

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL CASE NO. E009 OF 2022**

**REPUBLIC**

.....**PROSECUTOR**

**VERSUS**

**MESHACK NYANSIKERA**

**OMBATI.....ACCUSED**

**JUDGMENT**

1. **Meshack Nyansikera Ombati** 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 the accused on 4<sup>th</sup> February, 2022, at Ndege Ndimu area in Nakuru North sub county within Nakuru county murdered Givan Onger Nyamwaka.
2. He denied the charge and the case proceeded to full hearing with the prosecution calling eight (8) witnesses. The accused gave a sworn statement of defence without calling any witnesses.
3. **PW1 Velah Bonareri Serema** was on 4<sup>th</sup> February, 2022 8pm notified by her brother in law that the accused had killed the deceased. She took a ride using a motorbike to the home and confirmed the report. Police officers were already

at the scene. She confirmed that her daughter (PW4) and the accused have a child.

4. **PW2 - Peter Nyamweya Momanyi** stated that in early December, 2021 the deceased was brought to him for care. The accused who is the child's biological father came to see him on 2<sup>nd</sup> February, 2022 8pm. He received a report from his son Pembe Ondieki informing him of the deceased's death caused by the accused. He took a motorbike home and confirmed the report. On 15<sup>th</sup> February, 2022 a panga (EXB 1) was found nearby and it was taken to Lanet police station. They were informed of a suspect who had surrendered at Githioro police station. The suspect was the accused who had a list of people he was to kill and he was one of them. He confirmed that as he went to work as a security guard he left the deceased with his children and his wife was also at home. The deceased, he said was in Std. 5.
5. **PW3 Gabriele Peter Nyamweya** then aged 13 years and in Std. 6 at Dimu primary school testified that PW2 is his father while Beatrice Kwamboka is their mother. After school on 4<sup>th</sup> February, 2022 him and his brothers went to play upto 7pm. Upon their return their mother told them to peel potatoes. The accused then arrived carrying a box. He gave his son (the deceased) bread. He then removed a panga from the box and threatened to kill them. He wanted to leave with the deceased but his mother refused and followed

him. The accused chased her and she escaped through the window.

6. The deceased opened the closed door and told him not to kill him. They spoke as the rest of them were in the house. He saw the accused cutting the deceased on the head and hand with the panga. His mother went screaming and rushed outside the fence. That the accused let off his son who rushed towards the door which he opened rushed to the bedroom. The accused then cut his hand and the neck and the witness was able to see. The accused came to where he was and he hid inside the blanket. The accused took off.
7. As his mother continued screaming PW3 came out and saw the deceased injured. He said they had not had any issues with the accused before this day. That he had known him since he brought the deceased to their home.
8. In cross examination he said the accused came carrying a box with a carrier bag inside and he did not greet anyone even though the mother was inside. That he gave the deceased bread. He only removed the panga when he was denied permission to go with the child. He however left with him after he was granted permission. He said he saw what the accused did through the window as it faces the gate.
9. **PW4 - Purity Nyarangi Ombati** introduced herself as a cousin to the deceased and a former girlfriend to the accused. Later she testified as the mother to the deceased. In summary she said she had left the deceased with her aunt

Beatrice as she went to work in Nairobi as the father (accused) was not supportive. The deceased was 3 years old at the time of his death. She was not married but the accused was.

10. In cross examination she said the accused had tried relating with her and the deceased. She did not know if he occasionally went to see the child and if he paid school fees. Further that she was against him taking the child.
11. **PW5 No. 250094 P. C. David Osoro** testified that on 4<sup>th</sup> February, 2022 at around 9.45pm he was on duty at Githiopo police station when the accused came there and told him he had killed. He called Cpl Ahmed and relayed the said information to him. They were directed by the OCS Mr. Wangecho to place the accused in cells. At 10.30pm the OCS Lanet came with the deceased's family and identified the accused. He said the accused had a booklet indicating he would teach them a lesson.
12. In cross examination he said the accused came to the station while shaken, and told him he had killed. He confirmed that the alleged booklet was not in court.
13. **PW6 Naftali Momanyi** an uncle to the deceased received a report of the death of the deceased on 4<sup>th</sup> February, 2022 at about 7.30pm. He went to PW2's home and confirmed the report. Him and others took the body to the mortuary, and went to Githiopo police post and found the accused there.

The next day the children gave them a panga which they took to Lanet police station.

