



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CRIMINAL DIVISION**

**CRIMINAL (MURDER) CASE NO. 26 OF 2010**

REPUBLIC .....PROSECUTOR

VERSUS

SILAS MMBO.....ACCUSED

**J U D G M E N T**

**Introduction**

1. The accused herein has been charged with the offence of murder contrary to section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that on the 31.07.2010 at Saosi Village Shamakhokho Location in Hamisi District within Western Province murdered Elikana Murefu. The case herein was heard by two judges who have since been transferred. Judge Mrima who heard the case to its conclusion was unable to write the judgment due to ill health and asked this court to write and deliver judgment. This court complied with section 200 of the Criminal Procedure Code, hence this judgment. The delay in writing and delivering the judgment is thus regretted.

**The Prosecution Case**

2. The prosecution called a total of five (5) witnesses to prove their case against the accused herein. PW1 Peris Luyove told the court that on the 31.07.2010 at about 6.00pm she was at home having come from a funeral. She heard the deceased say “oi mama” and saw him fall down. She also saw the accused who was standing next to the deceased and she told him (Accused) to leave the deceased alone. She ran where the deceased was lying and tried to make his stand but he was not able to stand. The deceased then crawled to his house.

3. She testified further that she saw the accused assault the deceased with a stick (PEX1). The deceased had been hit on the back. She raised an alarm which attracted people including one Samuel who she instructed to do first aid on the deceased. The accused ran away from the scene. Police were called at around 7 pm but the deceased succumbed to the injuries an hour after the assault.

4. She also testified that there was no quarrel over anything though she added that there was a circumcision ceremony in the area and that the deceased wanted to circumcise one of his sons. She later learnt that one of the deceased sons had been circumcised traditionally and that is what brought about a quarrel between the accused and the deceased

5. On cross examination PW1 clarified to the court that the deceased used to drink alcohol and that during circumcision ceremonies people generally drink alcohol. She further explained that there was firewood

where the people were drinking alcohol and that the deceased did not fall on the firewood but he fell in a ditch. She confirmed that she heard screams but did not see accused assault the deceased. She also stated that when she went to the scene she saw accused who immediately ran away.

6. PW2 Samuel Mukasa was also at the scene on 31.07.2010 at about 6.00pm. He testified that he was at the time chatting with the deceased who is his younger brother. As they were chatting the accused started a quarrel and threatened to kill them both. The accused did not want his sister Eunice's son to be circumcised at their homestead as he did not want a strange blood to mix with that of their family. According to PW2 the accused took those issues seriously while but PW2 and deceased did not share his views. When PW2 left to go to the toilet to relieve himself he heard screams. The accused had hit the deceased on the chest with a stick (PEX1) and the deceased died outside his house. PW2 ran away for fear of his life. He went and reported the incident to Isaac the village elder. The police were informed and they went to the scene but the accused had gone into hiding. PW2 witnessed the post mortem examination on the 6.8.2010. He concluded his testimony by stating that whenever the accused became drunk he usually quarreled with the father claiming he would kill someone.

7. In cross examination PW2 testified that he saw PW1 on that day as she was the first to arrive at the scene. He added that the toilet where he went to relieve himself was about ten (10) meters from where the deceased was. He explained that they were seated in front of the house before he went to the toilet. He confirmed that he heard screams while he was in the toilet and that the accused hit the deceased while he (PW2) was in the toilet. He did not see the accused hitting the deceased. He further explained that PW1 was tethering the cows when the incident occurred and she (PW1) was outside her house. He added that the deceased used to drink and that during circumcision ceremonies all of them would drink a lot of alcohol.

8. He also testified that the deceased was unhappy because the accused had not gone to the circumcision place to take care of Franco who is a grandson of the deceased. PW2 was re-examined and he testified that he saw the accused hit the deceased and that he came out of the toilet when he heard screams. When he came out he saw accused holding a stick. He added that the accused hit the deceased without the deceased anticipating it.

