



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT BUNGOMA**

**Criminal Case 57 of 2004**

**REPUBLIC.....PROSECUTOR**

~VRS~

**ANDREW BARASA SIMIYU.....ACCUSED**

**JUDGMENT**

The accused Andrew Barasa Simiyu faces a charge of murder contrary to sections 203 as read with 204 of the Penal Code. It is alleged that on the 8<sup>th</sup> day of August, 2004, at Mahanga Village, Bokoli Location in Bungoma District he murdered Simon Wanyama Juma. He pleaded not guilty to the offence.

The facts of the case are that on the 08/08/2004 around 4.00 p.m the deceased was a pillion passenger on the bicycle of PW1 being ferried to his home at Mahanga from Bokoli market. On the way, the accused was standing on the road where the deceased pointed at him using his walking stick. The accused did not respond but walked towards the same direction where PW1 and deceased were going. There was a big pot hole ahead and PW1 stopped for deceased to alight so that PW1 could push his bicycle ahead. This is when the accused came running and snatched deceased's walking stick from him and kicked deceased on the stomach. The deceased who appeared drunk fell on the road. The accused carried him to the side of the road and left him there. The accused walked away with the walking stick. The accused was arrested by the mob and handed over to the Senior Assistant Chief (PW4) of the area who placed him in the hands of the police. PW4 also handed over the exhibit, a Somali sword to the police.

It was the evidence of the prosecution witnesses that the accused stood on the road when the deceased pointed at him with a sword as he passed him. The deceased was a passenger on the bicycle of PW1. The deceased was armed with a sword which was in a sheath and which looked like a stick. PW1 indeed called it a stick. The chief (PW4) who received the exhibit and handed it over to the police said it was a Somali sword which was about one metre long inserted in a sheath. A witness said that the sword in the sheath is normally used as a walking stick. PW1, the boda boda operator and PW2 confirmed that the deceased was drunk at the time of the incident.

The accused in defence said he was walking on the road when the deceased and PW1 in a bicycle passed him on a slow motion. The deceased pointed at the accused with a sword as if he wanted to stab him. The deceased uttered abusive language on the accused calling him a fool. He said: ***(Wewe mjinga kama wazazi wako-You are a fool just like your parents.)*** On reaching a pot hole ahead the deceased and

PW1 passed and stopped ahead. The accused found them there. The deceased had removed the sword from the sheath and pointed it at the accused. It is at this juncture that the deceased attempted to stab the accused with the sword. The accused ducked and avoided the sword. A struggle ensued and the sword fell on the ground. The accused further said that he picked the sword and ran away with it. The deceased had fallen down and a bottle full of chang'aa slipped out of pocket. The accused then surrendered to the Assistant Chief (PW4) to whom he handed over the exhibit.

It is not in dispute that as the confrontation started, the accused was either walking or standing on the road. PW1 and PW2 who were the only eye witnesses said it is the deceased who started it all by pointing at the accused with his sword (in a sheath). PW2 said the deceased challenged the accused to a fight. Both witnesses were in agreement that the deceased was drunk at the material time. PW2 said the deceased had a bottle of chang'aa in his pocket. This corroborates the defence of the accused who said that when the deceased fell, a bottle of chang'aa slipped off his pocket.

The accused in his defence denied he inflicted the injury which caused the death of the deceased. However, the accused admits there was a struggle between him and the deceased as the deceased attempted to stab him. The struggle resulted in the fall of the deceased and in the accused snatching the sword from the deceased. To this extent the accused's defence is consistent with the prosecution's evidence. PW1 said he saw the accused beat the deceased during the struggle. The accused kicked the deceased on the side of the stomach once. PW1 was standing close to the two men as they struggled and saw what transpired. PW2 watched at a distance because the bicycle had passed him and stopped ahead. He also saw the drama on the road save that he may have missed to see the accused kicking the deceased in the stomach. The deceased did not come in contact with anyone else but the accused who assaulted him. The doctor (PW6) formed the opinion that the deceased died of cardiac arrest due to trauma on the already enlarged spleen. The spleen of the deceased was enlarged and hardened, the kicking on the spleen hammered the last nail on deceased's life. The deceased had a bruise on the left wrist joint which was evidence of a struggle. I find that the prosecution have proved beyond reasonable doubt that the accused did the act which caused the death of the deceased.

In a charge of this nature, the prosecution must prove malice aforethought. From the evidence adduced by the prosecution, it is not in doubt that the deceased started the confrontation which led to the accused assaulting the deceased. It is not disputed that the deceased was armed with a sword at the material time and challenged the accused to a fight pointing the sword at him. Were it not for the conduct of the deceased as he armed himself with a sword, the accused would not have assaulted him. The accused did not prepare or plan to kill the deceased. There is no evidence of a prior disagreement or grudge between the two men.

It is my finding that malice a forethought has not been proved on part of the accused. The evidence on record cannot sustain a conviction on a murder charge. I find the accused guilty of a lesser charge of manslaughter contrary to sections 202 and 205 of the Penal Code and convict him accordingly

**F. N. MUCHEMI  
JUDGE**

Judgment dated and delivered on the 21st day of July, 2010 in the presence of the accused, his counsel Mr. Waswa and the State Counsel Mr Ogoti.

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