



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUSIA**  
**CRIMINAL CASE NO. 10 OF 2018**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**BONIFACE NYARANGA SIMIYU.....ACCUSED**

**JUDGMENT**

1. Boniface Nyaranga Simiyu is charged with an offence of murder contrary to section 203 as read with section 204 of the Penal Code.
2. The particulars of the offence are that on the 20<sup>th</sup> day of April 2018, at **Asiriam** village **Okame** sub location in **Chakol** Division of **Busia** County, murdered **Silvester Ounoi**.
3. Some villagers in Asiriam village were keeping vigil in a home where a lady had passed on. When some two young men were going home, they found the accused and others not before court stabbing the deceased.
4. The accused contended that he resides in Mumias where he was, on the material night. He therefore denied any involvement in the murder.
5. The issues for determination are:
  - a) Whether the accused was at the scene of the murder on the material night.
  - b) Whether the accused was involved in the killing of the deceased or not; and
  - c) Whether the offence of murder was established.
6. The accused in his defence pleaded an alibi. When such a defence has been pleaded, the onus is on the prosecution to prove that the said alibi is not true. The Court of Appeal in the case of **KIARIE VS REPUBLIC [1984] KLR** held:

**An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. The Judge had erred in accepting the trial Magistrate's finding on the alibi because the finding was not supported by any reasons.**

In the instant case, I will endeavor to find whether the prosecution discharged the onus in respect of the

alibi defence.

7. Two witnesses testified to have seen the accused at the scene of the offence. These are SE (PW1) and Wilson Obwaku (PW2). Let us turn our spotlight to what each said to have witnessed.

8. SE (PW1) was a 17 years old boy at the time of his evidence in court about ten months after the incident. On the night of 19<sup>th</sup> April 2019 he was in home where a lady had passed on and was keeping vigil with other mourners. At about 1 a.m., he decided to go home. On his way home, he heard some noise outside the fence of the compound. When he went to check, he found Amala, Jose and Sai pinning the deceased down and the accused was stabbing him. He returned to call Kennedy the brother of the deceased.

9. Wilson Obwaku (PW2) contended that he saw the accused and others stabbing the deceased. This witness contradicted himself as to whether there was moonlight or not whether he was the first to inform Kennedy Etyang (PW3) about the incident or SE (PW1) who did it. Kennedy Etyang (PW3) testified that he was informed about the incident by SE (PW1). The evidence of Wilson Obwaku (PW2) is very unreliable and he fits into the description of a witness who was described as such by the Court of Appeal in the case of **Ndungu Kimanyi vs. Republic (1979) KLR 282** stated:

**The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.**

10. The evidence of Kennedy Ikaslon Etyang (PW3) is that SE informed him about the incident. He found the deceased who was still conscious and who mentioned the accused as among the people who had stabbed him.

11. I therefore find that the evidence on record has displaced the alibi defence by the accused. It has been established that he was at the scene and was one of the people who stabbed the deceased.

12. In order for a conviction for the offence of murder to be founded on the evidence on record, the prosecution must prove the existence of malice aforethought. In **Black's Law dictionary, 10th Edition** malice aforethought is defined as:

**The requisite mental state for common-law murder, encompassing any one of the following (1) the intent to kill (2) the intent to inflict grievousbodily harm (3) extremely reckless difference to the value of human life (the so-called "abandoned and malignant heart"), or (4) the intent to commit a dangerous felony (which leads to culpability under the felony-murder rule).**

13. Section 206 of the Penal Code gives instances when malice aforethought may be proved. It provides:

**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, whether 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.**

14. In the instant case the prosecution has not proved malice aforethought against the accused. I however find that the prosecution has proved the lesser offence of manslaughter beyond any reasonable doubt. I acquit him of the offence of murder. I find him guilty and convict him of the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code.

**DELIVERED and SIGNED at BUSIA this 18<sup>th</sup> day of February, 2020**

**KIARIE WAWERU KIARIE**

**JUDGE**