



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CRIMINAL CASE NO. 43 OF 2012**

REPUBLIC..... PROSECUTOR

VERSUS

JOSAM MWANGOKO MSAGHUI .....ACCUSED

**JUDGMENT**

**JOSAM MWANGOKO MSAGHUI** hereinafter referred to as the Accused is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code.

The particulars are that:-

***“On the 8th day of August, 2012 at Mkengerenyi village, Mwachabo Location Taita-Taveta County, murdered CHOLA MWANDAWA”.***

The prosecution called seven (7) Witnesses in support of their case. The Accused gave sworn testimony.

**Brief facts.**

On the 8th day of August, 2012 Jackson Mwaburi Mutuku (PW 1) was selling traditional liquor in the house of Kilema Mwaivu at a place called Mkegereni. The Accused and the Deceased were among the patrons. The two picked up a quarrel as the night progressed and a fight ensued.

During that fight the Accused armed himself with three pieces of firewood with which he used in hitting the Deceased severally on the head. The Accused had chased the other revelers away. They proceeded to report the matter to the relatives of the deceased and later police.

Dr. Emmanuel Macharia (PW 6) produced in Court a post mortem report of the Deceased Chola Mwandawa. Post mortem Examination was carried by Dr. Mwaleso Kishindo at Wesu District Hospital.

The injuries were;

- Lacerations of occipital region exposing the skull.
- Cut on the right frontal region on forehead.
- Cut on the right side upper lip
- Cut on the right earlobe.

He formed the opinion that the cause of death was Cardio-respiratory arrest secondary to intra cranial bleeding caused by a blunt injury.

In his defence the Accused told the Court that he did pass through some club where traditional drinks were being sold and Imbibed same and went to the local market to buy some drugs. Later he passed at the same club where he took more drinks. He called his brother so as to handover to him his motor bike. Later he went home. The following day he was arrested at Mwatate town by police and later charged with this offence.

The Accused is charged with the offence of murder which is defined under section 203 of the Penal Code thus,

***“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder”.***

Malice aforethought is an important ingredient of murder and is defined under section 206 of the Penal Code in the following manner,

***“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 harm is caused or not, or by a wish that it may not be caused.***

***(c) An intent to commit a felony.***

***(d) .....”.***

In the present case both the Accused and the Deceased went to PW1's house to partake of a traditional drink by the name of Bhangara when a fight ensued and the Accused proceeded to hit the deceased with pieces of firewood and inflicted on him the fatal blows.

The investigating officer (PW 7) did testify to the effect that the Accused himself had an injury on the right forefinger and was arrested the following day after the incident when he went to report a case of assault alleging that he had been bitten by the Deceased. He was taken to Hospital for treatment and psychiatric examination.

The fight between the Accused and the Deceased was witnessed by PW 1 the man who was selling the traditional liquor to the revelers, PW 2 and PW 3 who had been doing some cultivation in the shamba of Kilema where the drinks were being sold and who had later joined the drinking party. Upon a careful analysis of the evidence adduced before the Court, I am satisfied that it is the Accused who inflicted the fatal blows on the Deceased during a fight after the two had consumed traditional liquor.

The Accused may not have intended to kill the Deceased. There is no evidence to the effect that the Accused intention to go to PW 1's house was to kill.

The prosecution has not proved the element of malice aforethought and therefore the charge of murder cannot stand. However, I am satisfied that he is the one who caused the death of the deceased by an unlawful act.

Section 202 of the Penal Code provides,

***“Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed manslaughter”.***

By dint of the provisions of section 179 of the Criminal Procedure Code, I find the Accused guilty of the lesser offence of manslaughter contrary to section 202 of the Penal Code and he is Convicted accordingly under section 322 of the Criminal Procedure Code.

Judgment delivered dated and signed this **3rd** day of **November, 2015**.

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**M. MUYA**

**JUDGE**

**3RD NOVEMBER, 2015**

***In open Court and in the presence of:-***

Learned Counsel for the prosecution Miss Ogwen

Learned Counsel for the defence Mr. Ontwere holding brief Lewa

Court clerk Musundi

**M. MUYA – JUDGE**

**Court:**

Mitigation

The Accused still maintains his innocence. Thats all.

**M. MUYA – JUDGE**

Mention on 16/11/2015 for probation report and Sentencing.

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**M. MUYA**

**JUDGE**

**3RD NOVEMBER, 2015**