



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII
Criminal Case 57 of 2005**

REPUBLICPROSECUTOR

VERSUS

BOB AYUB ALIAS EDWARD GABRIEL MBWANA

ALIAS ROBERT MANDIGA ACCUSED

JUDGMENT

The accused was charged with murder contrary to **sections 203 and 204** of the **Penal Code**. The particulars of the offence are that on the 16th day of September, 2003 at Magenche sub-location in Gucha District within Nyanza Province, jointly with others not before court, the accused murdered **Kefa Nyanchoka**, hereinafter referred to as "**the deceased**". The case was partly heard by the late Hon. Justice Kaburu Bauni. The provisions of **Section 200(3)** as read with **section 201 (2)** of the **Criminal Procedure Code** were complied with and it was agreed that this court continues with the case from where Bauni J had reached.

The prosecution evidence can be summarized as hereunder:

Fredrick Makaye Nyanchoka, PW1, is the deceased's brother. He testified that on 16th November 2003 at about 5 p.m. he returned from a funeral together with the deceased, **Ezekiel Nyanchoka and Samuel Nyanchoka**. As they were having food inside a house they heard someone shouting outside the house "**today you will move out of this land**".

PW2, the deceased and the other two people moved out of the house and saw a group of people. PW1 recognised the accused as well as James Nyabuto, Joseph Nyabuto, Ayub Ojwang, Silva Oteri among others. Suddenly Silva Oteri shot the deceased with an arrow. The deceased fell down as PW1 and his brothers tried to assist the deceased, the accused and his accomplices continued to throw arrows at PW1 and his brothers. The deceased died as efforts were being made to take him to a hospital. The cause of the attack was a land dispute that existed between the family of the deceased and the family of the accused.

The evidence of PW1 was corroborated in all material aspects by **Samuel Nyanchoka, PW2**, and **David Kengere Nyanchoka, PW4** who were together with PW1 and the deceased at the time of the attack.

Dr. David Momanyi produced a post mortem report in respect of the deceased. According to the post mortem report prepared by **Dr. Olonde**, the body of the deceased was received at Kisii District Hospital

with a portion of an arrow protruding out. The body was identified to the examining doctor by relatives of the deceased. Internally, the left lung had been lacerated and the abdominal aorta had been severed. The doctor formed the opinion the cause of death was cardiopulmonary failure following severe internal bleeding.

In his defence the accused stated that on 5th September 2003 he was studying in Tanzania.

Shortly thereafter he received a report that his cousin had died at Kenyatta National Hospital. He travelled to Kenya and attended the burial ceremony. On 11th September 2003 the accused said he was at a bus stage intended to return to Tanzania when he was arrested by two police officers and taken to Ogembo Police station. When he was taken before the **District Criminal Investigation Officer**, he found that his name was not among the names of suspects that had been given to the police. He alleged that he remained at the said police station for one month and three days. On 14th of October 2003 he was arraigned in court. The accused stated that he was not in Kenya when the offence was committed.

Mr. Mogire for the accused submitted that according to PW1 the person who shot the deceased is known as Silva Oleri and therefore the accused ought to be acquitted. He further submitted that the accused's constitutional rights were violated in that he was held in police custody for a period in exceeding fourteen days as required under **section 72(3)(b)** of the **Constitution**.

Mr. Kemo, Principal State Counsel submitted that the evidence of PW1, PW2 and PW4 identified the accused as being in the group of people that shot at the deceased and his brothers. Even if the deceased was killed by an arrow that was shot by Silva Oleri, the accused was executing a common purpose with the said Silva Oleri.

From the evidence on record, it is not in dispute that on the material day the deceased and his brothers were attacked by a group of people who were armed with bows and arrows. PW1, PW2 and PW4 recognised the accused as one of the people who attacked them. The accused and his accomplices were neighbours of the deceased and his brothers who testified in court. The offence was committed in broad day light at about 5 p.m. There was no mistake in recognition of the accused. The reason for the aforesaid attack was a long-standing land dispute between the family of the accused and that of the deceased.

PW1, PW2 and PW4 said that the deceased was shot by Silva Oleri, but the three witnesses testified that the accused shot **David Ronald Arasa** who did not die. Silva Oleri was not arrested because he disappeared after the attack.

It is thus clear that the accused was together with Silva Oleri and others when they attacked the deceased and his brothers with bows and arrows. The fact that it was not the accused herein who made the fatal shot does not observe him from culpability, as long as he was with Silva Oleri when the offence was committed. Section 21 of the Penal Code provides as follows:

“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”

I find and hold that the accused, Silva Oleri and others had a common intention to either kill the deceased and his brothers or cause them grievous harm. They all had malice aforethought as defined in **Section 206** of the **Penal Code**. The accused defence of alibi is untenable when viewed against the evidence of PW1, PW2 and PW4.

As regards the accuseds contention that his constitutional right as guaranteed under **section 72(3) (b)** of the **Constitution** was violated, there is no evidence to that effect. The dates that were given by the accused are inconsistent with the record herein. The record does not clearly show when the accused was

arrested but the plea was taken on 24th October 2005. The accused may have disappeared following the deaths of the deceased and may have been arrested much later. I therefore reject the accused defence in total. I find the accused guilty of murder as charged and convict him accordingly.

DATED, SIGNED and DELIVERED at KISII this 27th day of February, 2009.

D. K. MUSINGA.

JUDGE.

Accused: I have nothing to say.

SENTENCE: The accused is sentenced to death as by law prescribed.

D. MUSINGA

JUDGE.

Delivered in the open court in the presence of:

1. The Accused
2. Mr. Mogire for the Applicant.
3. Kemo, Principal State Counsel for the Republic.

D. K. MUSINGA

JUDGE.