



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 42 OF 2014**

**REPUBLIC .....PROSECUTOR**

**VERSES**

**DANIEL MABONGA SIMIYU.....ACCUSED**

**JUDGEMENT**

1. The Accused was charged with the offence of **Murder contrary to Section 203 and 204 of the Penal Code**. The particulars of the offence were that **on the 10<sup>th</sup> day of August, 2014 at Amani area within Trans Nzoia County murdered WHYCLIFF SIFUNA MAKARE.**
2. The Accused denied the charge. The prosecution called several witnesses to establish its case. Their evidence is worth summarising at this juncture and thereafter what the accused said in his defence.
3. **PW1 Kepha Joshua Mulongo** testified that he was a chairman of **"nyumba kumi"** in his area. On the material day while in his house he heard a lady screaming from the homestead of the accused. He rushed to the scene where he found the deceased sitting and injured. He said to him that he knew those who had killed him. He could not however stand. He called his friend, PW2, to assist him but he could not as he was already drunk. He hit him with a walking stick. The friend hit him too and he lost consciousness and he found himself in his house. The deceased however did not tell him who had assaulted him.
4. On cross examination he said that there were many people at the scene and it was said that the deceased had an affair with the accused wife. He maintained that he did not know who had injured the deceased. The knife that was used to injure him was recovered at a water tank by the police the following day.
5. **PW2 Fred Wanjala Wanyonyi** testified that on the material day at around 9.30 p.m he was heading home when he heard screams from the accused home. He rushed to the scene where he found PW1 and the deceased who had been injured. The accused's wife ran away when he told PW1 that this was a police case and although he pursued her he was unable to apprehend her. He said that he argued with PW1 who hit him with a stick and he in turn hit him using his fist and he felt down. He left for his home and the following day police arrived and he was taken to Sikhendu police station where he recorded statement.
6. On cross examination he said that he did not know who injured the deceased. He said that he fought with PW1 for he did not want to take him to the hospital and that both of them were drunk.
7. **PW3 Dr. David Mugabi** carried out the post-mortem exercise and concluded that the cause of death was severe head injury with bleeding into the brain caused by a penetrating object.
8. **PW4 Martin Wangila Mati** testified that on the material day he was at the house of the accused taking alcohol. The accused wife was with the deceased on a shade drinking. He said that 6 people came with torches and rungun and the accused began assaulting the deceased. He was armed with a knife and he used it to stab the deceased. They tried saving the deceased together with the village elder, "mkasa" PW1. They left him with the deceased and they went away. He said that there was moonlight and he could see the deceased and the accused wife very well. He said that it was alleged that the deceased had a love affair with the accused wife.
9. On cross examination, he said that people were taking changaa at the homestead and that when he arrived the accused was not there but was called by one Kanyoni although he was not very sure. He said that the accused was with 6 other people whom he did not know and were armed with rungun and pangas. The accused was armed with a knife. He insisted that it was the accused that stabbed the deceased.
10. **PW5 Fred Simiyu Ambani** testified that he was at the accused's home on that night taking alcohol. The alcohol was sold to them by Peninah, the accused wife. The deceased was taking alcohol with the deceased wife outside while he was at the kitchen. He then saw 6 people led by the accused with torches and the accused said **"ndio huyu"**. They descended on the accused and beat him up and the witness ran away. He said that the accused was his cousin and that the deceased died at the scene although he changed his mind that he died at the

hospital.

11. On cross examination he said that he got to know Nelson Juma who was in the group. He said that he did not see who assaulted the deceased.

12. When placed on his defence, the accused gave unsworn evidence, and he said that he worked a Kiptagich tea factory in Olenguruoni. He said that on the material day he asked for permission from his place of work and came home. He arrived home late and found the radios volume very high and he knocked at the door and her 13 year old child opened the door for him.

13. He then asked her where her mother was and she answered that she may have gone to some circumcision ceremony which was nearby. He then knocked the bedroom door and she opened and went back and sat on the bed. As he approached the radio so as to reduce the volume someone hit him on the back of his head and he felt down. He said that he did not see that person but he was kicked and beaten and that he could not defend himself.