9. PW3 Margaret Alima the wife to the deceased confirmed that on 31.07.2010 when she arrived home at 5.00pm she found her husband dead and there was a crowd in her home. She inquired about what happened and was told that the accused is the one who had hit the deceased.

10. PW4 No.61365 CPL Joseph Ngatia was on duty on 31.7.2010 when he received a report from the OCS Serem Police about a murder incident of within Saosi Village. Together with PC Mwai and PC Orita they went to the scene where they found the body of the deceased which was inside the house. On inquiry he was informed that the deceased had quarreled with the son over the circumcision of the grandson of the deceased. The accused was bitter that the deceased had allowed the circumcision of the grandson in their home. Later the accused hit the deceased on the back causing his death. PW4 stated that no visible injuries could be seen on the deceased's body. The body of the deceased was removed by police from Vihiga police station and they arrested the accused from one of the abandoned houses where he was hiding and also recovered the piece of firewood in the same house.

11. The firewood was produced as PEX1. PW4 stated that the accused was sober when he was arrested and on examination he was found to be of sound mind as shown in the P3 form PEX2. On cross examination PW4 explained to the court what investigations he carried out and his findings therefrom. He denied a suggestion by the defence that he was behind the house and not at the scene of crime.

12. PW5 Dr. Masika Collins a medical officer stationed at Emuhaya Hospital testified that he conducted a post mortem examination on the body of Elikana Murefu on 6.8.2010. His observations were that the body had bruises on the abdomen and back. The digestive system had blood in the peritoneal cavity that is inside the abdomen. The spleen was ruptured. He formed the opinion that the cause of death was intra-abdominal haemorrhage secondary to spleen rupture. He filled and signed the post mortem report which he produced as PEX3. The prosecution closed its case at this juncture and this court found that a prima

facie case had been established against the accused person who was placed on his defence.

13. After the court complied with section 306 of the Criminal Procedure Code, the accused opted to give an unsworn statement.

### **Defence Case**

14. In his defence the accused did not call any witnesses. He told the court that on 30.7.2010 he prepared firewood up to 3.00pm. His father was unwell. He saw his father at a distance from the river where he had taken the cows to drink. His father collapsed and he ran to help him. He then assisted him and took him to his house and left him there and went to look for pain killers.

15. When he was coming back he saw police officers who arrested him on allegations that he had killed his father. He was later charged. He denied the allegation that he assaulted his father.

### **Analysis of the evidence.**

16. From the evidence the incident that led to the deceased death happened at the deceased homestead. It happened in the evening at about 6.00pm on the 31.07.2011 identification of the accused was therefore positive. He was properly placed at the scene of crime by PW1 who testified that he saw him with a stick(PEX1) which was later recovered at the home in an abandoned house where he was hiding. PW4, the investigating officer told the court that during his investigations he had established that the deceased had quarreled with his son over the circumcision of his grandson. That the accused got bitter that the deceased had allowed the circumcision of the grandson in their home and for that reason the accused is said to have ahead and hit the deceased on the back resulting to his death.

17. The post mortem report has shown that the cause of death was as a result of a ruptured spleen. PW5 formed the opinion that the cause of death was intra-abdominal haemorrhage secondary to spleen rupture.

### **Issues for Determination and Conclusion**

18. The accused person herein faces a charge of murder. The prosecution has the burden to prove the charge against the accused person beyond any reasonable doubt. The issues that arise for determination in this case are;-

(1) Whether the accused inflicted an injury which caused the deceased's death.

(2) Whether at the time the accused inflicted the said injury the accused had malice aforethought. I have isolated these two issues after a careful analysis of the prosecutions as well as the defence cases, and the submissions by both counsel.

