



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 14 OF 2018**

**REPUBLIC.....PROSECUTOR**

**-versus-**

**FRANCIS CHACHA MWITA..... ACCUSED**

**JUDGMENT**

1. **Francis Chacha Mwita** (hereinafter referred to as **'the accused person'**) was charged with the murder of one **Daniel Nyagonchera Muniko** (hereinafter referred to as **'the deceased'**). The particulars of the offence were that on 10/06/2018 at Kugisingisi village within Migori County the accused person murdered the deceased.

2. The accused person denied the charge and the prosecution availed eight witnesses in a bid to prove the charge. There were two eye-witnesses in this case who testified as **PW1** and **PW7**. They were **Francis Nyamohanga Maseke** and **Patrick Makemba Mogesi** respectively. A son to the deceased testified as **PW3**. He was one **Nyangi Joseph Nyagonchera**. Two brothers of the deceased also testified as **PW4** and **PW5** respectively. They were **Stephen Chacha Muniko** and **Samson Koroso**. A former landlord and a neighbour to the accused person one **Benson Julius Mwita Muniko** testified as **PW2**. **Dr. Vitalis Owuor K'Ogutu** who conducted the post mortem examination on the body of the deceased testified as **PW6** whereas the investigating officer one **No. 82026 Corp. Christopher Samoei** who was attached at the Isebania DCI Office testified as **PW8**. I will refer to the witnesses in the sequence in which they testified before Court.

3. It was the prosecution's case that on 10/06/2018 at around 06:00pm while visibility was very clear, the accused person so publicly and in the presence of several people including **PW1** and **PW7** murdered the deceased. **PW1** knew the deceased and the accused person so well. He used to see and eventually knew the deceased who worked at Kenya Relief Organization in Migori town where **PW1** used to visit someone whom they married from the same family. **PW1** became more acquainted with the deceased as they both stayed at the Kugisingisi village in Mabera. **PW1** also knew the accused person who ran a butchery business within their village and where **PW1** was a regular customer.

4. As **PW1** rode his motor cycle home on the material day and time, on passing Kugisingisi Primary and Secondary Schools he saw the deceased and the accused person engaged in an argument. Since **PW1** knew both the deceased and the accused person he stopped his motor cycle about 8 metres from where the two were. The argument took about 10 minutes and **PW1** patiently listened. **PW1** heard the accused person complaining that his son had been injured. **PW1** then saw the infuriated accused person remove a knife with a yellow handle from his coat and stabbed the deceased in the stomach. **PW1** screamed and the accused person escaped. Members of the public pursued the accused person as others assisted the deceased. **PW1** then left for his home as he was sending drugs to his sick child. **PW1** later recorded his statement with the police and identified the knife in Court.

5. **PW7** also had an encounter with the accused person and witnessed the events as they unfolded. **PW7** was a *boda-boda* rider. As he rode his motor cycle from Karanu area to Mabera town on the material day and time, **PW7** was stopped by a passenger who was accompanied by a boy and who asked to be taken to the police station. The boy was about 8 years old and had a small bruise on one of his hands. **PW7** obliged and carried the passengers. As **PW7** barely covered 100 metres, the accused person informed him that he had spotted the person he wanted and requested **PW7** to stop and wait for him as he rushed to meet the said person. **PW7** once again obliged. **PW7** noted that the accused person was visibly angry. The accused person then alighted from the motor cycle leaving the boy there and crossed over the road to meet the person who was on the other side. The accused person then engaged the deceased whom **PW7** knew quite well. There was a near scuffle between the two for about 5 minutes and suddenly the accused person removed a knife with a yellow handle from his coat and stabbed the deceased in the stomach. **PW7** was about 5 metres from where the accused person stabbed the deceased. **PW7** screamed for help.

6. **PW7** then saw **PW3** riding his motor cycle past him and he told him of what had happened to the deceased who was his father. **PW7** also showed **PW3** the accused person who had stabbed the deceased and was walking away. **PW3** parked his motor cycle and ran towards the accused person. He asked the accused person to stop. According to **PW3** the accused person instead drew a knife from his coat. **PW3** saw the knife with blood stains and the accused person aimed it at him. **PW3** quickly avoided the knife whose sharp end nearly cut his jacket. **PW3** was shocked and began running away. The accused person gave chase to **PW3** while armed.