14. He however managed to escape outside and called for help. The deceased could not run away as he was unable to get out of the bedroom since the same was locked and it had to be broken. The deceased was brought out with the accused wife and made to sit down by the Kenya Police Reservist. They beat him up because of infidelity and PW1 came to calm things down but he was also assaulted till he became unconscious. A motorcycle was brought courtesy of the accused and the deceased was taken to the hospital.

15. The accused discounted what the witnesses said for the simple reason that they were drunk and were standing far off especially PW4.

16. The accused closed his case and did not call any witness.

### **ANALYSIS AND DETERMINATION**

17. The offence of murder under the provision of Section 203 of the Penal Code is defined as,

***“any person who of malice aforethought causes death of another person by unlawful act or omission is guilty of murder”.***

18. What the court shall endeavour to establish is whether in the light of the evidence at hand there was established malice aforethought on the part of the accused.

19. The parties have filed written submissions through their respective counsels on record and this court does not see the need to reproduce them save that it has perused them exhaustively.

20. In line with the above definition can it be said that the evidence as adduced by the prosecution points irresistively to the accused culpability? The incident admittedly occurred in the homestead of the accused where there was sale and consumption of alcohol namely changaa. Most of the witnesses admit that they were drunk and it appears that after the incident or during the incident most of them took off.

21. The cause of death was summarised by PW3, the doctor who performed the post mortem on the deceased body. There was no production of the murder weapon as the investigating officer did not testify. Nonetheless the cause of death and the weapon used was consistent with the findings of the pathologist. It was not clear though where the deceased died, whether in the hospital or at the scene.

22. The star witness was PW4 who said that the accused came with 6 people and started attacking the deceased. The accused was known to him as they were cousins. He went on to state ;

***“The accused faced the deceased. He began assaulting the deceased. He had a knife. He stabbed him with the knife. We started to save the deceased.”***

23. He said that there was moonlight and he could see what was taking place and that the deceased was sitting with the accused wife whom it was alleged had an affair with. Even at cross examination he maintained that he saw the accused stab the deceased.

24. PW5 equally corroborated what PW4 had stated that the deceased was taking alcohol with the accused wife when the accused arrived with 6 other people and the accused exclaimed , ”ndio huyu”. The deceased according to him was beaten by the mob. Although the said witness in the cross examination said that he did not see who assaulted the deceased, by the time he took off, the accused and others were assaulting the deceased.

25. The accused gave along unsworn defence and he seemed to have laid blame on other people who came to the scene when he raised alarm. What cuts across is the silence from his wife who takes up the centre stage in all the evidence by the witnesses. It appears that she had an affair with the deceased and in my view this was the cause of the beef between the deceased and the accused.

26. The fact that she took off in the whole melee explains the rumours that had gone round in the village. In fact PW2 states that when he mentioned to the village elder PW1 that this was a police case the said lady took off and he could not be apprehended.

27. The defence by the accused does not hold much taking into consideration that it was not subject to any cross examination. The same has no probative value.

28. I find the evidence of PW3 consistent and although the parties appear to have been drinking I find that the accused came with some other 6 people who under their guidance deliberately descended on the deceased and assaulted him. The same was premeditated as can be seen from PW4 evidence. Although he may have been assaulted by other people as well, the accused played a major part.

29. The evidence as tendered by the prosecution is both direct and circumstantial in my view. (*See Sawe vs. Rep (2003) KLR 363*). Although the witnesses may have run away they left when the deceased was being attacked by the accused and within his homestead.

30. In the premises, I find that the prosecution has established its case beyond any shadow of doubt. The murder weapon for some reason was not produced as the investigating officer did not testify. However this was premeditated action by the accused. He may have come from his place of employment that day and prepared to attack the deceased who was rumoured to have had a love relationship with the deceased.

31. I therefore proceed, which I hereby do to convict the accused herein for the murder of the deceased under the provisions of Section 203 of the Penal Code.

**Dated, signed and delivered this 16<sup>th</sup> day of October, 2019.**

---

**H. K. CHEMITEI**

**JUDGE**

**16/10/19**

**In the presence of:-**

**Mr Omoria for State**

**Vigundo holding brief for Abari for Accused**

**Accused – Present**

**Court Assistant – Kirong**

**Judgment read in open court.**