



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

**CRIMINAL DIVISION**

**CRIMINAL (MURDER) CASE NO. 28 OF 2013**

**REPUBLIC .....PROSECUTOR**

**VERSUS**

**ANDREW MUYERA AMUKASA.....ACCUSED**

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

**Introduction**

1. The accused person herein Andrew Muyera Amukasa 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 9<sup>th</sup> day of May, 2013 at about 8.00pm at Eshibinga sub-location, Kisa East Location in Khwisero District within Kakamega County murdered one JOASH ANUNGO AMUKASA.

2. The accused person first appeared in before the DR of this Honourable Court on 16.05.2013 for appointment of Counsel. The case was then fixed for plea on 04.06.2013, but on that date, the court was not sitting. Plea was eventually taken on 15.07.2013. The accused person pleaded not guilty to the charge. He was granted bond but he did not raise a surety. The case has been ongoing since 17.02.2014.

**The Prosecution Case**

3. The prosecution called 2 witnesses, LUCIANA AMUKASA, who testified as PW1 (Luciana) and No.59058 Police Constable Omar Moyo who testified as PW2. From the evidence of the 2 prosecution witnesses, the prosecution case is as follows;- On the 09.05.2013, Luciana was in her house at Eshibinga Village. She had just come home from a burial ceremony for her brother in law. When she got home at about 7.00pm, she did not find her two children, the accused and the deceased herein at home. The two had gone to take chang'aa. At about 8.00pm Luciana heard the accused shouting and saying "mama, nimeua Anungo." Luciana left the house and headed to the scene. On her way she met with the accused. When she got to the scene, she saw the deceased's body. It was raining. She however noticed panga cuts on the body of the deceased. She also stated that both the accused and the deceased were drunk.

4. In her evidence during cross examination, Luciana reiterated her evidence in chief. That she heard the accused person shouting and telling her that he had killed the deceased. She denied a suggestion that it was someone else who had informed her that they had heard the accused person saying that he had killed the deceased. Luciana stated that she heard the words herself.

5. Pw2, PC Omar Moyo testified that on 10.05.2013 at about 8.00pm he was at Khumusalaba Police Patrol Base police lines when he received a telephone call from his in charge Sgt Alex Ogotu aksing him

to go the patrol base. On arrival at the base, he met another police officer, Bonface Musyoka and together they proceeded to the scene. On their way to the scene, PC Moyo and (PC) Musyoka met some motorbike riders who informed them that the accused person herein was running away. The two officers were also informed that the accused person could be lynched any time if police were not at the scene quickly. PW2 and his colleague therefore boarded motor bikes which took them to the scene where they met he accused person on the road and arrested him. According to PW2, two villagers John Maganya and Alex Otondo (both not called as witnesses) identified the accused person to PW2. The accused person was later escorted to Khwisero Police Station by PW2 and PC Musyoka.

6. After PW2 had testified, prosecution counsel Mr. Oroni applied for adjournment to enable him call other witnesses. The application was granted and the case fixed for further hearing on 25.03.2014. On 25.03.2014, there were no witnesses in court so the case was adjourned to 25.09.2014. On 25.09.2014 the trial Judge was not sitting. On 24.10.2014, the case was fixed for further hearing on 20.01.2015, but it was not until 22.07.2015. That the case was listed before me for further hearing. By then Hon. Mr. Justice S.J. Chitembwe had been transferred to Malindi High Court. Though the prosecution informed the court that it was ready to proceed with one witness, it transpired after taking directions under Section 200 of the Criminal Procedure Code, Cap 75 Laws of Kenya. That the witness who was present in court on that day was Luciana. In the circumstances the case was taken out of the hearing list, and fixed for further hearing on 11.11.2015, the court was informed that no witnesses had been bonded and the investigating officer was also absent from court. The prosecution again applied for adjournment. The application was granted but the same was marked as the last adjournment. The case was fixed for further hearing on 03.02.2016. On the said date, neither the investigating Officer nor witnesses were in court. The prosecution counsel Mr. Orwenga told the Court that through the investigating officer was present in Court on 11.11.2015, and was aware of the court's order giving a last adjournment to the prosecution, the (I.O) was not in court. Counsel applied for another adjournment which was vehemently opposed by the defence. The court upheld the defence objection and declined any further adjournment of the case. The prosecution then closed its case.

### **Defence Case**

7. By its ruling dated 11.04.2016, the accused person was put on his defence. The accused elected to give sworn evidence in which he told the court that the deceased herein was his younger brother. He further stated that at the material time on 09.05.2013, he was at the home of his employer, one Peter Mutwasi where he was staying. Then on the morning of 10.05.2013, at about 7.30 am, he heard of the deceased's death from some children who were going to school the accused person also testified that the home of Peter Mutwasi was just 200 meters away from the scene where the body of the deceased was lying but about 50 metres from their home. When he went to the scene, he found his mother Luciana.