7. **PW4** had been informed by some people that there was a problem at their home. As he was on a motor cycle **PW4** asked the rider to rush there. As **PW4** neared home he saw the accused person chasing **PW3** while armed with a knife and asked the rider to stop which he did. **PW4**

alighted and crossed over the road to where the two were. PW4 asked the accused person why he was chasing PW3 with a knife. The accused person then charged at PW4 and PW4 engaged him. The two fiercely fought for about 20 minutes before PW4 was able to disarm the accused person and took possession of the knife. As the fight went on, PW2 appeared and intervened on behalf of the accused person whom he knew as his former tenant and his then neighbour. The accused person then managed to escape and PW2 instead asked PW4 to rush and assist his brother (the deceased) who had by then been taken to hospital. PW4 kept the knife which had a yellow handle until the following day when he took it to the police and recorded his statement as well.

8. The deceased was rushed to Akidiva Hospital for treatment by some family members and members of public. He however passed on as he received treatment. The family reported the incident and death to Isebania Police Station on the same day and transferred the body to Pastor Machage Memorial Hospital Mortuary the following day for preservation and further police action.

9. The investigations were conducted by Corp. Ruth Anzala who at the time of the trial was undertaking a course at Kiganjo Police Training College. The matter was then passed over to PW8 who testified on behalf of the initial investigating officer. The police visited the scene on receipt of the report. They interrogated several people and requested some to record statements at the police station the following day. Indeed, they turned up and recorded their statements. The police also visited and viewed the body at the Akidiva Hospital.

10. On the following day the police were led by an informer to a house in Nyakore village near Kehancha town where they arrested the accused person who was hiding. He was escorted to the station and on the following day he was taken to Migori County Referral Hospital for mental assessment. He was found fit to stand trial. On the same day PW6 conducted a post mortem examination on the body of the deceased and found a single stab wound on the ulterior chest wall which had penetrated the chest wall and ruptured the heart, spleen and colon. Four litres of blood were collected from the pericardium. PW6 opined that the death of the deceased was due to hypovolumic shock due to internal haemorrhage secondary to assault. He filled in the Post Mortem Form which he produced as an exhibit.

11. The accused person was later formally charged. It is the forgone chronology of events that led this Court to find that the accused person had a case to answer at the closure of the prosecution's case. Placed on his defence, the accused person elected to and gave sworn evidence and did not call any witness. He denied committing the offence and remained firm that he did not know the deceased or any of the witnesses and that the charge was only, but framed against him. He contended that on the alleged 10/06/2018 he was held in Isebania Police Station having been arrested on 05/06/2018 over chang'aa drinking. He also stated that he was subsequently charged before the Chief Magistrate's Court at Migori.

12. At the close of the defence case, Learned Counsels left the matter for judgment. It is on the basis of the foregone evidence that this Court is called upon to render itself on whether the accused person is guilty as charged.

13. As the accused person is charged with an information of murder, the prosecution must prove the following three ingredients: -

**(a) Proof of the fact and the cause of death of the deceased;**

**(b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the Accused which constitutes the 'actus reus' of the offence;**

**(c) Proof that the said unlawful act or omission was committed with malice afterthought which constitutes the 'mens rea' of the offence.**

14. There is no doubt that the deceased died. All the witnesses save PW1 confirmed as such. As to the cause of death, PW6 took this Court through the Post Mortem Form which he prepared after conducting the examination and opined that the cause of death was the assault which ruptured the heart, liver and the colon. There being no other evidence contradicting the medical finding on the cause of death this Court concurs with that medical evidence. The first ingredient is answered in the affirmative.

15. On the second ingredient as to whether the accused person unlawfully caused the death of the deceased, PW1 and PW7 were eye-witnesses. They both testified on how the accused person attacked the deceased with a knife which they both identified in Court. The eye-witness account was therefore duly corroborated. PW1 knew the accused person as well as the deceased. He testified that the incident occurred in the evening when it was still not dark and he could clearly see. He stopped his motor cycle on seeing the accused person and deceased arguing since he knew both of them. He witnessed the accused person stabbing the deceased with a knife.

