



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAPENGURIA**  
**CRIMINAL CASE NUMBER 1 OF 2016**  
**(Formerly Kitale HCCR. NO. 48 OF 2012)**

**REPUBLIC ..... PROSECUTION**

**VERSUS**

**POGHISIO AKUDOKI MERIMUK ..... 1<sup>ST</sup> ACCUSED**

**THOMAS MERIMUK ..... 2<sup>ND</sup> ACCUSED**

**JUDGMENT**

POGHISIO AKUDOKI MERIMUK and THOMAS MERIMUK are 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 10<sup>th</sup> day of November, 2012 at Seraro Location within Pokot County, the accused persons, jointly with another one not before court murdered Lolinganyang Ywokole.

In this case the prosecution called a total of 6 witnesses of which only one of them, the PW-1, is an eye witness to the incident constituting the alleged offence. His father is the deceased in this case. His evidence is that on 9<sup>th</sup> November, 2012 at about 10.00am he was at home with his father. They heard a tree being cut in their farm. The father went to enquire. Immediately thereafter PW-1 heard the second accused person calling out his own father. The second accused was cutting the tree. PW-1 proceeded to the scene. He found the second accused had been wrestled to the ground by PW-1's father (the deceased). The second accused's father was strangling the deceased. Both the accused persons, who are a father and a son respectively, were assaulting the deceased. PW-1 intervened to save him. The second accused's mother joined in. The three family members assaulted the deceased. PW-1 held and hit the second accused person on the leg. The deceased started bleeding from the head. PW-1 tried to protect him but in vain. Villagers got to the scene and restrained the assailants. The deceased was taken home and then to Kapenguria District Hospital. According to PW-2, he died while on the way to Moi Eldoret Referral Hospital, on 10<sup>th</sup> November, 2012 at 9.58am as indicated in the postmortem report. The report indicates the cause of death as cardiorespiratory arrest, secondary to subdural hematoma due to head trauma.

On Cross examination by Mr. Kaosa the advocate for the accused persons, PW-1 further disclosed that: - There was an existing land dispute between the deceased and first accused person. The deceased was injured in a fight between PW-1's family and that of second accused; Both accused persons were armed with sticks; The second accused's mother was armed with a panga which she used to assault the deceased; And that she was not charged as she escaped after the offence.

PW2 on cross-examination revealed that the accused persons had also been injured and found the two on 9.11.2012 in the hospital. Their P-3 forms were produced by PW-5. The one for the first accused persons indicates he suffered a cut wound of 5cm long on the occipital region of the head. It was stitched. He also had a left hand bruise and swollen palm region. The probable weapon which caused the injuries was blunt. The degree of injury was assessed as harm.

The second accused had a stitched wound on the head; midhead 8cm long and forehead 2cm long. The injuries were caused by sharp objects. The degree of injury was assessed as harm.

The said witness indicated in regard to deceased visible injuries that he had 3 cuts on the head, of which one was 4cm long, another 10 cm and the third one also 4cm. They were all stitched by the time of postmortem. No weapon was recovered in this case. After investigations the DCIO preferred the offence against the accused persons.

The 1<sup>st</sup> accused's defence is that on 9.11.2012 after he took tea at 8.00am, he heard his son, who's the second accused person screaming. He faced his farm and saw the second accused person standing. He also saw two other persons. These other two persons were the deceased and PW-1. The second accused was crying and 1<sup>st</sup> accused person rushed to where he was. The second accused fell down. His head was whitish and he was bleeding. He had a cut wound on the head. The 1<sup>st</sup> accused tried to lift him up. He was hit on the head and hand in the process by PW-1 who was armed with a club. He immediately fell on the second accused, lost consciousness and regained it at Kapenguria District Hospital.

Second accused's defence is that on 9.11.2012 he had visited his grandmother. The grand mother asked him to go to the land and get her piece of a tree to repair the granary. The second accused went to cut it near his father's home. He was using a panga. While doing so he was held from behind. He was held by two men who are the deceased and PW-1 in this case. PW-1 took the panga he had. He used it to cut the second accused on the head. The second accused screamed and fell down. He fell unconscious. He did not witness the arrival of his father. He gained consciousness in the hospital. He does not know who attacked the deceased. He was not involved. His P3 form shows he had stitched wounds on the head (mid head 8 cm long and forehead 2 cm long). The probable weapon which caused the injuries was sharp. The degree of injury was classified as harm. He was arrested while returning to the hospital on a Saturday, at the hospital gate.

