



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

**CRIMINAL DIVISION**

**CRIMINAL (MURDER) CASE NO. 46 OF 2012**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**PETER INGOKA KHATSIMBA ALIAS MUYABI.....ACCUSED**

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

**Introduction**

1.The accused person in this case, Peter Ingoka Khatsimba, alias Muyabi, 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 Peter Ingoka Khatsimba alias Muyabi ,. On the 25<sup>th</sup> day of October, 2012, at Shimichini, Shibeye Sub-Location in Kakamega Central District within Western Province, murdered Kelly Kefa Shitandi. On 03.12.2012, the accused denied the charge when he appeared for plea before Hon. Lady Justice B. Thurania. The prosecution called 4 witnesses in an effort to prove the charge against the accused person.

**The facts and the Evidence**

2. The facts of this case can be geared from the testimonies of Belinah Donna Makomere, PW2 Moses Khainga Opati, PW3 and No. 63708 CPL Danson Mwasho who testified as PW4. Dr. Dixon Mchana Waludindi provided the medical evidence. When he testified as PW1.

3. Briefly the facts are that on 24.10.2012 at about 1.00pm, the accused herein was at the home of PW2 (Belinah) drinking chang'aa. He was accompanied by PW3(Moses) who was also taking the chang'aa. While the two were enjoying their drink, the deceased came by and asked Belina to give him a hon which she did. She asked him to cut firewood for her but before commencing the work he asked for money to buy cigarettes. Belina gave him kshs.50/= and the deceased went away.

4. On his return, the deceased was sweating and appeared drunk. When Belina saw the deceased, she told him he was too drunk for the job she had given him and told him to return the next morning. But instead of going away the deceased started abusing the accused and Moses and hit them with stick which he (deceased) was holding in his hand. Belina tried to intervene, but the accused picked the stick which the deceased had in his hand and used that same stick to hit the deceased on the head. The accused also allegedly picked up some stones and hit the deceased on the head before the deceased went away.

5. Before the deceased left, he allegedly grabbed and drank three glasses of chang'aa which the accused

had ordered for himself. The deceased's conduct displeased the accused and a fight ensued during which the deceased was hit on the head with a stick and stones. Both Belina and Moses identified the stick – PMFI 1 – produced as PExhibit 2- and also identified the accused during the trial.

6. PW4 investigated the case and after recording witness statements he preferred the charge of murder against the accused. Dr. Mchana testified that he conducted the post mortem examination on the body of the deceased on 31.10.2012 and his findings were;- The deceased who was in his mid – 50's was of good nutrition but by then the body peripheries appeared bluish. He had a bruise on the right forehead, with blood clots on left elbow and shoulder. Internally there was a huge clot in forehead, with a skull fracture on the left back side of the head right to the right ear. There was also a huge clot above the brain covering Dr. Machana formed the opinion that the cause of death was raised pressure in the brain as a result of assault. Dr. Mchana produced the post mortem form which was marked as PExhibit 1. During cross examination, Dr. Machana ruled out the possibility that the injuries could have been caused by a fall. He also stated that the injuries were caused by a great force.

### **The Defence Case**

7. At the close of the prosecution case, the accused was placed on his defence. The accused gave sworn testimony and denied ever killing the deceased. He recounted how on 12.11.2012, he was arrested and taken to Bukura Police Station for 2 days before being moved to Kakamega Police Station where he was held for 4 days before being arraigned in court. The accused contended that he did not know how the deceased who was his sister's son, died.

8. Concerning the witnesses who testified in court, the accused alleged that they gave false testimony against him because of a land dispute between himself and the witnesses. He singled out Belina and told the court that his land dispute with her was at the Assistant Chief's office; and that the death of the deceased offered Belina a perfect opportunity to frame him. The accused did not call any witnesses, but maintained that he was nowhere near where the deceased met his death.