16. PW7 had carried the accused person on his motor cycle to the police station before the accused person saw the deceased and the accused person stopped PW7. That, he witnessed the accused person confront the deceased. PW7 stood about 5 metres away from where the accused person and the deceased were. He could hence see all what happened. Although PW7 did not know the accused person, he saw him stab the deceased, confirmed that there was sufficient light and that there was no impediment to seeing all what at sight. PW7 identified the accused person as the one he had carried as a pillion passenger and who had asked to be taken to the police station on the material day.

17. PW3 was stopped by PW7 and shown the accused person who had just stabbed the deceased. The deceased was the father to PW3. When PW3 confronted the accused person, the accused person withdrew the knife and chased PW3. It was PW4 who saved PW3 from the angry and daring accused person. PW4 fought and disarmed the accused person. PW3 and PW4 also identified the accused person in Court. PW2 knew the accused person well as his former tenant and neighbour. During the encounter between the accused person and PW4 it was PW2 who intervened and the accused person managed to escape. PW2 clearly saw and talked to the accused person whom he had earlier twice met him that day. PW2 therefore confirmed that the person who fought with PW4 and on whose behalf he intervened was the accused person in this matter.

18. The accused person however presented an *alibi* defence. He stated that on the material day and time he was in custody at Isebania Police Station awaiting to be arraigned before court having been arrested for drinking chang'aa on 05/06/2018. The accused person was represented

by Counsel. Without being seen as shifting the burden of proof which rests on the prosecution all through and resisting the urge of calling upon the accused person to prove the *alibi*, none of the prosecution witnesses were cross-examined on that aspect or at all. The accused person also denied knowing any of the prosecution witnesses including PW2 who was at one time his landlord and was his neighbour. The defence only came up at the tail-end of the proceedings.

19. This Court had an opportunity and watched the witnesses testify. The prosecution witnesses were candid and straight-forward. They also withstood and were not shaken in cross-examination. The Court formed the opinion that the witnesses were truthful and credible and their evidence reliable. A witness who deliberately causes a Court to see him/her as otherwise not a straight-forward person runs the risk of his/her evidence regarded of no probative value or such little value, if any. Based on the evidence on record against the defence this Court is not convinced that the accused person was truthful in his defence. The defence was, but an afterthought and is hereby rejected.

20. There is hence no doubt that the accused person was at the scene as alleged and proved by the prosecution. There is cogent and well corroborated evidence to that effect and, as said, the defence of *alibi* fails. I find and hold that the accused person was at the scene as alluded to by the prosecution. It was also the accused person who occasioned the fatal stab on the deceased. The second ingredient is also answered in the affirmative.

21. As to whether there was malice aforethought in the accused person causing the death of the deceased, the starting point is the law. **Section 206** of the Penal Code defines '*malice aforethought*' as follows:

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

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**(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.**

22. The Court of Appeal has also dealt with this aspect on several occasions. In the case of **Joseph Kimani Njau vs R (2014) eKLR**, the Court of Appeal in concurring with an earlier finding of that Court (but differently constituted) in the case of **Nzuki vs R (1993) KLR 171**, held as follows: -

**Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused; -**

**i) The intention to cause death;**

**ii) The intention to cause grievous bodily harm;**

**iii) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.**

**It does not matter in such circumstances whether the accused desires those consequences to ensue or not in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed. The mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder. (See Hyman vs. Director of Public Prosecutions (1975) AC 55.**

My Lordships in the above case went on to say that: -

**In the case of Isaac Kimathi Kanuachobi -vs- R (Nyeri) Criminal Appeal No. 96 of 2007(UR), the Court expressed itself on the issue of malice aforethought in terms of Section 206 of the Penal code: -**

*There is express, implied and constructive malice. Express malice is proved when it is shown that an accused person intended to kill while implied malice is established when it is shown that he intended to cause grievous bodily harm. When it is proved that an accused killed in further course of a felony (for example rape, a robbery or when resisting or preventing lawful arrest) even though there was no intention to kill or cause grievous bodily harm, he is said to have had constructive malice aforethought. (See Republic vs Stephen Kiprotich Leting & 3 others (2009) eKLR..."*

