



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**CRIMINAL DIVISION**  
**HIGH COURT CRIMINAL CASE NO. 33 OF 2008**  
**REPUBLIC.....PROSECUTOR**  
**VERSUS**  
**DICKSON KUBIA ANDALIA.....ACCUSED**  
**J U D G M E N T**

**Introduction**

1. The accused person Dickson Kuba Andalia 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 8<sup>th</sup> day of July, 2008 at Ebukhulitsi Village, Ebusiratsi Sub-location, North Bunyore Location in Emuhaya District of the Western Province Dickson Kubai Andalia murdered Joshua Musiya Omuganda.

2. The accused pleaded not guilty to the charge after it was read to him in Kiswahili language which he understood. The accused was assigned Mr. Wafula advocate to act for him but later M/S Onsando Advocate took over the matter. It is also worth noting that this case was heard by several judges before this court took over the case for purposes of writing the judgment.

**The Prosecution Case**

3. The prosecution called a total of ten (10) witnesses in an endeavor to prove their case to the required standard. PW1 Lydia Ongayo the wife to the deceased testified and told the court both in her evidence in chief and in cross examination that on the 8.7.2008 her husband returned home at about 6.30pm crying and complaining that he had been stabbed in the buttocks and beaten by Dickson(the accused) who is his cousin. She further stated that the deceased told her that Dickson used a cobbler's knife to stab him. She informed the deceased mother (PW3) of what had happened. The next day they took the deceased to hospital at Emuhaya and later to Mbale Hospital where they had been referred to. He was admitted but was discharged after two(2) days. He died on the 13<sup>th</sup>/14<sup>th</sup> of July, 2008 at home and thereafter the body was taken to the mortuary. Dickson the accused was arrested. She testified that she also informed the area chief of what had happened, it was also her evidence that the deceased never told her who else was present.

4. When the deceased stabbed him, only adding that the deceased told her that he had been stabbed near their home which was only 80 metres away from the home of the accused person.

5. PW1 further explained that the deceased was being carried by Caleb and Omutamba though she did not

include that information in her statement to the police. She added that the accused had a grudge with the deceased and that he (accused) had told the sub chief that he was going to kill the deceased but the sub-chief did not take any action.

6. The deceased's post mortem examination was witnessed by his son Simon Musiya PW2 who identified the body in the company of Luka Alukoye. PW3 Seliba Ayestsia claimed that the accused told her that he was going to kill her son(the deceased) because he(the accused) had no father wife or child. She claimed that the accused told her that he had informed the Likuru and sub-chief of his intentions. After about two weeks she received information from PW1 that accused had killed the deceased. She rushed to the deceased home and spoke to him and he told her that it was the accused who had stabbed him. She took the deceased to hospital at Mbale where he was admitted for 2 days. He died two days after being discharged. She explained when she was being cross examined by Mr. Wafula for the accused that she thought the accused person was drunk when he told her that he would kill the deceased and that it was for that reason she did not take any action.

7. PW3 also testified that the Likuru did not also take any action after she told him of what transpired. PW3 told the court that from what she knew of the accused person, who is her neighbour had no wife and no child.

8. PW4 Johana Asikhoi Mukanda received information on the 9.07.2008 that the accused had injured the deceased. He rushed to Joshuas home where he found him lying on a bed with blood oozing from his anus. The deceased told him that the accused had injured him. He testified that he got a wheel barrow and carried the deceased to Emuhaya Dispensary and thereafter to Mbale District Hospital. On their way to hospital they reported the incident at the Administration Police camp. He added that when the post mortem examination was conducted a stick was removed from his anus. He told the court that he did not know what made the accused to injure the deceased. Initially he thought that the injury was caused by a knife only to realize that it was a stick which was in the anus after post mortem was performed.

9. PW4, who identified the accused person in the dock, also testified that the accused died 3 days after being discharged. PW5 Prisca Angote told the court that she saw the deceased on the 8.07.2008 at about 5.20pm. On the 9.07.2008. The deceased's wife visited her home and enquired as to what time the deceased had left her home the previous evening but did not tell her what had happened to the deceased. She also testified that she did not see the accused who is her neighbour on the 09.07.2008 but only saw the deceased.

