



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CRIMINAL CASE NO. 37 OF 2012**

**REPUBLIC .....PROSECUTOR**

**VERSUS**

**OSCAR MAKWA MACHANJA.....ACCUSED**

**JUDGMENT**

1. Oscar Makwa Machanja is charged with murder contrary to section 203, as read with section 204, of the Penal Code, Cap 63, Laws of Kenya. The particulars of the offence allege that on 23<sup>rd</sup> September 2012 at Shihanga Village, Lukhose Sub-Location, Khayega Location, in Kakamega East, within Kakamega County, he murdered Kelvin Anami, hereinafter referred to as the deceased. He pleaded not guilty to the charge on 22<sup>nd</sup> October 2012. The hearing of the case by the prosecution commenced on 17<sup>th</sup> March 2015. The prosecution called six witnesses.

2. Godfrey Muhambi testified as PW1. He testified that on 22<sup>nd</sup> September 2012 at about 4.00 AM, he and Stephen Muhambi and the deceased, who were his brothers, had just gotten home from a funeral. At their gate, a group of people came from behind, and the accused told them to kneel down. He slapped PW1, whereupon the PW1 advised his brothers to run away. They all began running, shouting their mother's name, while running towards her house. He and Stephen got to the house and entered, but the deceased was too late. The accused caught up with him and slashed him on the head with a machete or *panga*. The accused then ran away after the assault. PW1 and others opened the door for the deceased, who came in and collapsed. He was rushed to hospital, but he died.

3. Stephen Muhambi testified as PW2. He was a child of thirteen years, who gave sworn testimony. He stated that they got home at 4.00 AM, on 22<sup>nd</sup> September 2012, from a funeral, when they found a group of people standing at their gate. He stated that he only recognised the accused person. PW2 was with PW1 and the deceased. The accused greeted PW1 and then slapped him with a *panga*, whereupon the three of them started running towards their home. The deceased was the one at the rear, he was cut on the head. When the door was opened for them, the deceased ran in saying that the accused had cut him on the head. He was given first aid, and, was later removed for hospital. PW2 said that the persons they found at the gate had torches, and he recognised the accused because he was in front of the group. He said that he knew the accused prior to that.

4. Pamela Asuvila Juma testified as PW3. She was the mother of PW1, PW2 and the deceased. She testified that she was woken up at about 4.00 AM, on 2<sup>nd</sup> September 2012 by the three. They were coming from a funeral. They were shouting that the accused was killing them, so she immediately opened the door for them. They got in. She noted that the deceased was injured, and he told her it was the accused who had injured him. She did some first aid on him, before arranging to have him taken to hospital. He died on the way to hospital.

5. The case for the State closed after the three witnesses testified. The state was unable to call more witnesses. The last witness testified on 17<sup>th</sup> March 2015. A last adjournment was given on 27<sup>th</sup> June 2018, by Njagi J. When the matter came up next on 8<sup>th</sup> October 2018, the State did not have witnesses, and it closed its case.

6. The accused person was found to have case to answer, and was put on his defence, in a ruling that was delivered on 19<sup>th</sup> December 2018. The defence hearing happened on 3<sup>rd</sup> December 2019. The accused person gave an unsworn statement. He testified that on an unspecified date he had just arrived from Nairobi. He arrived at Khayega township at 11.00 AM, on his way home, he met youths, who asked him to give them something, when he told them that he had nothing, they attacked him and stole Kshs. 50, 000.00 from him. He was saved by police officers. He was taken to hospital by the police, and after his discharge the police charged him with murder. He denied killing anyone. He said that he did not know the accused person.

7. None of the parties submitted at the close of the oral hearing.

8. The elements of the offence of murder, as defined in section 203 of the Penal Code, are the fact of death, the cause of the death, the role of the accused person in the cause of the death and the fact that the death is caused by the accused with malice aforethought. See *Republic vs. Stephen Sila Wambua Matheka* [2017] eKLR (Nyakundi J) and *Republic vs. Andrew Mueche Omwenga* [2009] eKLR (Maraga J). Section 203 of the Penal Code states as follows:

“203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”

9. On the fact of the death, there is overwhelming evidence that the deceased died. He died on the way to hospital, and his death was confirmed by PW3, his mother, who was among those who were taking him to hospital. She also testified that she identified his body for post mortem purposes. There is, therefore, evidence beyond any doubt that he died.

