



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KISII**  
**CRIMINAL CASE NO.35 OF 2003**

**REPUBLIC ..... PROSECUTOR**

**VERSUS**

**JOHN NYABERI ZEBERIO ..... ACCUSED.**

**SUMMING UP TO THE ASSESSORS.**

The accused JOHN NYABERI ZEBERIO is charged with the offence of murder contrary to s.203 as read with 204 of the Penal Code in that on the night of 21st and 22nd February 2003 at Enchoro sub location Nyamira District he murdered MARY BONCHARI ZEBERIO.

The prosecution called 8 witnesses. Accused give unsworn statement and called no witnesses.

You will recall that PW1 DAVID ORINA MANYONGA who is the ass. Chief of Enchoro sub-location testified that on 27/2/03 at 9 a.m. he was informed by one MAKORI ZEBERIO that the deceased had been burnt to death. He went to her home where he found many people. He found the body of the deceased in the sitting room. It has been burnt. The body was on a mattress which was still burning. Face was burnt beyond recognition. Area Chief and A.P.s were there. MAKORI told them they suspected accused to have killed the deceased. Accused was present. They arrested him. He had a fresh bruise near the nose and on the legs. He was taken to Nyamira Police Station.

On cross-examination PW1 said that before he had arbitrated over disputes between the accused and the deceased but he had not received any complaints that day.

PW2 was JOYCE MAKRO NYANKARA. She told court that the deceased was her step-mother-in-law. Her house was about 150 meters from that of the deceased. She said at 9 p.m. on 21/2/03 she heard the deceased screaming. She did not go to her house. As she was going to a kiosk she met another daughter-in-law of the deceased who told her that she too had heard the screams and wanted to go and find out what was going on. PW2 never went to the deceased's that night.

Next day at 8 a.m. she heard screams. She saw smoke coming from the deceased's house. She rushed there and found many people. The house was locked from inside. The door was broken and inside they found the deceased's body which was burnt. Ass. Chief and A.P.s were called. Accused who was at the scene was suspected to have killed the deceased. He was arrested.

On cross-examination P.W.2 said there were two houses in the family but there was no land dispute between the members of the two families. She further stated that deceased used to drinking and start screaming. PW3 was No.201845 A.P. CPL. SILAS OTIENO who was then attached to Nyakach Chief's Camp which was a difficult location.

On 22/2/03 at a 9 a.m. he got report from one Ongori that some people had been killed. He

accompanied him to the home of the deceased where he found the body. After investigation they arrested the accused. He also said that they found a stick which appeared to be a shaft of a spear but without the spear head hidden in some flowers.

PW4 was ONGERI MOSASI MAKORI. He is a step-son of the deceased. He said on 22/7/03 at 7 a.m. he was in his house when he heard screams from the deceased's home. He rushed there and found other people had already arrived. The door had been opened. He went inside and saw the body which had been burnt beyond recognition. It was in the sitting room.

On cross-examination PW4 told court that he did not know who killed the deceased as she was killed at night. She was living alone.

DR. JOHANES ODUR was the fifth witness. He told court that he performed Post Mortem on the body of the deceased on 24/2/03 at Nyamira District Hospital Mortuary. He said the body had burns on the face and lower trunk. The legs were burnt to the bone. He concluded that she died due to severe burns -95%. He produced Post Mortem report.

PW6 JERUSHA KWAMBOKA ONDIEK said deceased was her mother-in-law. On 21/2/03 at 8 p.m. Joyce Makori (PW2) went to her house and asked her if she had heard the deceased scream. She told her no. PW6 went to the deceased's house and found it locked from inside. There were no screams. She went back to her house and slept. Next day at 7 a.m. She saw smoke from the deceased's house. She went there and found the door still locked from the inside. The windows were all locked except one which was open. She got into the house through the open window which was leading to the bedroom. She did not find the deceased in the bed room. The door leading to the sitting room from the bedroom was locked. She went out and started screaming. Neighbours arrived and the front door was broken. They found the body of the deceased on the sitting room. It had burnt. Outside in a floor bed they found a stick with bloodstains, after the area chief and ass. Chief came. Accused was arrested as a suspect.