10. Jane Owano muhando the Assistant Chief of Ekilata Sub-location in Ebushiratsi Sub-location who testified as PW6 got information from members of the public that the accused person had killed Joshua Musiya and he had been arrested and was at the chief's camp. She rushed to the chief's camp where she saw the accused person who told her that he was not aware of what had happened.

On the 09.07.2008 she was informed that the deceased had been taken to Mbale Hospital and on 14.01.2008 she was informed that the deceased had died. Later, she was directed by the chief to apprehend the accused if he was not yet in police custody. She was able to arrest the accused with the help of Wilbur Amatonye and Jonas Koyi (deceased's brother) and they took him to the AP's camp. He was later taken to the DCIO's office in Luanda. She identified the accused by pointing at him as he sat on the dock.

11. On cross examination PW6 explained that she only visited the deceased's home on the 14.07.2008 upon the deceased demise. She met the deceased's younger brother at home who informed her that they were preserving the body. He knew that the body had a case and it ought to have been reported to the police.

12. PW7 Dr Amunga Jairus produced the post mortem report on behalf of Dr. Odira Francis. He explained that the post mortem examination was performed at Vihiga Hospital on 18.7.2008 four days after the death. There was a piece of wood approximately 10cm through the right side of the anal opening into the abdomen. The respiratory system was normal and there was a foul smell in the abdomen. The

rectum was lacerated.

13. He told the court that Dr. Odira Francis concluded that the cause of death was peritonitis secondary to penetrating rectum injury. The piece of wood and blood were taken as specimens. He produced the post mortem report which was marked as PEX1. Dr. Amunga also produced the piece of wood which was marked as Pexhibit 2.

14. PW8 Luka Lukoye identified the body of the deceased at Mbale Hospital Mortuary. PW9 No.220476 APC David Kipkoech Maritim testified that on the 14.07.2008 while at the D.O's Camp at Emuhaya PW6 went to the office in the company of the accused. He re-arrested the accused and took him to Luanda police station. He identified the accused person as the one who was sitting in the dock.

15. PW10. No.219124 CI Albert Khavai former DCIO Vihiga District in Vihiga County testified that he received information from OCS Luanda police station on 14.07.2008 that there was an incident of death at Lukhongo village where a person who had been injured previously was treated but later died in the home. The OCS requested for his assistance in investigation. He took the court through his investigation report which led him to the deceased's house after passing through Lukongo AP camp where an earlier report had been made. On visiting the deceased's home, he found the body of the deceased which was lying on the floor. There were no visible injuries on the body. He was told that the deceased had been stabbed in the anus through the rectum in a fracas on a certain road. He thereafter took the body to Mbale District Hospital Mortuary.

16. PW`10 stated that during investigations he gathered that the incident occurred on 08.07.2008 and the person who is the accused herein had been arrested and taken to Luanda police station. He interviewed witnesses and recorded their statements and also transferred the accused from Luanda police station to vihiga Police Station. He further explained that a thick stick PEX2 was removed from the rectum of the deceased.

17. On cross-examination PW10 explained that he was not the only one who recorded the statements of the witnesses. He was taken through PW1's statement which showed that the deceased had been stabbed in the back and that there was blood in the anus. He mentioned to the court the hospitals the deceased went to before he died. He relied on the post mortem report to prefer the charges against the accused person because the treatment notes were with PW1. He maintained that the body had no other injury apart from the injury in the anus. He also referred to PW6's statement which stated that the body had been treated for preservation at home. He told the court that the cause of death was confirmed by the pathologist and that PW6 was not at the scene to confirm whether it was a stick or a cobbler's knife which had been inserted in the deceased anus.

18. The prosecution closed its case after the testimony of the investigating officer. The court found that a prima face case had been established against the accused person and proceeded to put him on his defence.

### **The Defence Case**

19. In his defence Dickson Kubia Andalia denied the charge. He claimed to have been at his place of work on 08.07.2008 at Esibuye market where he worked until 6.30pn when he left for his house. He testified that he slept at 7p.m. on reaching home. The next day the local Assistant chief went to his place at 8am accompanied with the deceased's wife PW1 and brother (PW4) and two others. He was told that he was wanted by the area chief.