19. Regarding the first issues as to whether the accused person inflicted the injury which caused the deceased's death, both PW1 and PW2 testified that it is the accused who inflicted injury to the deceased herein. Their testimonies which corroborate each other and which are consistent show that the accused was with the deceased on the 31.07.2011 at about 6.00pm. They saw the accused hitting the deceased with the stick. According to their testimonies, the accused hit the deceased on the back, as a result of which the deceased suffered a ruptured spleen. According to PW2 the accused hit the deceased by surprise as the deceased did not expect his son to hit him. PW5 confirmed that the injuries sustained by the deceased were on his back. The findings of the post mortem report are thus consistent with the testimonies of PW1 and PW2.

20. The accused has claimed in his defence that the deceased collapsed and that he only ran to him to assist him. He claims that his father was ailing and that he tried to assist him and even went to buy him pain killers.

21. I find that the accused person's defence is hollow and is not supported in any way. He was properly

placed at the scene by PW1 who is his grandmother and who saw him hit the deceased with a stick. I find that the prosecution proved that the accused person herein is the one who inflicted the injury which caused the deceased's death.

22. Murder is defined in Section 203 of the Penal Code as follows. "203 Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder."

23. The prosecution has shown that the accused is the one who inflicted the injury on the deceased which caused the deceased's death. The second issue is whether at the time the accused inflicted the injury, the accused had malice aforethought.

24. Malice aforethought is an important ingredient for the offence of murder which the prosecution has to prove. Section 206 of the Penal Code defines malice afore thought as follows;-

"206 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.

25. From the evidence by the prosecution it is evident that the act by the accused of hitting the deceased with a stick (PEX1) was an unlawful act which inflicted an injury which caused the death of the deceased. At the time of inflicting the said injury that led to the deceased's death the accused had formed the necessary malice aforethought to cause either death or grievous harm to some person.

26. PW2 explained in his testimony that while he was chatting with the deceased the accused went to the deceased's house and started a quarrel. PW2 explained the cause of the quarrel to be that the accused did not want the deceased grandson who was a child to his sister to be circumcised in their homestead but the deceased went ahead and allowed the circumcision. Accused was annoyed and in his anger picked the stick and hit the deceased by surprise. He then ran into hiding. PW2 also stated that when he later saw the deceased's body, he said that that was what he wanted to see. From such utterances, it is clear that the accused had the intention of killing the deceased and his defence does not, in my considered view, displace the prosecution evidence against him. PW1 further stated in his testimony that the accused started a quarrel and threatened to kill then both. The accused's mind was thus set at killing them both. He had a guilty mind which led him to pick the stick and kill his father. His anger was uncontrollable, and he must have known, for a fact that if he did the unlawful act of hitting the deceased who was 65 years old, such act would lead to grievous harm or even cause death to the deceased person. The evidence is clear that the accused person hit the deceased on the abdomen and the back. Both these areas were bruised as per the post-mortem report.

27. I find therefore that the accused person at the time of injuring the deceased with a stick, had a mind to kill the deceased for reasons that the deceased allowed the blood of strangers to mix with the family blood during circumcision. The prosecution has proved that the accused at the time of inflicting the injuries on the deceased had malice aforethought.

28. I have considered the evidence by the prosecution and the defence by the accused person. His

defence is not substantiated even though the burden is not upon him the accused to prove his innocence. The prosecution has proved that the deceased died from injuries caused by the accused person. They have also proved that the accused person had malice aforethought at the time he inflicted the said injuries on the deceased.

**Conclusion.**

29. The upshot of all the above is that the prosecution has proved the charge of murder against the accused person herein beyond reasonable doubt and accused is hereby found guilty as charged and he is convicted accordingly under Section 322(1) of the Criminal Procedure Code.

Orders accordingly

Judgment delivered read and signed in open court at Kakamega this **21<sup>st</sup> day of February 2017**

**RUTH N. SITATI**

**JUDGE**

In the presence of;

.....Mr. Manyoni holding for Anziya.....for Accused

.....Miss Tarus (Present.....for state

.....Mr. Polycap .....Court Assistant