



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO 25 OF 2014**

**REPUBLIC.....PROSECUTION**

**VERSES**

**FLORA MAKOIYA.....1<sup>ST</sup> ACCUSED**

**ARNOLD BARASA.....2<sup>ND</sup> ACCUSED**

**ANTHONY WANYONYI.....3<sup>RD</sup> ACCUSED**

**STEPHEN WAFULA KWEYU.....4<sup>TH</sup> ACCUSED**

**BENJAMIN KHAEMBA.....5<sup>TH</sup> ACCUSED**

**JUDGEMENT**

1. The accused were jointly charged with the offence of **Murder contrary to Section 203 as read with Section 204 of the Penal Code**. The particulars of the charge were that **on the 5<sup>th</sup> day of April, 2014 at Simatwet village within Trans Nzoia County murdered GLADYS MASISA**.

2. The accused denied the offence and the prosecution called several witnesses to establish its case. The accused at the close of the prosecution case were placed on their defence and each gave unsworn evidence and did not call any witness. Before looking at the merit or otherwise of this matter it's appropriate to summarise the evidence as presented during trial.

3. **PW1 VA** testified that she was a class 8 pupil at [particulars withheld] primary school and the deceased was her mother. She said that she was at home on the 5.4.2014 when after lunch her mother went to visit her friends. She remained with F and the rest of the children.

4. The accused and the others attacked them and begin cutting the house and they assaulted the rest of her sibling including F using a metal bar. She managed to see the accused persons assault the deceased near a river bank. She rushed to a neighbour where she managed to call one Margret the sister to her mother. Later the police came and took the deceased body. The said witness also identified the hoe or jembe used to assault the deceased.

5. **PW2 Dr. Blustus Kagundi** produced the post-mortem report on behalf of Dr. Odhiambo who carried out post-mortem exercise on the body of the deceased and concluded that the cause of death was cardiopulmonary arrest due to severe head and chest injury as well as severe bleeding internally.

6. **PW3 FM** testified that she was a daughter to the deceased herein and that on the material day at 3.00 pm she was at home. She heard screams from the neighbours and she told PW1 to check what was taking place. While at that the 3<sup>rd</sup> accused came from behind the house and attacked her after removing her from under the bed. He then took her to the road and together with the rest of the accused continued to beat her.

7. Her mother came screaming and they attacked her as well and she managed to escape in the process but the accused kept on beating her. She ran to some house in the neighbourhood but was told not to stay there. She ran to some bush and she saw the deceased being beaten and stripped of her clothes. She was equally drowned in the river. She managed to get a boda boda which took her to the hospital.

8. She said that she had been defiled by one of the accused relative who died in prison while serving a 20 year sentence. He was called Dickson Nyongesa. She further stated that she was aware that her mother had been threatened and had reported the matter to the police.

9. **PW4 Wesley Kibet Kemei** testified that he heard some screams from Moi farm that afternoon while at home and within a short time

some lady came calling and screaming and he followed her. She found the deceased injured and naked and he saw the accused persons assaulting her. There were people from his area and he knew them very well. Police arrived after she had died and the assailants had already taken off.

10. **PW5 PC Theophilus Mutie** from Kitale police station carried out the investigation and recorded witness statements. He said that the cause of the incident was as a result of the death of the accused relatives who died in prison while serving a 20 years sentence after being convicted of defiling PW2. He said that the prisoner died from some illness.

11. The said PW2 was a daughter to the deceased and that she had already been threatened and had reported the matter at the station. He produced the occurrence book. He also produced an undated photograph showing some of the accused standing next to the naked body of the deceased. They seemed to be holding some objects which they had used to assault her. The maker of the said photo was not traced as well as other witnesses who had fled the area after the incident.

12. When placed on his defence **DW1 Flora Mukolye** in her unsworn defence stated that she was from her casual work at around 2pm when she heard people screaming ahead of her. The deceased was surrounded by many people and police from Sirende arrived shortly and took her. After 5 days she was arrested. She denied the offence.

13. **DW2 Arnold Barasa** testified vide his unsworn evidence that he does matatu business and while on duty on the material day his neighbour called Barasa came and told him of a lady who was being attacked. He went to the scene with 7 others and found many people. The police came and took the body.

14. **DW3 Anthony Wanyonyi** in his unsworn evidence testified that on the material day he went on with his farming business and went back home at 3 pm. On the way he heard people screaming and she met a lady who told him that there was retaliation over the man who had died. He went to the scene and told the mob not to burn the house and that they should not attack the child who was innocent. He was also assaulted by the crowd and tore his shirt. She managed to escape and people descended on him and in the process she saw the body of the deceased who was the mother of the lady he had saved. The police came and took the body and was arrested 5 days later.

