



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**CRIMINAL DIVISION**  
**CRIMINAL (MURDER) CASE NO. 42 OF 2011**  
**REPUBLIC .....PROSECUTOR**  
**VERSUS**  
**ANTHONY MULULI SHIKANGA .....ACCUSED**  
**J U D G M E N T**

**Introduction**

1. The accused person herein is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the charge are that on the 8<sup>th</sup> day of June 2011 at Shingalole Village, Makhokho Sub/Location, Ikuhu location Kakamega South District within Western Province he murdered Moris Otunga Khayeka. The accused denied the charge and the case has been ongoing since 6<sup>th</sup> July, 2011 when the plea was taken.

**Prosecution Case**

2. The prosecution called 4 witnesses in an effort to support the allegation of murder against the accused. PW1 was Sophia Khayeche Shikokoti. It was her testimony that on 8<sup>th</sup> June, 2011 at about 5.00pm, she was looking for her chicken around the home of Sofia Munyasia when she saw the accused and the deceased quarrelling. She said she also saw her brother in-law William trying to separate the two when the accused slapped the deceased who fell down on his back. As soon as the deceased fell down, the accused kicked the deceased in the stomach. The deceased lost consciousness and when he came to, the deceased went to PW1's home and started crying. PW1 sent for Agnes (wife to deceased who was not called as a witness). With the help of her co-wife Susan, Agnes took the deceased to the hospital for treatment, first at Ikuhu Health Centre and later to St. Elizabeth Mission Hospital, Mukumu. After one day the deceased died.

3. On cross examination, PW1 stated that she did not mention William in her statement. PW1 could also not tell whether on the material day, the accused and the deceased were drunk, but she testified that the two frequently took the illicit brew known as Chang'aa.

4. Pw2 was Peter Aromama Kaayeka. When he learnt that accused had beaten the deceased, he reported the matter to the area sub-chief who visited the home to confirm what had happened. On 15<sup>th</sup> June, 2011, he got information from the deceased's wife that the deceased had died. It was also PW2 who identified the body of the deceased to the doctor for post mortem examination and later organized for the burial of the deceased who was his brother.

5. Number 40484 Inspector Stephen Kingori of Kakamega Police Station at the time testified as PW3. He recalled being summoned by his boss, the OCS Chief Inspector Joseph Musyoka and asked to attend the post mortem on the body of the deceased which was being done at Mukumu Mission Hospital. He proceeded to the hospital where he met Dr. Dixon Mchana, PW4, who conducted the autopsy. The body was identified by Peter (PW2) and Agnes Nanzala, wife to deceased.

6. After the autopsy, PW3 visited the scene of murder in the homestead of Sophia Aisha within Khayega area. At the scene, he established that the accused and the deceased had fought while at the drinking den on the evening of 8<sup>th</sup> June, 2011. The deceased was taken to the hospital on 9<sup>th</sup> June, 2011 but died on 11<sup>th</sup> June, 2011 while undergoing treatment at the hospital. The accused had in the meantime disappeared from home.

7. PW3 testified further that on 12<sup>th</sup> June, 2011 the accused surrendered himself to the police at AP Camp at Koitut in Nandi County from where he was arrested and escorted to Lessos, Police station. The accused was taken to Kakamega Police Station on 14<sup>th</sup> June, 2011 by PC Bor and PC Limo. After recording statements, PW3 charged the accused accordingly. PW3 identified the post mortem report – PMFI 1.

8. In cross examination PW3 admitted he was the investigating officer in the case and that when he visited the scene of the accident, he confirmed that both accused and deceased had taken chang'aa, though he could not say how drunk they were at the time of the altercation. PW3 also stated that from his investigations, he did not ascertain whether the deceased had been ailing before the fight.

9. The last witness for the prosecution was Dr. Dixon Mchana who testified as PW4. He conducted the autopsy on the body of the deceased on 15<sup>th</sup> June, 2011 after the body was identified by Peter (Pw2) and Agnes. From the observation of the body of the deceased both externally and internally, Dr Mchana made the following findings: the body had defence injuries on both arms and forearms and there was also evidence of medical intervention, showing operation on the stomach. There were contusions below the skin in the interior abdominal walls and chest. There was fracture of the 4<sup>th</sup> and 5<sup>th</sup> ribs and blunt trauma on the left upper lobes of the lung. There were also injuries on the large intestines; and an operation on the small intestines, part of which had been removed. There was blood clot behind the liver and pus between the abdominal cavity. The spleen bled easily.

