



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 21 OF 2016**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**DISMUS MUSUDI TINDI.....ACCUSED**

**JUDGMENT**

1. **Dismus Musudi Tindi** 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 15<sup>th</sup> day of May 2014, at **Mauko** village, of **Butula** District in **Busia** County, murdered **Patrick Opanga Makokha**.
3. At about 6 p.m. a group of people descended on the home of the deceased and attacked him. When his wife intervened, she was also attacked. The accused was identified as one of the attackers.
4. In his defence the accused pleaded an alibi and denied any involvement in the offence.
5. The issues for determination are:
  - a) Where the accused was present at the scene of the offence;
  - b) Whether the prosecution has proved its case against the accused to the required standards.

When an accused person raises an alibi defence, even if he does so during his defence, the onus is on the prosecution to show that the alibi is not true. In the case of **Victor Mwendwa Mulinge vs. R [2014] eKLR** the Court of Appeal rendered itself thus on the issue of alibi:

**It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution; see Karanja vs. R, [1983] KLR 501 ... this Court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought.**

In the instant case I will endeavour to find if the prosecution discharged its burden in respect of the alibi defence raised by the accused.

7. The incident took place at about 6 p.m. according to the evidence of Evaline Opanga (PW1) and Justina Ngashi Makokha (PW2). Both witnesses in their evidence testified that they saw the accused in the group of the attackers all of whom they described as their fellow villagers and some were relatives.
8. According to the evidence of Evaline Opanga (PW1) the accused had a machete and a stick. She said the accused cut the deceased at the back near the neck.
9. The evidence of Justina Ngashi Makokha (PW2) also placed the accused at the scene. She said he was armed with a machete and a club. She testified that the accused cut the deceased with a machete.
10. These two witnesses described what the accused was armed with, apart from the machete differently, one of them calling it a club and the other a stick, in my view this is a minor discrepancy which can be excused owing to the prevailing circumstances. I therefore make a finding that the alibi defence of the accused has been displaced by the evidence on record. He was placed at the scene of the incident at the time the deceased was attacked.

11. The evidence on record by the two eye witnesses is that the accused participated in the attack that inflicted the fatal injuries to the deceased. The two witnesses testified that as the group of about nine people approached, they announced that Opanga was going to die. They were all armed. Section 21 of the Penal Code provides:

**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 therefore find that the accused herein had the common intention with his group to either do grievous harm or kill the deceased. His defence amounted to mere denial. I accordingly dismiss it.

12. For an offence of murder to be established, the prosecution must prove that the death of the deceased was occasioned by an act or omission by the accused person and that he had malice aforethought.

13. The medical evidence adduced by Dr. Hillary Kiplagat (PW5) was that the deceased had several penetrating injuries on the head, a large hematoma on the neck, blood clots on the nostrils and ears, penetrating injury on the left fore arm and at the back. The brain substance was injured. The cause of death was severe head injury. These injuries were inflicted by the accused and his accomplices.

14. Section 206 of the Penal Code gives the instances when malice aforethought is established. It states that:

**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.**

In the instant case, the prosecution has established that the accused and his group were out to commit a felony. The existence of malice aforethought has been proved.

15. The upshot of the foregoing analysis of the evidence is that the prosecution has proved its case against the accused beyond any reasonable doubt. I find him guilty of the offence of murder and accordingly convict him.

**DELIVERED and SIGNED at BUSIA this 6<sup>th</sup> day of May, 2019**

**KIARIE WAWERU KIARIE**

**JUDGE**