15. **DW4 Stephen Wafula Kweyu** testified too and in his unsworn evidence stated that he was at home that afternoon splitting timber. He said that he saw a child coming to him and told him that her mother was being attacked. He took her home and left her with his wife and went to the scene and saw the deceased body. He said that the deceased was his neighbour. The police came and took the body and he was arrested after 3 days.

16. **DW5 Benjamin Wekesa Khaemba** too gave unsworn evidence denying the charge. He said that he had gone to assist one Baba Allan to plan maize. He was also with one Wycliffe Juma. At around 3.00 pm he heard people screaming and they rushed to the scene and on the way he met pw3 who was holding a child. He accused her of stating that he wanted to kill her yet he saved her life. He said that there were no witnesses who produce a panga which he allegedly used to attack the deceased. He said that he was stoned while he attempted to save PW3. He said that he was innocent of the offence.

### **ANALYSIS AND DETERMINATION**

17. The court has perused the entire proceedings and the submissions by the counsels on record. What is evidently clear is that the death of the deceased was as a result of the imprisonment and subsequent death of one Dickson Nyongesa in prison who had been charged and convicted of the offence of defiling PW3. As clearly explained by the investigating officer the assailants were not happy and the target was the deceased who was the mother to PW3 and who had complained of the threats as per the copy of the occurrence book produced.

18. Although the people who had threatened her were not mentioned in the O.B it was common knowledge that the same was as a result of the defilement matter.

19. The centrality of the evidence against the accused is on identification. I have examined carefully the evidence of PW1, 3, and 4 and invariably they all explained what they saw. Although there could be slight variance on what the assailants carried in form of the weapons used to attack the deceased, this court is satisfied that the witnesses managed to see them during the incident.

20. It has not been disputed by the accused in their unsworn evidence that they were not known to the witnesses. They were all neighbours and that was not disputed. They have not equally denied that they were not at the scene. Each of them in their evidence tried to explain what they did and how they saw the incident.

21. Looking at the evidence of the three eye witnesses I have tried to see whether there could be a case of mistaken identity. Is it possible that in the nick of time and the distress that the witnesses were going through they could be a possibility of such mistake?

22. The incident occurred around 3.00 pm a fact admitted across the board. PW1 and 3 described the weapons used by the assailants. Although not recovered the nature of injuries suffered by the deceased as found by the pathologist were consistent with such.

23. Then there was the production of the uncertified photograph which was not disputed by the parties. Although the maker was not called to produce and the reasons were explained by the investigating officer, the same in the manner taken shows some of the accused standing next to the deceased naked body and they are holding crude weapons including a hoe/jembe.

24. None of the accused denied that they were not present at the scene and thus it can be concluded that they are actually the once who attacked the deceased contrary to what they have stated in their defence. Granted that the weapons were not produced, the mere fact that they were mentioned by the witnesses and can be seen in the photo leads this court to conclude irresistibly that they were the once used to injure

the deceased and caused her death.

25. On the question of the accused unsworn evidence, the same is of no probative value as they were not cross-examined. Nobody for instance could tell whether DW3, 4 or 5 assisted any of the witnesses and in the process were also injured. There was no production of any medical documents to indicate any injuries they may have suffered. The said defences in totality are hereby rejected. They did not bother to call any witness to back up their defence.

26. Consequently I find that the ingredients of murder have been established against each and every accused person. There was a common intention to kill the deceased and that was to avenge the death of Dickson Nyongesa who had died in prison. The accused had malice and despite coating it to look as though it was a mob justice the witnesses were able to positively identify them. There was nothing that could have stopped the witnesses from seeing the attack as the same took place in broad daylight. The accused and the witnesses were neighbours who knew each other well. In a nutshell there was no case of mistaken identity.

27. In the premises each of the accused person is found guilty of murder under the provision of Section 203 as read with Section 204 of the Penal Code.

28. Orders accordingly

**Dated ,signed and delivered in open court at Kitale this 6<sup>th</sup> day of June, 2019.**

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**H. K. CHEMITEI**

**JUDGE**

**6/6/19**

**In the presence of:-**

**Mr. Omooria for State**

**None appearance for the Accuseds**

**Accused 1, 2, 3, 4 & 5 - present**

**Court Assistant - Kirong**

**Judgment read in open court.**