10. In the opinion of Dr. Mchana, the cause of death was severe inflammation following blunt abdominal trauma due to assault. The post mortem report filled and signed on 15<sup>th</sup> June, 2011 was produced as PExhibit 1.

11. When Dr. Mchana was taken through cross examination, he stated that the cause of the deceased's death was suspicious because the infection he observed was not an infection of the blood. He also stated that any infection of the blood also known as septic shock causes death within 12 hours. Yet in the instant case, the defence injuries were inflicted at least 48 hours prior to death. Dr. Mchana admitted that he did not look at the history file of the deceased.

## **Defence Case**

12. After analyzing the evidence on record this court held that a prima facie case had been established against the accused person who was put on his defence. Section 306(2) of the Criminal Procedure Code was complied with after which the accused opted to give sworn testimony. He did not call any witness.

13. In his evidence he claimed that on the 08.06.2011 he was in Nandi where he was working and he never met with deceased. He claimed that the evidence by PW1 was full of lies as he did not know how the deceased died. He explained the circumstances that led to his arrest on the 12.06.2011 while he was in Nandi.

14. On cross examination he maintained his alibi defence and added that he had a boundary dispute with

PW1. He also claimed that PW1 was always drunk and that was the reason why she lied. He then closed his defence.

## **Submissions**

15. The accused through his counsel Mr. Ondieki filed written submissions which submissions were highlighted. He submitted that the prosecution had not proved its case against accused beyond reasonable doubt, and further that there were no eye witnesses to the alleged incident which took place at PW1's compound. He also submitted that the only evidence left is that of PW1 which the court has to rely on but that the said evidence does not meet the threshold of a single identifying witness. Counsel prayed for an order of acquittal.

16. Mr. Ng'etich, prosecution counsel submitted that the evidence by the accused consists of mere denials which were not substantiated by any other evidence and that as long as the court has no doubt concerning PW1's statement then the court can proceed to convict, regardless of the fact that other listed witnesses were not called to testify. Counsel maintained that the prosecution had discharged its burden of proving the case beyond reasonable doubt. He prayed that the court do find the accused guilty as charged and convict him and sentence him as by law provided.

## **The Law**

17. The accused faces the charge of murder contrary to Section 203 as read with Section 204 of the Penal Code. Murder is defined under 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.”

18. The burden of proof lies on the prosecution to show by evidence that it is the accused who killed the deceased person. The prosecution must also show by evidence that at the time of killing the deceased the accused had formed the necessary intention to either cause death or grievous harm to the deceased.

19. The intention to cause death or grievous harm is malice aforethought. The circumstances which constitute malice aforethought are set out under Section 206 of the Penal Code as follows;

“ 206 Malice aforethought shall be deemed to be established by evidence proving any one of the following circumstances;-

a. an intention to cause 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 intention 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.”

20. The prosecution case as to what transpired between the accused and the deceased is premised on the testimony of PW1, a single witness as no one else was called to testify to that fact though she mentioned other people who were at the scene but who did not testify.

21. Case law is clear that the evidence of single identifying witnesses must be examined with considerable circumspection to ensure that it cannot but be true before a conviction is founded on it. It

was in **Kiilu and another - vs – Republic[2005] 1KLR174** that the court held, inter alia that:-

“Subject to certain well known exceptions, it is trite law that an act may be proved by testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct pointing to guilt from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness can safely be accepted as free from the probability of error.”

22. In **Kiarie – vrs – Republic [1984] KLR 739**, the Court of Appeal had this to say. “It is possible for a witness to be honest but mistaken and for a number of witnesses to all be mistaken. Where the evidence relied on to implicate an accused person in entirety of identification that evidence should be water tight to justify a conviction.”

23. The above two cases deal with identification of an accused under difficult circumstances. In this particular case, the circumstances under which the deceased was killed were not difficult. According to PW1, the accused and the deceased had a quarrel on the 8.6.2011 at about 5.00pm. it was daytime and she was able to see what was happening. In any event, the accused and deceased were family members of PW1 the deceased being a brother to her husband while the accused is a nephew. I have no reason to doubt her statement regarding the quarrel and the events that followed. I have also no doubt in my mind that there was no mistaken identity.