### **Final Submissions**

9. Mr. Aburili, Advocate for the accused filed final submissions on 27.02.2017 in which he urged this court to make a finding of not guilty and to acquit the accused of the charge of murder. Counsel submitted that the evidence on record leaves serious doubts as to whether the accused is the one who caused the injuries from which the deceased died. He submitted that the prosecution evidence lacked credibility, was contradictory and inconsistent in addition to the fact that (according to Counsel) no proper investigations were carried out. Counsel placed reliance on the following cases to support his plea for acquittal. **Republic – vs –Nyambura and 4 others [2003] KLR 355. Ndungu Kimanji – vs – Republic –[1979]KLR 282 Paresh Kapoor – vs – Republic HCCRA(MwanzaTanzania) No. 3 of 2007; Solomon Musyoka Ngula – vs – Republic HCCRA NO. 7 OF 2003 [2006] eKLR and Mwangi – vs- Republic [2000] KLR 472**

10. Prosecution counsel, Mt. Samson Ngetich relied on the evidence on record in asking the court for a judgment date.

### **Analysis and Determination**

11. Section 203 of the Penal Code provides that

“any person who of malice aforethought causes death of another personally an unlawful act or omission is guilty of murder.” Section 206 of the Penal Code on the other hand sets out the circumstances which constitute malice aforethought. In light of the above provisions, the prosecution in this case must prove;-

(a) The death of the deceased and the cause of that death

(b) That it is the accused herein who caused that death by either an unlawful act or omission and

(c) That is causing the death of the deceased, the accused had malice aforethought

### **The death of deceased and cause of that death**

12. The evidence on record by all the prosecution witnesses shows that the deceased died on 25.10.2012. Belina, Moses and PW4 CPL Mwasho all testified to that fact. Dr. Mchana testified that on 31.10.2012, he carried out post Mortem examination on the body of the deceased Kelly Kefa Shitandi at the Kakamega County General Hospital mortuary. This was some 6 days after the deceased's death on 25.10.2012. Dr. Mchana painted to a number of injuries on the deceased's body both externally and internally a bruise on the right forehead, huge blood clots in the forehead, fractured skull on the right side of the head and a huge clot above the brain covering. In his opinion, the deceased's death was caused by raised pressure in the brain as a result of assault. The post mortem report confirming the death of the deceased was produced as PExhibit 1.

13. There is therefore no doubt that the deceased died. There is also no doubt as to the cause of that death of the deceased being raised pressure in the brain due to blunt trauma to the head. I now move to the next issue for determination.

Whether it is the accused who, by an unlawful act or omission caused the death of the deceased.

14. The case for the defence in that the prosecution has fallen short in discharging its burden on this issue the evidence on record shows that there was an altercation between the deceased and the accused at about 1:00pm on 24.10.2012 when the deceased came to the home of Belina sweating and in a foul mood. He not only quarreled and abused the accused but he also snatched three glasses of chang'aa, one after another belonging to the accused and imbibed the whole contents. According to Belina, the deceased was in the habit of disturbing others.

15. According to Belina, the accused grabbed the stick which the deceased had used to hit him (accused) and hit him (deceased) with it. Belina also stated the following in her evidence in chief:-

“The accused also picked stones and hit the deceased on the head. The deceased then left. The accused and his friend then left.”

16. During cross examination, Belina said:-

“ I told the court that the accused hit the deceased with stones. I forgot to tell the police. I told the police that the accused hit the deceased with a stick. Moses was merely talking persuading them to stop fighting”

17. Belina's evidence in cross examination rules out the issue of the accused having used stones to hit the deceased, but leaves the evidence of the accused having used a stick to hit the deceased on the head intact.

18. Moses, PW3, on the other hand stated in his evidence in chief that he was together with the accused at Zakaria's home (the same home as Belina's) when the deceased appeared on the scene and snatched the accused's glass of chang'aa, three times in a row and drank the chang'aa, the accused became annoyed with the deceased, but the deceased started assaulting the accused and the accused in turn took the stick from the deceased and used it to fight the deceased. Belina then ordered everyone to go away from her home.

19. In cross examination, Moses testified thus;-

“this is the stick belonging to the deceased. He did not hit me with it. He hit the accused with it. I don't know if any other weapon was used.....” from this evidence, Moses does not make any mention of the accused having picked up stones (or any weapon other than the stick) and hit the deceased on the head with the same. It is worth noting here that all the people at the chang'aa den had taken chang'aa and the

court is not certain how much of the going on any of the witnesses was able to observe!

