



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**CRIMINAL(MURDER) NO. 13 OF 2007**

**REPUBLIC.....APPLICANT**

**VERSUS**

**J O A.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. This case has a long history, which has taken the accused through the hands of 4 Judges. The accused herein **J O A** was arraigned before court on a single charge of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence were that on 16<sup>th</sup> day of December, 2006 at [Particulars Withheld]in Migori District within the Nyanza Province murdered **E K O**.
2. He pleaded not guilty to the charges and the case proceeded to full trial, partially with assessors and partially without. In a ruling delivered by Makhandia, J (as he then was) on 24<sup>th</sup> February, 2011 he held that though the trial had initially commenced with the aid of assessors, along the way, the assessors fizzled out and the trial proceeded without them, a situation he said was irregular. As a consequence therefore he declared the proceedings to be a mistrial and ordered the case to start afresh without the aid of assessors. The case thus started afresh on 22<sup>nd</sup> January 2014. The accused pleaded not guilty to the charge. The prosecution called 5 witnesses and with the concurrence of defence counsel, adopted the evidence of Dr. P.M. Ajuoga who had testified as PW3 before Hon. Justice Aggrey Muchelule on 14<sup>th</sup> July 2009. Dr. Ajuoga has since died.

**Opening Statement**

3. Mr. P. Ochieng who appeared for the State in this case told the court that on 16<sup>th</sup> December 2006 the deceased was escorting his two children, B O (PW1) and A A aged 14 and 5 years respectively to the Uriri Bus Stage. The accused's son named G was also in the company of the deceased. The three children were going to visit their maternal grandmother. The accused and the deceased are married to sisters.
4. Upon reaching the bus stage, the accused who had been following the 4 persons stopped them and enquired from his son where he (son) was going. The accused's son told him that he (son) was accompanying his cousins to visit their maternal grandmother. Upon hearing his son's answer, the accused drew a knife but on sensing danger, the son ran away. The accused then turned on the deceased and stabbed him in the chest.
5. The deceased fell down. He was later rushed to Ombo Mission Hospital where he was pronounced dead on arrival. A report was made to the area chief, Mr. John Ouma Manyala (PW4) who managed to apprehend the accused and later transferred him to Migori police station. The

accused was later charged with the offence for which he stands trial before this court.

### The Prosecution Evidence

6. PW1 was B O who was aged 18 years old when he testified on 22<sup>nd</sup> January 2014. His evidence was that on 16<sup>th</sup> December 2006 at about 6.30 a.m. he was walking to the Uriri Bus Stage accompanied by his father, who is the deceased in this case, his sister A A and his cousin G O. Their plan was to visit their maternal grandmother in Rachuonyo. As they walked to the bus stage, the accused came by riding a bicycle. He went past them, stopped, put his bicycle on the ground and then asked his son G O “**where are you going?**” The accused then removed a knife from his rear trouser pocket and started chasing the son. The son ran away. The accused then turned on the deceased and stabbed him on the left side of the chest. The deceased fell down.
7. Information about the incident was relayed to M A O, PW2, a sister in-law to the deceased. PW2 rushed to the scene and found the deceased lying on the ground bleeding from his chest. With the help of a man called Elisha (not called as a witness) the deceased was rushed to Ombo Mission Hospital but the deceased was pronounced dead on arrival at the hospital.
8. PW2 stated that B O told her that it was the accused who had stabbed the deceased in the chest. The information about the death of the deceased was also relayed to the chief of South East Kanyamkago Location, Mr. John Ouma Manyala who testified as PW4. With the help of members of the public and the police PW4 managed to apprehend the accused. PW4 stated that he knew the accused person well for over 20 years. PW4 identified the accused in court and also identified the knife which was alleged to have been used to stab the deceased.
9. On the 18<sup>th</sup> December 2007, a post mortem examination was performed on the body of the deceased by Dr. P.M. Ajuoga who has since passed away. The postmortem examination was done at Rapkon Hospital at Awendo. According to the evidence of Dr. Ajuoga who testified before Hon. Muchelule, J. the deceased’s body had a deep pierced wound on the left side of the chest on the epicardial region. There was another pierced wound on the upper lobe of left lung and a pierced wound on the left ventricle of the heart. Dr. Ajuoga formed the opinion that the cause of death was anemia due to ruptured heart and ruptured left lung. Dr. Ajuoga also testified that the wounds could have been caused by a sharp instrument. The postmortem report was produced in evidence and marked **P. Exhibit 4-1**.
10. PW3 was No.94021357 Sgt. Abel Ombok formerly of Uriri AP Post. His evidence was that on 16<sup>th</sup> December 2006, at about 10.00 a.m. he was on duty at the AP Post at Uriri when he received a report from PW2, M A O about the death of the deceased. He was also informed that the deceased who had by that time been taken to Ombo Mission Hospital had been stabbed by a person well known to him (deceased). PW3 booked the report and thereafter, PW4 went to the AP Post and also reported about the death of the deceased.
11. Together with PW4, PW3 went to the accused’s home. The accused was a well known cobbler within [Particulars Withheld] Township. On arrival at accused’s home, they did not find him nor was he at his place of work. Later, acting on information received from members of the public, PW3 arrested the accused who was found pushing his bicycle up the hill. The accused was thereafter escorted to Uriri police patrol base from where he was taken to his home. At the accused’s house, and upon request by PW3, the accused led the police to his bedroom and removed a knife from inside the pocket of his coat that was hanging on the wall. PW3 identified the knife in court – **PMF1-1**. The accused was thereafter led to Awendo police station and after the routine search; he was placed in police cells. PW3 also recorded his statement.
12. In the court, PW3 identified the accused as the person he had arrested on 16<sup>th</sup> December 2006.
13. During cross examination, PW3 stated that the knife they recovered from the accused’s house was blood stained although the witness was not sure whether, after he handed it over to police, it was taken for analysis. PW3 also stated that when they took the accused to his house after arrest, they found his wife at home, but no statement was taken from the wife, the reason being that there was a huge commotion in the home.
14. PW5 was Number 63872 Police Constable Francis Opondo, formerly of Migori police station. He recounted that on 17<sup>th</sup> December 2006 he was instructed by his OCS Chief Inspector Baraza to accompany him to Awendo police station to collect a prisoner. They went to Awendo police

