

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MIGORI
CRIMINAL CASE NO. E012 OF 2022

REPUBLIC.....PROSECUTOR

-V/S-

CHALISI MARONGO NYAMBINYA
ACCUSED

JUDGMENT

Introduction

The accused person **CHALISI MARONGO NYAMBINYA** face a charge of murder contrary to Section 203 as read together with Section 204 of the Penal Code.

The particulars are that **CHALISI MARONGO NYAMBINYA** on 1st December 2021 at Lichota village, Ngege Sub-Location, Suna East Sub-Count within Migori County murdered Abel Onchoke Nyambinya.

The prosecution called 7 witnesses to support its case that the accused person committed the offence of murder.

PW1, Anne Kemunto the mother of the accused and the deceased testified that on 1st December 2021 her two sons came from drinking and Abel the deceased found when the accused had entered her house and questioned why the accused kept on going to her house to ask for food. That they then started to quarrel. That she went to tell Abel to keep quiet and sleep but he refused and abused her and called her a prostitute. That she ran away and went to call the village elder for help. She also went to call the police. That on return she heard PW2 crying and when she met PW3 and Kerubo her grandchildren they told her their father had died. That on arriving home she found her son Abel had died and the body was at the door to her house and he had injuries to the head. She said she did not find the accused at home when she returned from the police station.

PW1 said that the accused did not have a house because the deceased threatened that if he built he would burn the house. She said that previously Abel had cut and fractured the accused person's hand. She said the 2 used to quarrel daily and fight for about 6 years. She said the deceased person's father died in 1982 and subsequently she gave birth to the accused and he was not liked in the home.

In cross examination she said that Abel the deceased herein used to start the quarrels and refer to the accused as 'kimerwa' which in dholuo means a person born out of wedlock.

PW1 said on the material day she was alone with the accused as the deceased person's house was some distance away from her house. She said that it is Abel who was carrying a panga and a stick and both her sons were drunk at the time they were quarreling. She said she did not see the accused kill the deceased.

PW2, Mary Mbone testified that she was the wife of the deceased and that on 1st December 2021 the accused returned and started demanding for food from the mother while quarreling. That when her husband the deceased herein arrived he told the accused not to disturb the mother. That the accused started quarreling with the deceased who had entered the house and said the deceased was a woman as he had been operated in the stomach. She said the accused was quarreling while outside the mother's house. That she told the accused to stop quarreling and the accused told her to go back to the house. That the deceased went out of his house but she did not see him carrying anything and that he did not see if the accused person who was near the mother's house was carrying. Pw2 said she went to wake up her son and on return found the deceased had died. That she started screaming as she went to view the body and saw he had a cut on the head and brain was exposed. She said the accused was standing by while holding two clubs which he took to the mother's house and then left. She said that the deceased had a panga and 2 clubs

She said that report of murder was made to the village elder who called police from Migori and they came and took the body to the mortuary. That the panga and clubs recovered at the scene were also taken as exhibits.

PW2 said the accused and the deceased used to quarrel daily and could fight and injure each other and the mother had been referred to report to police.. She said they could intervene and separate them.

PW3, testified that on 1st December 2021 he went to sleep after eating. That his mother went to knock at his door and told him to come out and assist as his father was fighting with the accused. That when he arrived at the scene he found his father lying on the ground near his grandmother's house and he was bleeding from the head and brain was exposed. He said he heard the assailant running in the maize plantation but he did not find anyone at the scene. That he went call the village elder Chacha and woke him up. He said when he went to sleep his father had not returned home. He said he had seen him during the day. PW3 also said that he had not seen the accused person on the material day. PW3 said the blood stained panga he saw besides his father's body belonged to his father the deceased.

PW3 said that the police from Lichota called CID from Migori and they came and took the body to the mortuary for postmortem. He said when the PM was done he was present. PW3 confirmed that the accused and the deceased had a grudge. He said he could not tell if the deceased came home when drunk.

