



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CRIMINAL CASE NO. 36 OF 2012**

**REPUBLIC..... PROSECUTOR**

**VERSUS**

**NGALA CHIRONGO MWAMEE .....ACCUSED**

**JUDGMENT**

**NGALA CHIRONGO MWAMEE** 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 6th day of June, 2012 at Egu village, Taru Location in Kwale County murdered ASMAN NGALA MWAMBEYU”.***

The prosecution called nine (9) witnesses in support of their case. The Accused gave a sworn statement. The wife of the Deceased Umezi Kombo (PW 3) had a love relationship with the Accused a situation commonly referred to as a love triangle.

PW 3 Umazi Kombo did testify to the effect that she was a wife of the Deceased but she also had a love relationship with the Accused. That on the 6th day of June, 2012 she met the Accused in the bushes where they proceeded to engage in sex but before they could finish they were caught in the act by her husband. A fight ensued between her husband and the Accused. At the time her husband was armed with a panga. The Accused cut her husband on the head and also stabbed him. She decided to go home but the Accused warned her not to mention what had transpired to anybody.

When she went home she did not report the matter for fear of her dear life. Later after burying the deceased she reported the matter to village elders who later reported to police and the Accused was arrested.

In his defence, the Accused in his sworn testimony told the Court that on the 7th day of June, 2012 he was at Taru when he was informed by his father of the death of the Deceased who was a relative. It was alleged that his body had been found in the forest and his killers were unknown. He participated in the burial of the Deceased. Later on 12/7/2012 he received summons requiring him to report at Taru police station which he did. He was informed that he was a suspect in the murder of the Deceased.

He does not deny that he had sexual relationship with the wife of the Deceased in 2010 and that the matter was solved traditionally and he was ordered to pay adultery compensation of Ksh. 20,000/= but

he denies having been found having sexual intercourse with Umazi (PW3) on 6/6/2012 by her husband (the Deceased). He alleges that on the day in question he was at Taru bus stage where he operates his Boda Boda business. It is the contention by the defence that the Deceased was an old man and that old men in Kinango Area are routinely killed on suspicions of witchcraft and the same fate could have befallen him.

The Accused is charged with the offence of murder

Section 203 defines murder 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 defined under section 206 of the Penal Code as follows,

***“Malice aforethought shall be deemed to be established by evidence proving anyone of the following circumstances -***

***(a) An intention to cause the death of or 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 wish that it may be caused.***

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

***(d) .....***”

In the instant case, the Deceased went missing on 6/6/2012. The body was retrieved from the forest the following day.

Post mortem examination was conducted on 8/6/2012 by Dr. Wahome. The head was crawling with maggots. There was a fracture on the skull. The body was decomposed. She formed the opinion that cause of death was as a result of trauma due to head injury.

The report by police was that the Deceased was found lying dead with deep cuts on the head and the brains were out.

In this case it is the evidence of PW 3 the wife of the Deceased against that of the Accused.

The Accused defence is that he was at Taru at a bus stage for Boda Bodas on the date of the alleged incident.

The wife of the Deceased maintains that on the fateful day they were caught red handed (***in flagrante delicto***) having sexual intercourse in the bushes by the deceased (who was her husband) and a fight ensued. That she clearly saw the accused cut the Deceased on the head and she fled the scene. That she did not report the matter because the Accused had threatened to kill her.

She further testified that it was not the first time she had made love to the Accused. That after their love relationship was discovered the Accused was punished but they did not cease seeing each other.

The Accused does not deny having had a sexual relationship with the Deceased wife and having been punished but he maintains that he had stopped the affair.

After a careful evaluation of the evidence adduced before the Court though PW 3 did not report the incident immediately after it happened, there were plausible reasons for not to report, stemming from the fact that the Accused could have threatened to finish her as she alleged.

Though her evidence is not clear as to whether at the time she decided to run away from the scene the deceased was still alive, or dead I find there is ample evidence to the effect that she had left when substantial injuries had been occasioned on the Deceased by the Accused. There is some controversy as to whether the object used was a panga or the blood stained piece of wood which was produced in Court. There is evidence to the effect that the Deceased was armed with a panga at the time and that the Accused over powered him and took it. Both weapons could have been used to cause the fatal blows on the deceased head.

The intensity of the blows as reflected by the injuries on the head goes a long way to show that the intention of the attacker was to finish the victim. The intention was not only to maim but to cause death. Malice aforethought was clearly established in this case.

The Deceased wife bore no grudge against the Accused. They were indeed lovers which fact is not disputed. Though police had suspected her involvement in the death of her husband, there is no evidence that she was coerced into mentioning the Accused as the person who killed her husband.

I am satisfied that the last person to be seen with the Deceased was the Accused and this was after inflicting injuries on him. This was in the evening. The following day the lifeless body of the Deceased was recovered in the bushes where the attack took place. The prosecution has proved its case beyond reasonable doubt. The Accused is found guilty as charged of the offence of murder contrary to section 203 as read with section 204 of the Penal Code and Convicted under section 322 of the Criminal Procedure Code.

Judgment delivered dated and signed this **7<sup>th</sup>** day of **October, 2015**.

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**M. MUYA**

**JUDGE**

**7TH OCTOBER, 2015**

**In the presence of:-**

Learned Counsel for the prosecution Mr. Masila

Learned Counsel for the defence Mrs. Nyange

Court Assistant Musundi

**M. MUYA – JUDGE**

**7/10/2015**

**Court:**

Mention on 21/10/2015 for mitigation and probation officers report. Notice to issue to Mrs Nyange.

**M. MUYA – JUDGE**

**7/10/2015**

**21/10/15**

Before Hon. Justice M. Muya

Court Assistant Musundi

Masila for the State

Miss Nyange for the Accused

Mention at 2:30 pm

**M. MUYA – JUDGE**

Miss Nyange absent

**Court:**

Mention 3/11/2015. Notice to Counsel and probation officers Report.

**M. MUYA – JDUGE**

**21/10/2015**

**3/11/2015**

Before Hon. Justice M. Muya

Court Assistant Musundi

Miss Ogweni for the state

Mrs Nyange for the accused

**Mitigation:**

The Accused is remorseful. He is a young man with a family. He is the sole bread winner. We pray that the Court do show leniency. He can still benefit the community. He is a first offender.

**SENTENCE**

The Accused was Convicted of the offence of murder contrary to section 203 as read with section 204 of the Penal Code.

The court has taken into consideration the mitigation by Counsel on his behalf. The punishment for murder as currently stipulated is death.

The Accused is Sentenced to suffer death as per law provided.

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**M. MUYA**

**JUDGE**

**3RD NOVEMBER, 2015**