- station and collected the accused who had been arrested in connection with the death of the deceased through stabbing. He said he also collected a knife which was alleged to have been used for stabbing the deceased. The knife was produced as **P. Exhibit I**. PW5 also took witness statements and attended the postmortem examination of the deceased on 18<sup>th</sup> December 2006.
15. PW5 also produced a P3 form being a report on the mental status of the accused confirming that the accused was fit to stand trial. The P3 form was produced as **P. Exhibit 2**.
16. During cross examination, PW5 testified that he did not know how the knife was recovered. He also conceded that his statement to the police did not indicate that CI Baraza had asked him (PW5) to assist with investigations, nor does the statement say that he recorded any statements from witnesses.

### The Defence Case

17. The accused gave unsworn evidence and denied the charge. He stated that on 16<sup>th</sup> December 2006, he woke up in the morning and went to work in his shamba. At about 8.30 a.m. he went back home before leaving for Awendo town to buy some wares. He left Awendo town at about 11.30 a.m., but before he reached Uriri Township where he used to do some business, he was arrested suddenly and escorted to the AP Camp at Uriri. A few minutes later, he was bundled into a police land rover and escorted to his home by the police who alleged that he had killed somebody. After carrying out a search at his home, the police took him to Awendo police station where he was put in cells for the night.
18. On 17<sup>th</sup> December 2006, he was taken to Migori police station where he stayed for 74 days before being taken to court for plea on 28<sup>th</sup> February 2007.
19. Regarding the evidence given by PW1, the accused contended that the said evidence was not true. He also stated that he had a grudge with the said witness and that at some point, PW1 threatened his life, and that if indeed he (accused) had stabbed the deceased, PW1 would have raised an alarm. Concerning the testimony of PW2, the accused said he was a stranger to the allegations made by the said witness especially in the absence of any blood stained clothes belonging to the accused being produced in court.
20. As for the evidence of PW5, the accused stated that the said witness had no warrant to search his house, and that if anything the bicycle he was found riding should have been produced as an exhibit in court.
21. The accused vehemently denied the charges facing him. He also said that the name of the deceased was not clear – whether he was E O or E K.

### Final Submissions

22. At the close of the defence case, counsel for the accused submitted that the prosecution had not proved its case against the accused person beyond any reasonable doubt. Counsel submitted that there were contradictions between the testimonies of PW3, No.94021357, Sgt Abel Ombok and PW4, John Ouma Manyala as to whether or not any of the accused's wives were present at accused's home when the alleged murder weapon was recovered.
23. Secondly, counsel submitted that since no chemical analysis was done on the knife, there was no knowing whether the knife produced in court was the murder weapon. In light of those submissions, counsel urged the court to acquit the accused person of this murder charge, as it appears that both PW3 and PW4 did not visit the accused's home.