10. On the second aspect of the crime, on the cause of the death, no medical evidence was provided, as the pathologist did not testify. However, the cause of death can be presumed from the circumstances of his death. PW1 and PW2 testified that when they got to the gate to their home, the deceased was alright, until they were attacked by a group of people. He was cut on the head, in the presence of the PW1 and PW2. They said he was slashed with a *panga*. PW3 attended to the wound on the head and gave him first aid. No other injury was identified, and it can safely be said that he died of the injury to his head.

11. The third aspect is whether the death was caused by an act of the accused person. PW1 and PW2 testified that they were present when the accused attacked the deceased. They were eyewitnesses. They both said that they saw the accused strike the deceased on the head with a *panga*. PW3 testified that the deceased said that it was the accused who had injured him. Something that was corroborated by PW1 and PW2 who all said that it was the accused who pursued them, and struck the deceased with a *panga*. The accused was described by the three witnesses as a next door neighbour. They said they saw him when they were accosted at the gate, and he was the one who greeted them and told them to kneel down. They described him as the person who came nearest to them at the scene. They described the group as armed with torches, which they flashed around, hence making it quite easy for them to identify their assailant.

12. The fourth factor relates to malice aforethought. Malice aforethought is defined in section 206 of the Penal Code, as follows:

“206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances –

(a) an intention to cause the death of or to do grievous harm to any person, where that person is the person actually killed or not;

(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”

13. Malice aforethought is the intention to be inferred from either some conduct or facts. Malice aforethought is linked to the third factor, the role of the accused in the causation of the death of the deceased. It was stated, in *Matovu Vincent vs. Uganda* Kampala HCCRC No. 1362 of 2000 (Lugayizi J) and *Chesakit Matayo vs. Uganda* Kampala CACRC No. 95 of 2004 (Mpagi-Bahigeine, Engwau and Twinomujuni JJA), that malice aforethought can be deduced from such factors as the weapon used, the part of the body injured, the extent of the bodily injuries, the manner of the killing and the conduct of the accused.

14. In this case, the act or conduct leading to the death of the deceased is the assault on the person of the deceased with a *panga* wielded by the accused. PW1 and PW2 testified that they saw the accused strike the killer blow. The strike was strong enough to cause the injuries on the head, which caused the death of the deceased as he was being taken to hospital. The attack must have been vicious for it to have inflicted injury leading to death. The person inflicting the injury, that is to say the accused herein, must have intended to cause death or do grievous harm to the deceased, or he must have had knowledge that a strike on the head of the deceased with a *panga* with the force applied in the circumstances would cause death or grievous harm on the deceased, or he was indifferent whether death or grievous injury would be caused. The act or conduct of the accused person of striking the deceased in the manner described by PW1 and PW2 must have had an intent to commit a felony. The said act or conduct, or that set of facts, brings the matter within section 206(a)(b)(c) of the Penal Code. I find, therefore, that there was malice aforethought on the part of the accused person.

15. When the accused person was given a chance to defend himself, he gave a vague unsworn statement, which did not talk about where he was at 4.00 AM of 22<sup>nd</sup> September 2012. Instead he talked of being attacked at daylight as he went home on an unknown date.

16. Overall, I am persuaded that the prosecution has mounted a case that proved that the accused person was responsible for the death of the deceased. I am, in the circumstances, moved to find that he is guilty of the offence charged of murder, and I accordingly convict him, under section 322 of the Criminal Procedure Code, Cap 75, Laws of Kenya, of the murder of Kelvin Anami, contrary to section 203, as read with section 204, of the Penal Code.

17. For the purpose of determining the sentence most appropriate to mete out in the circumstances, I hereby direct the County Director of Probation, and allied services, to prepare a pre-sentence report, after interviewing the accused person and the affected families. The matter shall be mentioned thereafter for mitigation and sentence. Am alive to the decisions of the Supreme Court in *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki and Lenaola SCJJ) and *Francis Karioko Muruatetu & another vs. Republic; Katiba Institute & 5 others (Amicus Curiae* [2021] (Koome CJ&P, Mwilu DCJ&VP, Ibrahim, Wanjala, Ndung'u & Lenaola SSJJ).

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS.....10<sup>TH</sup> ..... DAY OF .....  
DECEMBER....., 2021**

**W MUSYOKA**

**JUDGE**