



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

**CRIMINAL CASE (MURDER) NO. 3 OF 2015**

**REPUBLIC.....PROSECUTOR**

**-VERSUS-**

**MOSES FABRIGAS.....ACCUSED**

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

1. The Accused, **Moses Fabrigas** was charged with Murder Contrary to Section 203 ad read with Section 204 of the Penal Code. The particulars of the Information state that on the 30<sup>th</sup> day of December, 2014 at Narok Township within Narok North Sub-County, he murdered **John Saita Karia**. The Accused denied the charge and was represented by Mr. Owuor.

2. The Accused and the deceased were cousins. The Accused lived with his family, apparently headed by his mother, **Margaret Karia** (DW1), a niece/sister to the deceased. On his part the deceased lived with his family headed by his own father. Both families were progenies of a common patriarch and occupied different portions of a common piece of land at Olpopon, Narok inherited from him, but without individual titles. Although some of the family members disputed this before the court, there was tension between the two families. Apparently the deceased's family believed that the family of the Accused had no right to ownership or occupation of the Olpopon land, and that their rightful land was at Mashariani, a distance away, and were of the view that they should move there.

3. On 30<sup>th</sup> December, 2014 a fight broke out between the Accused and the deceased over the disputed attempt by the deceased to set the Accused's homestead on fire. In the fight which took place at about 6.00pm, the deceased sustained six stab wounds to the face, neck and stomach, to which he later succumbed. Later in the night the Accused presented himself to **PC Mwaniki** at the Narok Police Station. He reported the alleged arson attempt and ensuing fight with the deceased. He was placed in the cells and eventually charged at the close of investigation.

4. The Accused's sworn defence is that he was summoned to his home by **Sebastian Pius Juma** (PW1) who reported that the deceased was trying to set ablaze the Accused's homestead. He rushed home to find that indeed one house had been set ablaze and the deceased was busy trying to set a second house alight. He confronted him and a struggle ensued between them. He disarmed the deceased who had a knife.

5. He stabbed the deceased with the knife but did not intend to kill him and denied he had any disagreement with him. He then reported to police. His mother DW1 stated that she learned on 31/12/2014 at about 5.00pm that the deceased had burned the fence to her compound. After she had the

fire put off, she went to report to the police and did not witness the fatal fight between the Accused and the deceased.

6. That the deceased died from stab wounds inflicted by the Accused during a fight is not in dispute. There is also credible evidence by **Moses Kasaine Karia** (PW4) and **Marisela Nepore** (PW5) both siblings of the deceased that there was a simmering land dispute between their family and that of the Accused. The latter were in their eyes intruders who ought to have moved out of the family land to their own land at Mashariani. This dispute is confirmed by the Accused and his mother (DW1).

7. As to what exactly prompted the fight on 31/12/2014, the evidence is not so clear. Both PW1 and **James Gitau** (PW2) being eyewitnesses to the fight admitted that earlier in the day the deceased had attempted to set alight the fence surrounding the homestead of the Accused. Naturally, PW4 and PW5 denied knowledge of such incident, hoping to deflect any suggestion of wrong doing on the part of their deceased sibling.

8. Two episodes of fire were mentioned. It does seem from the evidence of PW1 and PW2 as well as DW1 that the first attempted arson occurred before the fight, and had not been reported to police by the time of the fight. However after the fight the entire homestead of the Accused was razed down in an arson attack, apparently in revenge. That attack was reported to police by DW1 about the same time when the accused presented himself to police on the night of 31/12/2014. Thus the photographs taken by the scenes of crime officer **CPL Paul Kiilu** (PW8) on 31/12/2014 must be in respect of the second fire incident.

9. PW8's assertion that the murder occurred after he took the photographs is inaccurate and not supported by the evidence of DW1 that the houses were burned later (after the murder). Be that as it may, and whereas I have no doubt that the *actus reas* has been established, the same cannot be said on the question of the *mens rea*.

10. The defence submission was that the deceased was the aggressor and that he sustained fatal injuries during the fight with the Accused. It is not clear what period had lapsed since the alleged first fire before the fight took place or who among the combatants had the knife at the beginning of the fight. Indeed we have no direct evidence that the deceased caused the initial fire leading to the fight. Hence there is no plausible evidence that the deceased was the aggressor.

11. The legal authorities cited by the defence were not relevant to this case. Unlike the case of **Nzuki – Vs- Republic (1993) KLR 171**, the authority upon which the case of **Joseph Kimani Njau [2014] eKLR** turned, it cannot be said in the circumstances of the present case that there was absence of motive: there was a pre-existing simmering land dispute between the families of the Accused and the deceased.

12. Malice aforethought is distinct from motive and is defined in Section 206 of the Penal Code as follows:-

**“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.”**

13. However, as in **Nzuki’s case, (supra)** the Accused herein stabbed the deceased viciously (six times) with a knife. Two of the stabs were inflicted to the neck and abdomen, respectively. The latter caused excessive bleeding and death. An eye witness PW1 said the Accused had no visible injuries following the fight but neither he nor PW2 had witnessed the start of the fight. Evidently the multiple stabbing of the deceased targeting vital body organs could and did lead to death. However in absence of clear evidence as to the circumstances in which the fight actually began and proceeded on the material date, I reserve some degree of doubt as regards the proof of malice aforethought in this case.

14. The attack on the deceased nonetheless was as unlawful as it was vicious. The direct consequence was the death of the deceased. I am therefore satisfied that the prosecution has proved beyond reasonable doubt the offence of Manslaughter Contrary to Section 202 of the Penal Code and will convict the Accused accordingly.

Delivered and signed at Naivasha, this **12<sup>th</sup>** day of **February, 2016.**

In the presence of -

State Counsel : Miss Waweru

For the Accused : Mr. Owuour

Court Assistant : Steven

Accused : Present

**C. MEOLI**

**JUDGE**