PW4, Samwel Chacha the village elder of Lichota village testified that on 1st December 2021 at about 8.00pm he saw the grandchild of the accused who reported that the accused and the deceased were quarreling. PW4 said that the 2 used to quarrel daily after getting drunk. He said their mother also went to him and he could hear the noise as he lived 100m away from their home. That he sent a boy known as George to go and check what was going on and on return he said he found Abel had been killed. That he proceeded to the scene and found Abel lying on the ground dead. He said they fought near the mother's house. That inside the mother's house they found blood

stained panga and a club. He said police visited the scene and collected the body together with the exhibits. That on 26th June 2021 the accused returned home and he reported to police at Lichota and he was arrested at night.

PW4 said he had known the accused since his childhood and that they used to quarrel when drunk. He said that the two brothers quarreled over land. He said that the accused was not born in the home and according to Kisii traditions he was not wanted there. He said the deceased father died before the accused was born.

PW5, Dr. Ian Omuom of Migori County Teaching and Referral Hospital testified that he examined the body of Abel Onchoke Nyambinya on 12th December 2021 and established cause of death as compound skull fracture. He did observe that there was cut on the left parietal region measuring 7cm long extending from the mid parietal region towards the back of the head. He said there was bleeding from the ears and nostrils with conjunctival bleesding and palour. He also established compound skull fracture with bleeding in the brain.

PW6, P.C Nyahiri of DCI Migori testified that on 1st December 2021 at 23.00hours he accompanied CPL Kisenba and CPL Livingstone to a scene of murder together with officers from the police station CPL Linda, P.C. Makemba and Cheruiyot. He said the scene was in Lichota village within Suna East Sub-County. He also said that the report of murder was made by the village elder who said that there was a quarrel between two brothers which led to a fight and death of one of the brothers.

He said on arrival at the scene they found Anti-Stock Theft Officers from Lichota Camp were at the scene together with the mother of the deceased who led them to where the body lay on a footpath besides maize plantation.

PW6 said that the deceased had head injuries. They recovered a sharp panga with black handle and jembe stick both of which had blood stains. PW6 arranged for processing of the scene by taking photographs which were produced by PW7.

PW6 said that he established that both the accused and the deceased were drunk when they started quarreling and a fight ensued and when their mother failed to stop the quarrel and fight she ran to call the village elder but on return she found the deceased had already been killed and his lifeless body lay in a pool of blood and the accused had already escaped. The body of the deceased was collected and taken to the Migori General Teaching and Referral Hospital mortuary where postmortem was conducted by Dr. Ian Omuom on 12th December 2021.

PW6 further established from the wife of the deceased that her husband was returning home on the material night around 22.00hours when he heard the accused abusing the mother and demanding for food and that when the deceased intervened the accused could not listen. That the accused started quarreling with his brother and a fight ensued. That when Mbone tried to intervene the accused chased her with a panga and she ran into the maize plantation. That Mary Mbone returned and found the 2 brothers fighting and because it was beyond her she went to wake up her son Wycliffe to come and separate them but on return found the deceased the deceased was lying down dead in a pool of blood and the accused was not at the scene.

That when the accused resurfaced after about 4 months he was arrested and charged, PW6 produced the panga and jembe stick as exhibits 1 & 2.

In cross examination PW6 said that he was aware that the deceased was armed with a panga and the accused armed with a rungu. He also said that he was not aware the accused hit the deceased with a rungu in self-defense. He confirmed that when he interrogated the village elder he said it was not the first time that the 2 brothers were quarreling and that he had severally resolved quarrels between them and that they were both drunkards.

PW7 Sergeant Livingstone Katuyi from DCI Migori Scenes of Crime Section testified that on 1st December 2021 at 11.00pm he accompanied CPL Kisemba and P.C. Nyairi of Migori DCI and officers from the Police Station CPL Linda, P.C. Makomba and Cheruiyot to Lichota village to a scene of murder which had been reported by the village elder. PW7 documented the scene by

taking 4 photographs of the body which lay on along a foot path near maize plantation. He said the body was identified by the mother of the deceased. PW7 said that besides the body was a panga, rungu and a wooden stick. He also said that the deceased had an injury on the head.