8. The accused further testified that at about 8.00am on 10.05.2013 he heard Luciana telling him that other people had told her it was accused who had killed the deceased. Thereafter he was arrested and escorted to Khwisero Police Station. The accused person also stated that though Luciana had alleged that she heard him shouting and saying he had killed the deceased, Luciana did not say so in her statement to the police. Luciana's statement to the police was produced as DExhibit 1.

9. During cross examination the accused person told the court that he and Luciana had not had a good relationship since 2012. He also stated that he did not have any grudge with the deceased whom he described as a friend. He admitted that both the deceased and himself used to take chang'aa. He also testified that he used to sleep at Peter Mutwasi's home because Peter Mutwasi lived in Nairobi. Finally, the accused stated that because of the bad blood between him and Luciana the latter had a reason to lie to the court. The accused person did not call any witness.

### **Issues for Determination**

10. From the law and the evidence on record, this court is under a duty to determine the following issues;

- (a) Whether the deceased died and the cause of such death.

(b) Whether the deceased died as a result of an unlawful act or omission on the part of the accused person.

(c) Whether the state has proved that the accused person had malice aforethought when he committed the offence?

### **The Law, Analysis and Determination**

11. Section 203 of the Penal Code which defines murder is crafted as follows;

“ 203: Any person who of malice aforethought caused the death of another person by an unlawful act or omission is guilty of murder.”

In other words, the offence of murder is only committed when the perpetrator of the offence is proved to have acted or failed to act with malice aforethought.

Section 206 of the Penal Code defines Malice aforethought as follows;

“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 he flight or escape from custody of any person who has committed or attempted to commit a felony.

12. Case law is abundant on the twin issues of actus ren’s and mens rea are abundant. In the case of **Nzuki – Vs- Republic [1993] KLR 171**, the court of appeal expressed itself thus;-

“ before an act can be murder, it must be aimed at someone and in addition it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused;-

- The intention to cause death
- The intention to cause grievous bodily harm
- Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those act s deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.
- It does not matter in such circumstances whether the accused denies those consequences to ensue or not in none of these cases does not matter that the act and intention were aimed at a potential victim other than the one succumbed,.”

13. In the latter case of **Isaac Kimathi Kanuachobi vs – Republic, (Nyeri Court of Appeal Criminal Appeal No. 96 of 2007(UR)- Unreported-** the Court of Appeal had the following to say on the provisions of Section 206 of the Penal Code.

“There is express, implied and constrictive malice. Express malice is proved when it is shown that an accused person intended to kill while implied malice is established when it is shown that he

intended to cause grievous harm. When it is proved that an accused person killed in further course of a felony (for example rape, a robbery as when resisting or presenting lawful arrest) even though there was no intention to kill or cause grievous bodily harm, he is said to have had constructive malice aforethought. **(see Republic –vs – Stephen Kiprotich letting & 3 others [2009] eKLR.....”**

14. Now, applying the law and principles as above stated, there is evidence from both Luciana and PW2 that the deceased died. Apart from that fact however, there is no evidence confirming how the deceased died. Luciana alleged in her evidence that while she was in her house at about 8.00pm on the fateful night, she heard the accused shouting and telling her he had killed Anungo, the deceased herein, it came out clearly that the statement to the police – Dexhibit 1- did not contain a statement to the effect that she herself heard the accused shouting and saying that he had killed the deceased. Instead, her statement reveals that she only heard somebody shouting and saying that her son had been killed along the road, but she could not tell whose voice it was. So, though Luciana saw the panga cuts on the body of the deceased, there is no evidence pointing to the accused as the one who inflicted those injuries. It is also not clear whether the deceased died from those injuries because no medical evidence was adduced to confirm the cause of the deceased’s death.

15. Having reached the above conclusion, it cannot be said that it was the act or omission on the part of the accused which caused the death of the deceased herein. It also follows that where an act or omission has been proved against the accused person the question of malice aforethought does not arise. As correctly submitted by defence counsel, the prosecution evidence does not place the accused person at the scene, nor is there any circumstantial evidence tendering to connect the accused person to the death of his brother.

16. Though the testimony by the accused person does not seem to add up, it is not his duty to prove his innocence. It is the duty of the prosecution to prove its case against the accused person beyond any reasonable doubt. Having failed to do so, the accused person receives the benefits of the doubt.

17. Accordingly, I have reached the inevitable conclusion that the accused person herein is not guilty of the murder of his brother, one JOASH ANUNGO AMUKASA. I therefore acquit him of the murder under Section 322(1) of the Criminal Procedure Code. If this case was the only reason why he was in custody, he shall be released therefrom forthwith.

It is so ordered.

Judgment delivered, dated and signed in open court at Kakamega this 1<sup>st</sup> day of December 2016

RUTH N. SITATI

JUDGE

In the presence of;-

Mr. Elung’ata for Kundu.....for Accused

Mr. Oroni..... for State

Polycarp.....Court Assistant