**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”***

According to **Section 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.”***

Given the above provisions on the ingredients for the offence of murder, the court needs to establish:-

1. Whether the cause of death to the deceased has been established.
2. Whether accused person's act or omission gave rise to the cause of death to the deceased,
3. Whether the accused persons intended to kill the deceased or to cause him grievous harm;
4. Whether the accused persons had knowledge that their action would probably cause death or grievous harm to the deceased; and
5. Whether the accused persons simply intended to commit a felony.

The accused in this case are two and are charged together with another not before court. The court is therefore mandated to consider whether the accused persons, if at all they were involved in the commission of the said offence, acted in concert or had common intention. This is required of **section 21 of the Penal Code** which provides that:-

***“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”***

The evidence of PW-1 also invites me to consider whether the defence of ‘**self-defence**’ is available to the accused persons herein.

### **Cause of death to the deceased**

PW-1 in his evidence-in-chief stated 1<sup>st</sup> and 2<sup>nd</sup> accused were assaulting his father (the deceased). On cross-examination he made it clear that there was a 3<sup>rd</sup> person who's the second accused's mother; she had a panga of which she used to assault the deceased. She escaped after the incident and was not arrested. PW-5, the doctor who produced the post-mortem report indicated that the deceased had 3 cuts on the head, one was about 4cm long, another 10cm and the third one 4cm long. He died of cardiorespiratory arrest, secondary to subdural hematoma due to head trauma.

PW-1 on cross examination indicated that 1<sup>st</sup> and 2<sup>nd</sup> accused persons were armed with sticks. Considering the cause of death, one can clearly state that the 2<sup>nd</sup> accused's mother is the one who inflicted the fatal injuries.

The incident the way it occurred was not planned by the three assailants. It was not a premeditated incident. The two families, that of the deceased and of the accused persons had a land dispute. The 2<sup>nd</sup> accused went to cut a tree or part of it in the land the accused perceived to be theirs. The deceased heard the tree being cut and went to enquire. 2<sup>nd</sup> accused called his father the 1<sup>st</sup> accused. A fight between them ensued. PW-1 joined in as well as the 2<sup>nd</sup> accused's mother. The assailants got to the scene at different intervals and participated in the fight their own way with the weapon each had. It was not something arranged, organized or deliberated upon. PW-1 said when he went to the scene he found the deceased had wrestled the second accused to the ground. There is a possibility he is the one who triggered the physical confrontation when he found the 2<sup>nd</sup> accused cutting what he alleged to be his tree, in his farm or land. This was therefore a spontaneous attack. The accused themselves never inflicted grievous harm to the deceased or the fatal injuries. They were not involved in a joint enterprise aimed at causing grievous harm to the deceased or to kill him. It is the other suspect not before court who used a dangerous weapon, a panga, and inflicted the injuries which caused his death by cutting him three times in the head. Malice aforethought, which is part of ***mens-rea*** for the offence, is not therefore established by the prosecution, against the accused persons beyond reasonable doubt.

Section 17 of the Penal Code reads that:-

***“Subject to any express provisions in this code or any law in operation in Kenya, Criminal responsibility for the use of force in the defense of person or property shall be determined according to the principles of English Common Law.”***

At Common Law the defence of ***Self-defence*** allows a person to use reasonable force to:-

- i. Defend himself
- ii. Prevent attack of another person
- iii. Defend his property

The defence of ***self-defence*** if successful accords the defendant complete acquittal. However, in ***self-defence*** only use of reasonable force, given the circumstances is allowed or acceptable.

In the above regard, the second accused went to cut a tree at the request of his grandmother. He was attacked by the deceased prompting him to call his father the 1<sup>st</sup> accused person. 1<sup>st</sup> accused went to rescue the 2<sup>nd</sup> accused, his own son. There is no evidence that in doing so he used excessive force against the deceased. Both accused persons were injured in the said scuffle. The person who outrightly used excessive force is the suspect at large. The defence of self-defence is therefore also available to both accused persons, and would accordingly entitle them to an acquittal.

Having considered the foregoing, I do find that the offence of murder is not proved by the prosecution against the accused persons beyond reasonable doubt. The two are therefore acquitted of the offence of **Murder contrary to Section 203 as read with Section 204 of the Penal Code.**

Judgment read and signed in the open court in presence of both accused persons and the state prosecutor, Mr. Mark Nabuyumbu, this 15<sup>th</sup> day of March, 2017.

**S. M. GITHINJI**

**JUDGE**

**15.3.2017**