PW7 produced the photographs Ex P4(a) to (e). He said that the panga and stick had blood stains. He also produced certificate prepared upon processing the photographs as Ex P5.

When the accused person was placed on defense he gave sworn statement and said that the deceased was his brother but that the deceased did not have good will and they always quarreled and did not live peacefully.

That on 1st December 20221 he was at home with his mother at 10.00pm together with his sister in-law Mbone and the brother's son Wycliffe Kennedy. He said that the deceased had gone to drink and on return he was drunk and came while armed with a panga, spear and rungu. That the deceased came and started insulting him saying he did not belong to their family and was unwanted in the home. That he pleaded with the deceased asking why he wanted to kill him but he said he wanted to take over the land.

The Accused said the deceased wanted to stab him with the spear but he missed. That he also missed the panga aimed to cut him and he managed to snatch the rungu he was holding in his armpit and used it to hit the deceased once.

That by the time he snatched the rungu and used it to hit the deceased the Accused person's mother had rushed to go and call the village elder Samuel Chacha-PW4. That after he hit the deceased he managed to escaped and stayed away for 6 months before he returned and his mother reported to the village elder who in turn reported to the police and he was arrested.

The Accused said that the deceased was in the habit of cutting him and he had done it three times and he went to hospital but because he was his brother he always pardoned him. He said the village elder was aware that the deceased was violent and he testified to that effect.

In cross examination the accused person said that it is true that he hit the deceased with a rungu which belonged to the deceased. He said he was inside his mother's house when the deceased returned and started insulting him. That when the deceased started breaking the door to the mother's house and wanted to stab him with the spear he ran out of the house. He said that if he had continued running from the deceased he would have stabbed him as they were very close. He said that Mary Mbone the wife of the deceased was in her house 30 meters away and she did not see what was happening.

The Accused also said that when he hit the deceased and he fell he reported to his son who went and found he had died and raised alarm. The Accused said he escaped for fear that if members of public responded to the alarm they could have attacked him. He said he was confused and that is why he did not go to the police station.

Analysis and Determination

1. In consideration of the evidence of prosecution witnesses and in consideration of the accused person's sworn statement, this court is to determine whether the ingredients of the offence of murder as provided for under **Section 203** of the **Penal Code Chapter 63 of the Laws of Kenya** have been proved beyond reasonable doubt by the prosecution.
2. Section 203 of the Penal Code Chapter 63 of the Laws of Kenya under which the accused persons were charged provides as follows: -

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

3. The said provision creates elements of the offence of murder that must be proved by the prosecution beyond reasonable doubt as held in the case of **Anthony Ndegwa Ngari v Republic [2014] eKLR** to include: -

- i. **That the deceased died;**
- ii. **That the death was caused by an unlawful act or omission;**
- iii. **That the accused person directly or indirectly participated in the commission of the alleged offence; and**
- iv. **That there was malice aforethought.**

On Proof of Death there is no dispute that Abel Onchoke Nyambinya died. PW5, Dr. Ian Omuom, produced the postmortem report which confirmed that the deceased died of a **compound skull fracture** due to a cut wound on the parietal region. All the other prosecution witnesses confirmed the death of the deceased.

On whether the death was caused by an unlawful act the evidence shows that the deceased and the accused, who are brothers, engaged in a violent confrontation on the material night after both returned home drunk. Several witnesses including PW1 (their mother) and PW2 (the deceased's wife) testified that the two had a long history of quarrels, often escalating into violence fights.

On the material night, the accused admitted that he struck the deceased once with a rungu after disarming him. The deceased had come armed with a **panga, spear and rungu**, and according to the accused and PW1 said that she told the deceased to keep quiet and sleep but he armed himself with a panga and a club. PW3 said that the panga that was recovered and which had blood stains belonged to his father. PW2 also said that her

husband went out of the house and although she did not see what he was carrying the panga recovered at the scene belonged to her husband. It is evident from evidence of most prosecution witnesses that the deceased was the aggressor who confronted and attacked the accused. It is therefore clear that the unlawful act which caused death was a blow to the deceased's head.