20. What is however clear from the evidence of both Belina and Moses is that the deceased was the aggressor when first he drank the accused's three glasses of chang'aa without permission and secondly, by abusing and hitting the accused. What the accused did in response to the verbal and physical attack was self defence, although the accused in his defence denies being at the scene. The accused is placed at the scene, but when he hit the deceased with a stick, he was doing so in self defence. It appears from the testimony of Dr. Mchana that the injuries were serious, causing fractures in the head and huge clots on the brain covering. In my considered view, the accused was not justified in inflicting such serious injury to the deceased.

**Whether the accused had malice aforethought in causing the death of the deceased.**

21. In his written submissions, counsel for the accused borrowed a passage from Text book on Criminal Law, 6<sup>th</sup> Edition by Oxford University press ushered by Michael J. Aden LLb. LLM, Barrister at P.297 to the effect that "Murder is unlawful homicide committed with "malice aforethought. "Malice aforethought" describes the mens rea required for conviction of murder. If malice aforethought is lacking the unlawful homicide will be manslaughter." At page 49 of the same book, the author says: "where a person has performed acts or brought about, consequences which constituted the actus reus, of an offence he will generally be found guilty of the offence only if he had the necessary "mens rea" at the time he acted ..... Offences which require "mens rea" are generally regarded as more serious than those for which liability is strict"

22. I do concur with the above passages applying the same principles to the facts in this case, one cannot say that the accused planned the attack on the deceased. The fight was consequent upon the deceased's unprovoked attack on the accused and also because of his unbecoming behavior of being rowdy, abusive and generally being troublesome to those who were around. Although the injuries observed by Dr. Mchana are said to have been caused by a great force, it is not clear even from the evidence of PW1, the investigating Officer, what this great force came from. A close look at Section 206 of the Penal Code shows that the action by the accused of hitting back after being attacked by the deceased, does not fall within the circumstances set out under the said Section.

23. What then am I saying? What I am saying is that the prosecution has not proved the element of malice afore thought against the accused. In these circumstances the prosecution has failed to prove all the ingredients of murder as set out under Section 203 of the Penal Code. I however do not buy into the contention by the defence that the case against the accused is a frame-up. If that were so such an issue would not have escaped the attention of defence counsel during cross examination. The only thing I find is that Belina tried to exaggerate the evidence against the accused but this aspect of her testimony was soon laid bare during cross examination. Otherwise Belina's testimony at to the attack by the deceased upon the accused and the ensuing fight is corroborated by the testimony of Moses. Unlike what the court stated in the Tanzanian case of Parekh Kapoor (Supra). I do not think that Belina and Moses knitted up a story. "whose promisor purpose was to implicate the accused. Moses was a friend of the accused and in my considered view, his testimony to the effect that the accused hit the deceased with the same stick the accused had used to hit him (accused) was not aimed at implicating the accused.

24. I have carefully considered the submissions by counsel regarding contradictions and inconsistencies in the testimonies of Belina and Moses. The only contradiction as earlier noted is whether the accused also used stones to hit the deceased on the head. The answer is no because of the Belina's evidence in cross examination. Apart from that aspect, there is no other contradiction between the testimonies of the two witnesses.

25. Regarding the investigations, it is true that PW4 does not appear to have had a grasp of the assignment before him. Even after taking so many months to do the investigations, what he brought to the court fell below expectations. In essence therefore, the evidence as placed on record by the prosecution does not support the charge of murder against the accused person. I would have proceed to make a finding that there is evidence to support a charge of manslaughter, but because of the circumstances under which the

fight between the accused and the deceased took place. I would be slow to do that. The medical evidence by Dr. Mchana shows that something bigger than a stick was used to inflict the blunt trauma on the deceased. The investigations failed to reveal what that heavy object was or could be. It is also not clear from Dr. Mchana's evidence whether the body of the deceased was identified to him and if so, by who.

**Conclusion**

26. From all the above, I am not satisfied that the prosecution has proved the charge of murder against the accused person to the required standard. I therefore find peter Ingoka Khatsimba alias Muyabi, not guilty of the murder of Kelly Kefa Shitandi and accordingly acquit him under Section 322(1) of the Criminal Procedure Code.

It is so ordered.

Judgment delivered, dated and signed in open court at Kakamega this 4<sup>th</sup> day of May 2017

**RUTH N. SITATI**

**JUDGE**

In the presence of:-

.....Mr Juma (present).....for state

.....Mr. Aburili (present) .....for accused

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