20. The chief asked him whether he had killed somebody but he denied. He was then handcuffed by an AP Officer and ferried to Luanda police station. He was later taken to Vihiga police station where he spent 4 days before he took plea. The deceased was known to him and they lived at some considerable distance from each other. He refuted the claims by PW1 that he had stabbed the deceased with a knife as no knife was produced in court.

### **Submissions**

21. In his submissions M/S Onsando Getanda advocates opined that from the evidence on record, the accused person has no case to be convicted upon. He pointed out that there was no eye witness and that PW1 who was first to be informed of what happened to the deceased contradicted her statement on the possible weapon that caused the deceased's death. He further submitted that no treatment notes were produced to show what the deceased complained of before he died. He also raised issue with the preservation of the deceased's body which was done at home by the deceased's brother and claimed that that was the time the stick may have been inserted in the deceased body. He submitted that the body was clearly tampered with before being taken to hospital and that it was an afterthought to charge the accused with the offence herein.

### **The Law**

22. The murder charge is grounded on section 203 of the Penal Code which defines the offence. Murder is committed when any person with malice aforethought causes death of another person by an unlawful act or omission. The penalty for murder is death under Section 204 of the Penal Code. The burden to prove the offence squarely lies on the prosecution. They have to prove that the deceased died and that he died because of the unlawful act or omission of the person alleged to have caused the death (actus reus).

23. The prosecution also has to prove that the accused person had "Mens rea" and /or malice aforethought before committing the act as defined under Section 206 of the penal code. Malice aforethought is deemed to be proved when there is evidence showing either or all of the following:-

1. An intention to cause the death of or to do grievous harm to any person, whether the person is the person actually killed or not
2. 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.
3. An intent to commit a felony
4. 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.

### **Analysis and Determination**

24. From the evidence on record, no one saw the accused stab the deceased whether with a stick or a cobbler's knife. It was PW1's evidence that her husband told her that he was stabbed by the accused. She made mention of two people who escorted her husband home on the 8.7.2008 i.e. Caleb and Omustamba though she did not mention them in her statement to the police nor call them as witnesses. Although both Pw1 and PW3 testified that the deceased told them he had been stabbed on the buttocks by the accused person using the medical evidence which showed that the deceased died because of a penetrating wound in the stomach from a stick pushed into the anus. Pw4 was also told by the deceased that it was the accused who injured him but the fact that the alleged murder weapon was not produced. Creates some doubt in the mind of the court.

25. The prosecution had proved that the deceased herein died. A postmortem report (PEX1) was produced by PW7 and it showed that the cause of death was peritonitis secondary to penetrating rectum injury. It is evident therefore that there was penetrating rectum injury of the deceased which dislodges the assertion that the body of the deceased was tampered with. The body was identified by PW2 for purposes of post mortem and all the prosecution witnesses testified that they saw the dead body of the deceased.

26. The other issue is whether it is the unlawful act (Actus reus) of the accused which led to the death of the deceased. The prosecution witnesses have not placed the accused at "the scene" nor have they shown that the accused was with the deceased. No picture of "the scene" has been shown. It is not known where

the accused got his injuries from. I find therefore that the prosecution has failed to prove that it is the accused who inflicted the injuries that led to the death of the deceased.

27. Lastly I also find that the prosecution has failed to prove malice afore thought to the required standard. The issue of an alleged grudge that may have led the accused to commit the murder was not explained by PW1. These were just unsubstantiated allegations by PW1 and PW3 which do not add any value to the prosecutions case. For the above reasons, I find that the prosecution has failed to prove the charge against the accused person. The accused person is accordingly acquitted of the charge of murder under Section 322(1) of the Criminal Procedure Code and is to be released immediately unless for any other lawful reasons he is so held.

It is so ordered.

**Judgment delivered dated and signed at Kakamega this 16<sup>th</sup> day of February 2017**

**RUTH N. SITATI**

**JUDGE**

**In the presence of:-**

**Mr. Onsando.....for Accused**

**Mr. Ng'etich.....for State**

**Mr. Polycap.....Court Clerk;**