24. The prosecution proved that the deceased died. The post mortem report was produced as evidence of death by PW4. PW2 and PW3 both witnessed the post mortem examination conducted by Dr. Mchana (PW4) who gave his opinion on the cause of death to be severe infection (sepsis) following blunt abdominal trauma secondary to assault. The evidence is clear that the accused herein kicked the deceased in the stomach, at least two days before deceased died.

25. The remaining sticky issue in this case is whether the prosecution has proved the ingredient of malice aforethought as defined under Section 206 of the Penal Code. In his sworn evidence, the accused raised an alibi defence, namely that on 8<sup>th</sup> June, 2011, he was in Nandi where he was working and that as such he never met the deceased whom he described as a neighbour. Secondly, and contrary to what PW3 told the court that the accused person gave himself in to the police some 4 days after the alleged incident, the accused stated that he was arrested from some undisclosed place and escorted to Koilot AP Camp in Nandi.

26. I have carefully considered the evidence by all the prosecution witnesses, and especially their evidence on cross examination which makes no mention of the fact that the accused could have been in Nandi on the 8<sup>th</sup> June, 2011 when he is said to have assaulted the deceased by first of all slapping the deceased hard and then following it with a hard kick in the stomach after the deceased fell down. The only issue raised by the defence for example during cross examination of PW1 was that she did not mention William in her statement. Though the defence marked PW1’s statement for identification as a defence exhibit, the accused never produced it. During cross examination of PW3 the only issue raised by defence was whether the witness had established during investigations, that the deceased had been reported sick before the fateful day and why the accused went as far as Nandi before surrendering to the police. In my considered view the defence of alibi was an afterthought. The evidence by PW1 is clear that the accused was at the scene where he quarreled with the deceased and subsequently slapped the deceased, felling him down before kicking him in the stomach.

27. Although I did not take the testimony of PW1 there is no indication on the record of my learned colleague that the said witness was lying. I am satisfied that PW1 was worth believing. During cross examination by the State, the accused suggested that his neighbourliness with PW1 had not been good, but again this issue was not brought out when PW1 was being cross examined by defence counsel. In my considered view, the allegation by the defence that the accused had a land boundary dispute with PW1 was an afterthought. The defence also suggested during the testimony of the accused on cross

examination, that PW1 was always drunk. From the record, no such suggestion was brought out when PW1 was being cross examined by defence counsel. That allegation too was an afterthought. In short, the defence of alibi and all other allegations against PW1 have been displaced by the evidence given by PW1.

28. On whether or not the prosecution has proved malice afterthought on the part of the accused, I am satisfied that the prosecution has discharged that onus. The medical evidence given by PW4 Dr. Mchana corroborates the testimony given by PW1 to the effect that the accused kicked the deceased in the stomach while the latter was lying on the ground after the accused slapped and pushed him. The assault resulted in fracture of two ribs and rupture of the spleen and the intestines. The doctor ruled out an infection of the blood and the only evidence left is that the blunt abdominal trauma was caused by the accused's kick on the deceased's stomach as witnessed by PW1. There is no doubt in the mind of this court that the accused knew that his act of kicking the deceased in the stomach would probably cause the death of or grievous harm of the deceased. It is immaterial that the accused did not care whether or not death or grievous harm would result, or whether he wished that such eventualities do not occur.

29. The final issue raised by the defence is that this case against the accused person should fail because some critical witnesses were not called by the prosecution. While it is always desirable for the prosecution to call as many witnesses as possible to prove the allegations against an accused person, the law does not require the prosecution to call any specified number of witnesses, as long as the prosecution discharges the burden of proof as provided under Section 107 of the Evidence Act, Cap 80 Laws of Kenya. In the instant case, the prosecution has discharged that burden through the evidence of PW1, which evidence has clearly displaced the alibi defence raised by the accused. This court is also of the considered view that the alibi defence was an afterthought since it was not raised during cross examination of the prosecution witnesses.

### **Conclusion**

30. Based on the above findings, I am satisfied that the prosecution has proved its case against the accused beyond any reasonable doubt. I accordingly find him guilty of murdering Moris Otunga Khayeka on 8<sup>th</sup> June, 2011 and convict him accordingly under the provisions of Section 322(2) of the Criminal Procedure Code.

Orders accordingly.

**Judgment delivered, dated and signed in open court at Kakamega this 11<sup>th</sup> day of May 2017**

**RUTH N. SITATI**

**JUDGE**

In the presence of;-

Mr. Ondieki (present).....for accused

Mr. Juma (Present).....for state

Polycap.....Court assistant