The accused admitted participation. His defense is that he acted in **self-defence**, striking once to ward off a fatal attack from his brother. Without any provocation the deceased who came back home drunk found the accused in his mother's house and questioned why he was always going to ask for food from the mother and they started quarreling and although he had already gone to his house and his mother tried to tell him to keep quiet and sleep he abused the mother as a prostitute and while armed with a panga he got out of his house and went to attack the accused who was outside his mother's house.

Section 17 of the Penal Code provides for principles of common law on self-defence and the Court of Appeal in **Ahmed Mohammed Omar & 5 Others v Republic [2014] eKLR** held that a person is entitled to use reasonable force to protect himself.

Similarly, in **Nzuki v Republic [1993] KLR 171**, it was held that the test for self-defence is whether, under the circumstances as perceived by the accused, the force used was reasonable.

In this case the deceased was armed with multiple dangerous weapons and had previously attacked the accused, even fracturing his hand. PW1 confirmed that Abel (the deceased) was the habitual aggressor. In the face of an imminent armed attack, the accused disarmed his brother and struck once with the rungu. The action by the accused was not wholly disproportionate in the circumstances, especially given the accused's testimony that continued retreat would have resulted in his own death.

Alternatively, even if the force used was excessive, the accused was clearly provoked and Section 207 of the Penal Code provides that where a person kills in the heat of passion caused by sudden provocation, the offence should be reduced to manslaughter.

The Court of Appeal in **Gabriel Njoroge v Republic [1982-88] 1 KAR 1134**, held that sustained quarrels and insults, culminating in violence, may amount to provocation if they lead to a loss of self-control. The deceased's insults — referring to the accused as “illegitimate” (confirmed by PW1) — coupled with a drunken armed attack, constituted sufficient provocation that justified the reaction by the accused person.

On whether malice aforethought was proved by the prosecution
Section 206 of the Penal Code defines malice aforethought. It may be inferred from the nature of the weapon, the part of the body targeted, the manner of attack, or conduct before and after.

In the case of **Isaac Kimathi Kanuachobi -vs- R (2013) Eklr** it was held:

“There is express, implied and constructive 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 bodily harm. When it is proved that an accused killed in further course of a felony (for example rape, a robbery or when resisting or preventing lawful arrest) even though there was no intention to kill or cause grievous bodily harm, he is said to have had constructive malice aforethought.”

The elements to prove malice aforethought were also settled in the case of **Ernest Asami Bwire Abanga alias Onyango v R (CACRA No. 32 of 1990)** where the Court held:

“the question of intention can be inferred from the true consequences of the unlawful acts or omission of the brutal

killing, which was well planned and calculated to kill or to do grievous harm upon the deceased.”

Further in **Republic v Tubere s/o Ochen [1945] 12 EACA 63**, the court held that intention must be drawn from surrounding circumstances.

In the present case, there was no premeditation. The accused struck once during a sudden fight with his armed brother. His subsequent flight was reasonably explained as fear of mob injustice, not evidence of guilty conscience.

I therefore find that the prosecution failed to prove **malice aforethought** beyond reasonable doubt.

In conclusion this court finds that the prosecution proved beyond reasonable doubt that the accused caused the death of the deceased. However, the circumstances disclose either **self-defence** or, in the alternative, **provocation**, which negates malice aforethought.

I accordingly find the accused **not guilty of murder** but guilty of the lesser offence of **manslaughter** contrary to Section 202 as read with Section 205 of the Penal Code. The accused, **Chalisi Marongo Nyambinya**, is hereby **convicted of manslaughter** under Section 322(1) of the Criminal Procedure Code.

DATED, SIGNED AND DELIVERED AT MIGORI THIS 18th DAY OF September, 2025

HON. LADY JUSTICE ANNE ONG'INJO
JUDGE

In the Presence of;