On cross-examination she said she did not know where accused was that night. Further she said that one could gain access to the table room for the bedroom by climbing over the dividing walls as there was no ceiling. She said she did not know why accused was arrested.

PW7 was deceased's son Churchill Ongeru Osungu. He was in NAIROBI when the incident took place. He was telephoned by his wife and told his mother was dead. He arrived that evening before the body was removed. He is the one who identified the body to the doctor who performed post mortem.

PW8 P.C. GEORGE MATIKA of Nyamira Police Station went to the scene at 3.30 p.m. after they received report. Accused had already been arrested. They were also given the stick found in flower bed with bloodstains. Suspects had burns on the nose and both knees. They removed the body to the mortuary. He also said he attended post mortem on 24/2/04. However they were not able to get blood sample from the body for comparison with the blood on the stick found. He however sent the stick to Government Chemist who analysed and confirmed the blood on the stick was of a human being.

On cross-examination he said that though he was at Nyamira Police Station since 1998 he had heard no dispute between accused and the deceased.

Accused gave an unsworn statement. He told court that on 22/2/03 he was at home. His wife had given birth and he wanted to go and inform his mother. When he reached the gate he heard screams from his mother's home. He rushed there. He found other people there trying to get into the house. He went and broke into the kitchen and got a jembe which he used to break the door to the deceased's house. He said he was injured when breaking the door. Inside he got a pail and poured water on the burning body. Other people came in and assisted him to put off the fire.

After 15 minutes area Chief arrived. They went round the compound and returned with a stick which looked like firewood but they said it was a spear shaft. He was asked about it and said he knew nothing. He also told them he knew nothing about the death of the deceased. Accused said PW2-4 had a grudge

against him as he was given some land by his late father. He said PW2 used to quarrel the deceased always. Further he said deceased used to drink always and would sometimes spend the night outside.

In a nutshell that is the evidence before the court which you should consider and decide whether the accused did not murder the deceased. You should know that the main ingredients for offence of murder is the mens rea – the intention to kill and the Actus rea – the act of killing.

There was no eye witness to the incident. You have to decide whether the deceased was actually killed by another person or not. The evidence by the doctor who performed Post Mortem (PW5) said that cause of death was due to severe burns. Apart from the burns there were no other injuries on the body though PW6 suggested that deceased may have been killed before the body was set on fire. If that were so would the doctor have seen the injuries? A stick was produced in court which was said to have blood stains. Was it the murder weapon? It was not proved whose it was or that the bloodstains on it were that of the deceased.

PW1 the ass. Chief said when he arrested accused he had fresh bruises on the nose and both knees. PW8 said they were burns but there was no evidence to this. Did accused sustain the bruises while committing the offence? In his defence he explained how he sustained the injuries as he was breaking into the house. Accused was found by PW1 at the scene with the others. Do you accept his explanation as how he sustained the injuries. All those issues should be considered to decide if the deceased was actually murdered and if so by who. Accused said she used to drink. This was confirmed By PW2 in cross-examination. PW2 had said she had heard her screaming at 8 p.m. PW1 said it was PW4 who told him that the suspended accused to have committed the murder. However PW4 in cross-examination said he did not know who killed the deceased. He did not even tell the court that he suspected the accused and if so why, PW1 said the accused and deceased used to have disputes which he arbitrated upon.

You have to consider whether these disputes would have been a reason for accused to murder the deceased. He has denied doing it and there is no direct evidence. The evidence is circumstantial. You have to consider if that circumstantial evidence was enough. You may now state orally, individually your opinions. You are also at liberty to retire, consider the matter and bring your opinions to me.

**Summed up at Kisii this 22nd October 2003**

**KABURU BAUNI**

**JUDGE.**