### The Offence of Murder

24. Under **Section 206** of the **Penal Code**, there are three ingredients of the offence of murder which ought always to be established before a finding that an accused person is guilty of the offence.
- a. **Proof of the fact and the cause of death of the deceased.**
  - b. **Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the accused person which constitutes the 'actus reus' of the offence and**

c. **Proof that the said unlawful act or omission was committed with malice aforethought which constitutes the mens rea of the offence.**

25. From the above, the issue that arises for determination is whether the prosecution in this case has established all the three conditions to lead to a finding that the accused person herein is guilty of the murder of the deceased.

### Findings

26. PW1, B O gave the leading testimony and told the court that on the fateful morning, he was walking about 2<sup>1</sup>/<sub>2</sub> metres behind the deceased when the accused came along riding his bicycle, went past them, got off his bicycle and put it down before he started chasing G O asking him where he (G) was going. The accused then started chasing G who ran away and immediately the accused went for the deceased, and stabbed him in the chest without saying anything to the deceased. As a consequence of the stab, the deceased fell down and by the time he got to Ombo Mission Hospital, the deceased had died.
27. According to the testimony of PW1, the incident took place at about 6.30 a.m. when the visibility was good and from close range. The accused and PW1 were not strangers and PW1 stated that as far as he knew, the accused was like his father.
28. PW1 also testified that after the accused had stabbed the deceased, some people tried to arrest him but he (accused) took the knife he had stabbed the deceased with, licked it and then ran away.
29. I have carefully considered PW1's testimony, against the backdrop of the accused's defence, and I find that the testimony of the said witness remained unshaken throughout the trial. I am satisfied beyond any shadow of doubt that there was no mistaken identity of the person who stabbed the deceased. I am also satisfied that the accused's allegation that he had a grudge with PW1 is a hollow afterthought. It is not in doubt that as at 16<sup>th</sup> December 2006, PW1 was hardly 11 years and the court wonders what grudge a child of that age could have had with the accused and what threats such a child could have issued against the accused person.
30. Further, according to Dr. Ajuoga's evidence, the deceased was found to have had piercing wounds in the heart and in the left lung, and that the cause of death was anemia due to ruptured heart and left lung.
31. PW2 testified that when she got to the scene, she found the deceased lying down unconscious and his chest covered in a pool of blood.
32. I am aware of the fact that the only eye witness in this case is PW1 and because of that I must treat the evidence of PW1 with caution. I saw this witness testify. I observed his demeanour and he appeared very truthful, firm and calm. In any event, the accused was well known to PW1 and as was held in **Anjoni -vs- Republic [1976-80] KLR 1566** “--- recognition of an assailant is more satisfactory more assuring and more reliable than identification of a stranger because it depends upon personal knowledge of the assailant in some form or other ---.”
33. Although counsel for the accused contends that there are material contradictions in the testimonies of PW3 and PW4, thereby casting doubt on whether or not these 2 witnesses went to the accused's house together or whether they went at all, I find that no such contradictions exist or even if they do, they are so immaterial that they do not affect the fact that PW1 saw the accused stab the deceased with a knife and that the accused himself handed over that knife to PW3 when PW3 went to his (accused's) house and demanded to be given the murder weapon.

### Conclusion

34. In the premises, I am satisfied that the prosecution has proved beyond any reasonable doubt that:-
- *the deceased died and he died from piercing stab wounds into the heart and the left lung;*
  - *the deceased's death was as a direct consequence of the accused's unlawful act namely the act of stabbing the deceased in the heart;*
  - *the said unlawful act was committed with malice aforethought since on the fateful day, the accused*

*purposed to kill somebody.*

35.The accused is therefore found guilty of the murder of the deceased person herein on 16<sup>th</sup> December 2006 and is accordingly convicted under **Section 322 (1)** of the **Criminal Procedure Code.**

36.Orders accordingly.

**Judgment dated and delivered at Kisii this 5<sup>th</sup> day of June, 2014**

**RUTH NEKOYE SITATI,**

**JUDGE.**

In the presence of:-

Mr. S.M. Sagwe for O.M. Otieno for the accused

Mr. Majale (present) for the state

Mr. Bibu - Court Assistant