



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 37 OF 2011**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**JAMES NYAMBEYA SERERIA.....ACCUSED**

**JUDGMENT**

1. **JAMES NYAMBEYA SERERIA**, the accused person herein, was charged with the offence of murder contrary to **Section 203 as read with Section 204 of the Penal Code**. The particulars of the offence were that on 17<sup>th</sup> February 2008 at Mashangwa village in Transmara District of the Narok County jointly with others not before the court murdered **MAGIGE CHACHA MAGIGE**.

2. The accused pleaded not guilty to the said charge and a trial ensued in which the prosecution, despite their indication at the start of the trial that they will present the evidence of 6 witnesses in support of their case, presented the evidence of only 2 witnesses whose testimony was as follows:

3. **PW1 REBECCA GOBI CHACHA**, who was the prosecution's key witness, testified that on 17<sup>th</sup> February 2008 at about 1p.m. she was at her home where she had brewed busaa for sale when 4 people, who included the accused herein, came to purchase the alcohol after which they sat outside the house while drinking the said liquor. She named the customers present as the deceased herein, Marwa Mariba and one Kiratu Sereria. She stated that after about 5 minutes she heard noises from outside and saw someone getting into a cow shed and that the said person fell down and was bleeding. She checked and discovered that it was one Magige, the deceased herein.

4. She stated that she saw 3 people following the deceased and that the 3 were the accused herein, one Marwa and Kiratu Sereria and that they were beating him. She raised an alarm and neighbours came to the scene and took the injured person to the hospital.

5. PW2 was **NO. 88093 P.C. WEPUKHULU DAVID**. His testimony was that he was standing in for one Inspector Alfred Diema (deceased) who had investigated the case. He stated that the information contained in the police file showed that a report was on 18<sup>th</sup> February 2008 made to Mashangwa Police Station regarding a case of murder but that the said inspector Diema did not visit the scene due to heavy rains. He further stated that the investigations revealed that the deceased was assaulted by the accused together with others not before the court following an argument that had arisen at the busaa drinking den.

6. This marked the close of the prosecution's case and on being placed on his defence, the accused gave an unsworn statement and did not call any witnesses. He explained the circumstances under which he was arrested while walking to his home from work and denied any involvement in the murder of the deceased.

**Analysis and determination**

7. I have carefully considered the evidence tendered by the prosecution witnesses and the accused's defence. The issues for determination are:

- a) **Whether the prosecution proved the death of the deceased and the cause thereof.**
- b) **Whether the prosecution proved that the deceased's death was caused by an unlawful act and/or omission the part if the accused.**
- c) **Whether the prosecution has proved that in committing the offence, the accused had the necessary malice aforethought.**

8. **Section 203 of the Penal Code** defines murder in the following terms "Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder." Thus the central ingredients of the offence of murder are:

a. an unlawful act or omission on the part of the accused.

b. malice aforethought

9. On the other hand, **Section 206 of the Penal Code** provides as follows:

“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 one 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”

10. From the above definition, the Prosecution must thus prove that the accused person herein had the intention to cause the death of or to do grievous harm to any person: that he had the knowledge that his act or omission causing death would probably cause death either to the person intended or to some other person; that he had the intent to commit a felony or that he had an intention by the act or omission to facilitate the escape from custody of any person who had committed or attempted to commit a felony.

11. In the instant case the PW1 testified that she saw the deceased get into a cow shed and that he was bleeding before he fell down. She at the same time also stated that she saw the accused, who was in the company of three other people, following the deceased and that they were beating him with sticks and panga. What was not clear was what happened first. Did she see the deceased falling down or being assaulted before he fell down? The witness did not specifically state how far she was from the deceased and his alleged assailants and what weapon the accused used in assaulting the deceased. The witness did not state if the accused and the deceased had any disagreements that could have led to the assault even though she claimed that the accused, the deceased and 2 other people were, 5 minutes before she witnessed the alleged assault, taking busaa outside her house. PW1 did not even state if the deceased died as a result of the said assault. It is worthy to note that no post mortem report was produced to show firstly, that the deceased died and secondly, the cause of his death. It is therefore my finding that the prosecution did not prove the death of the deceased and the cause thereof which are very essential ingredients in establishing the offence of murder. Needless to say, having failed to prove the alleged death, it follows that the ingredient that the death was caused by the unlawful act or omission on the part of the accused was also not proved.

12. I similarly find that the prosecution failed to show that the accused had malice aforethought or any ill motive against the deceased that could have propelled him to cause his death. The evidence of PW1 was not corroborated by any other evidence even though she stated that there were many people in her home to whom she was selling the traditional liquor including the people who allegedly took the deceased to hospital. In the case of **Bukenya vs Uganda [1972] EA 549**, the Court of Appeal held that failure to call crucial witnesses by the prosecution entitles the court to make an adverse conclusion against the prosecution and acquit the accused person. In my humble view, the failure to call crucial witnesses weakened the prosecution’s case to the extent that they failed to prove their case to the required standards. The gap created by the failure to call important witnesses is a doubt whose benefit I must give to the accused.

13. In a nutshell, I find that the prosecution’s case was not only underwhelming but also fell way below the standards expected in any criminal case and more so in a capital offence such as the one before the court where the only punishment upon conviction, is a death sentence. The evidence was not clear on how the deceased met his death if at all he died. Not even the relatives of the deceased came to court to testify on his alleged death. As I have already stated in this judgment, there was no medical proof of death and the cause thereof. I am not satisfied that the case before me was proved beyond reasonable doubt.

14. Consequently, I enter a verdict of Not Guilty and I acquit the accused person of the offence of murder under **Section 306(2) of the Criminal Procedure Code** and set him at liberty unless he is otherwise lawfully held.

15. It is so ordered.

Delivered, dated and signed in at Kisii on **6<sup>th</sup> day of March, 2018.**

**W.A. OKWANY**

**JUDGE**

**In the presence of:**

- Mr. Otieno for the State

- Mr. Okenye for the Accused

- Omwoyo court clerk