23. And in the case of **Mary Wanjiku Gitonga -vs- R (Nyeri) Criminal Appeal No. 83 of 2007 (UR)** the Court of Appeal in analyzing the evidence and on holding that there was indeed malice aforethought stated as follows: -

*We are told by counsel that there was no malice aforethought on the part of the appellant; there had been no previous tension between the two and their relationship had been cordial. For our part, we think and are satisfied that the appellant and the deceased must have had a dispute over some issue just before the deceased was killed.... Taking into account all these circumstances, including the fact that the deceased was found lying on his back in the bed wearing only underwear, the logical inference to draw is that the appellant must have attacked the deceased while he was lying in bed. She attacked him using an axe and cut him on the head. Malice aforethought is proved where an intention “to do grievous harm to any person.....” is shown.*

*In using the axe to cut the deceased on the head, the appellant as a reasonable person must have known or ought to have known that she would at the very least cause grievous bodily harm to her husband, she ended up killing her.*

*In the circumstances we see no reason to interfere with the appellant’s conviction for murder. The conviction was fully justified by the evidence on record.*

24. In this case there was evidence that PW2 was awoken by a confrontation at around 02:30 pm and on finding out what it was all about, he found the accused person who was with his son complaining about the assault on his son. PW2 did not take him serious. PW2 again heard a commotion at around 05:50 pm and on finding out he noted that it was still the accused person with his son complaining on the assault. He again did not take the issue seriously as the son only had a scratch on his palm. Again at around 06:10pm PW2 heard of another commotion and on finding out what it was all about he found that it was still the accused person, but this time fighting with PW4. PW2 learnt that the deceased had been stabbed by the accused person.

25. There is no doubt the accused person was angered by the assault on his son. The assault must have occurred at around 02:00pm or even earlier. The accused person met PW2 twice while complaining before he stabbed the deceased well past 06:00pm. The accused person had ample opportunity to report the matter to the police well before the evening. It appears that the accused period was on a revenge mission. That, he had adequately armed himself with a knife and furiously searched for the alleged assailant. It was when he could not find him that he decided to go to the police. As the accused person was on his way to the police station, he saw the deceased and asked PW7 to stop. He immediately alighted and engaged the deceased. The deceased pleaded with the accused person that the matter be dealt with at home but the accused person refused. The accused person then stabbed the deceased.

26. It cannot be said that the accused person acted on provocation. There was ample time for the accused person to have cooled off and there was no impediment to reporting the matter to the police earlier. The accused person stabbed the deceased over four hours after his son was assaulted and there was no evidence that there was any sustained provocation on the accused person for such a long period. The accused person only intended to take revenge on the deceased and when the opportunity presented itself he would not let it go. The accused person even refused the plea by the deceased for an amicable settlement of the issue. This Court is therefore convinced, finds and holds that the cumulative effect of the accused person’s conduct is that the accused person intended to kill the deceased. The position of the stab also attests to that. Even though it was only a single stab the position thereof clearly demonstrated that the accused person aimed the vital organs being aware that chances of survival were so minimum, if at all any, once such organs are shattered.

27. I now find and hold that the prosecution tendered evidence which demonstrated malice on the part of the accused person. The accused person acted with malice aforethought in this case. The third ingredient is also answered in the affirmative.

28. Consequently, I find **Francis Chacha Mwita** guilty of the murder of **Daniel Nyagonchera Muniko** as charged and do convict him under **Section 322(2)** of the **Criminal Procedure Code**, Chapter 75 of the Laws of Kenya.

29. These are the orders of this Court.

**DELIVERED, DATED and SIGNED at MIGORI this 2<sup>nd</sup> day of May, 2019.**

**A.C. MRIMA**

**JUDGE**

**Judgment delivered in open Court and in the presence of:**

**Mr. Brian Mboya**, Counsel for the Accused person.

**Mr. Kimanathi**, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the State.

**Evelyne Nyauke** – Court Assistant.