Code**. The particulars of the offence were that on the 8th day of June 2005 at Mashangwa sub location, Oldoyo Orok location in Lolgorian Division, Trans Mara District, the accused murdered **Boke Sensema**, hereinafter referred to as “**the deceased**.”

The prosecution evidence against the accused may be summarized as hereunder:

On the material day at about 7.00 a.m. **Nyanswi Chacha Wambura, PW1**, the widow of the deceased, was going to their farm together with the deceased and their son, **Daniel Chacha Wambura, PW2**. Suddenly a group of people emerged from the bush. At first only two people came out of the bush but thereafter five more emerged. They attacked the deceased with pangas. They claimed that they had been arresting people and taking them to the police who kept on releasing them shortly after their arrest. PW1 said that the deceased had a land dispute with one of those people known as **Changai**. PW1 recognized the accused, and five other people whom she named as **Changai, Mbatara, Matinde, Nyamohanga and Mwame**. She said that the accused is her neighbour. His home is about a kilometer away from hers. Changai and Mahiri’s mother had been tilling the deceased’s land.

As the assailants descended on the deceased they disarmed him of a sword that was on his waist. They chased away PW1 and PW2. After a short while PW1 returned to the place where the deceased had been attacked at and found him lying down unconscious. He had a deep cut on one of the legs, forehead and the back. He had also been shot with an arrow by a person known as **Matinde** who was together with the accused. The accused was at the scene and PW1 saw him cutting the deceased with a sword.

After a while neighbours arrived at the scene and one of them went to Ntimaru police station and made a report. The police went to the scene and removed the deceased’s body to a mortuary.

PW2 corroborated the evidence of PW1 in all material aspects. He was positive that the accused was one of the people who assaulted the deceased.

Despite several adjournments at the instance of the prosecution, no other prosecution witness was availed to court. The prosecution had to close its case rather prematurely.

In his defence, the accused testified that on 8th June 2005 he left his house at 6.00 a.m. He went to Ntimaru town to check on his

tobacco that he had delivered there the previous day. On his way back he met two police officers and one Mwita Nyamotira John. They arrested him and enquired whether he knew one Mwita Nyamotira. He said that he knew him. The accused alleged that the said Mwita Nyamotira had vowed to teach him a lesson after they had differed over a certain issue. The police told him to agree with his adversary, who wanted to be paid Kshs. 5,000/=. The accused refused to pay the money and Nyamotira went away. He returned at about 1.00 p.m. together with PW1 and PW2.

On the following day the accused was asked to write a statement regarding the death of the deceased. He said that he knew nothing about it. The accused further alleged that he was kept in police custody from 8th June 2005 until 24th November 2005 when he was arraigned in court. He claimed that his constitutional rights were violated.

It is unfortunate that the prosecution was unable to avail several key witnesses. PW1 and PW2 said that one John Nyamotira accompanied PW2 to the area Chief's office where the initial report was made. Later the two made a further report at Ntimaru police station. The said John Nyamotira was not called as a witness. The arresting police officers did not also testify. The investigating officer was also not called as a witness. No reason was given as to why these witnesses could not be traced. There was no medical evidence as to what led to the death of the deceased.

The delay in arraigning the accused in court was not explained. It is not in dispute that his constitutional right as provided under **section 72 (3) (b) of the Constitution** was violated.

For all these reasons I find that the prosecution did not prove its case beyond reasonable doubt. The accused is therefore acquitted of the charge of murder and is ordered set at liberty forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT KISII THIS 8TH DAY OF MARCH, 2010.

**D. MUSINGA
JUDGE.**

8/3/2010

Before D. Musinga, J.

Mobisa – cc

Mr. Kaburi HB for Mr. Ombati for the Accused

Mr. Gitonga for the state

Court: Judgment delivered in open court on 8th March, 2010.

**D. MUSINGA
JUDGE.**