14. In cross examination he said the kids told him about the panga and he went and recovered it. He did so in the presence of Jackie Bonareri (his brother's wife). The panga had blood on it. He took the panga to the police station accompanied by one Samuel Makori.
15. **PW7 No. 244047 P. C. Eric Wainaina** of DCI Nakuru stated that him and Cpl Silas were tasked to investigate this case. At Lanet police station they were handed a panga (EXB 1) which was the murder weapon. The panga had blood stains. At the Ndilimu police post they recorded 12 witnesses' statements. He established that on 4<sup>th</sup> February, 2022, the accused went to PW2's home to pick the son (deceased) who had been taken by his mother (PW4). That the accused caused the fatal injury to the deceased after he was denied access to him. He left the scene and handed himself to Githoro police station (O.B No. 2 of 5<sup>th</sup> February, 2022) from where he was arrested.
16. **Dr. P. Irungu** conducted the post mortem and found the cause of death to have been massive bleeding. He sent the panga and deceased's blood samples to the government chemist on 17<sup>th</sup> February, 2022. The exhibits he took for examination were:
  - Blood samples of deceased
  - Deceased's finger nails

- Steel panga with a blood-stained handle
  - Pair of blue trouser jeans with blood stains.
  - A grey vest with blood stains.
17. He produced the post mortem (EXB2) by Dr. Ngulungu with the consent of the defence. Also produced were the following: panga (EXB 1); Blue trouser (EXB 3). Grey vest (EXB 4) and Exhibit Memo (EXB 5b).
18. In cross examination he said the scene was 5m from the house and 5m from the gate. He did not have the photos taken by the Scenes of Crime. He denied any knowledge of the accused having lived in that home or catering for the deceased's needs. He never recovered the box and carrier bag, but the panga was recovered 300m from the home. The blood-stained clothes were recovered from the accused while in police custody. Arrangements for changing had been made while he was in custody though he did not sign for them. He also confirmed that the accused was never presented at the government chemist.
19. On further cross examination he said the panga was brought to the station by the deceased's relative on the same date of incident. That the panga was not dusted for finger prints, but the analysis confirmed that the panga (EXB 1) was the murder weapon.
20. **PW8 Salavine Cheruto Katukoi** a senior Government Analyst based at Government Chemist Kisumu who holds a Bachelor's degree in Bio Chemistry from Kenyatta University

examined the exhibits herein. She received the following exhibits from Cpl Silas vide the Exhibit Memo (Exb 5a): Blood sample of Givan Ongeru in a cotton wool, finger nails sample of Givan Ongeru in a cotton wool, finger nails sample of Givan Ongeru in a small container, panga with a red handle in an envelope, a pair of trousers in an envelope and a grey vest.

21. The office was requested to ascertain the origin of the blood on the panga (EXB 1) compared with the blood samples of the deceased, and the finger nails. After the analysis the following were the results. The DNA profiles generated from the blood stains from EXB 1, 2 & 4 were all identical and matched the DNA from the blood and finger nails of the deceased. She produced the report dated 16<sup>th</sup> November, 2023 as EXB 5a.
22. In cross examination she said they only received blood samples from the deceased and not the accused. They had the post mortem form dated 7<sup>th</sup> February, 2022. She was not asked to do profiling with family members and so could not ask for their samples, or control sample.
23. In his sworn defence the accused denied having committed the offence. He said him and PW4 were lovers and they had a child together. On 5<sup>th</sup> December, 2021 PW4 called him and requested for an opportunity for them to discuss something. They met on 6<sup>th</sup> December, 2021 and discussed the custody of their child since she had got a job in Nairobi. It was agreed

that her aunt Beatrice Kwamboka Nyamweya stays with the child. PW4 travelled to Nairobi on 7<sup>th</sup> December, 2021.

24. He said he visited the child on 24<sup>th</sup> December, 2021 and was well received by Beatrice, PW2 and their children. They allowed him to go there any time to visit the child which he did including that January, 2022. PW4 informed him that Beatrice was complaining that she was not able to do her work because of the child. They agreed to have the child in a baby care school and Beatrice got one. She gave him the list of requirements and he paid part of the Ksh 4,500/= fees. On 4<sup>th</sup> February, 2022 PW4 informed him that Beatrice had told her the child was sick. He asked her to ask her to deal with the issue which she did.

25. On the same day he set out at 6pm to visit the child, after doing some shopping and reached PW2's home. Gabriele opened the gate and called the other children including his son. He was well received and as he entered the house he greeted Beatrice Kwamboka (aunt), but she never responded. He explained the reason for going there. The aunt responded in a harsh tone telling him to refund the Ksh 700/= she had used to treat his son. He placed the money on the table.

26. On asking if she had taken the child to school and for the teacher's number she responded saying he wanted to steal the child. She went out of the house screaming saying he wanted to steal the child. People arrived and he ran away

through the fence and went to the police station to report. At the station he was told to wait. While there PW4 arrived saying the child had been stolen. He was detained at the station. At 3.00am PW2 came there saying a person had been killed.

27. It was his evidence that when he went to PW2's place he only had shopping and no weapon. He denied telling PW4 that he would do something bad. The next day the DCI and others told him he had killed someone. He was then taken to Bahati police station where he was kept for 2 weeks and not allowed to talk or see anyone. He denied having any book or changing clothes when he was arrested. He produced a photo (DEXB 1) which was taken of him while in prison. He denied having disagreed with PW2 and his family or PW4.

28. In cross examination he said he was a casual labourer in Lanet while PW4 lived on the other side of Lanet. He was not married due to church matters. He supported his son who lived with PW4 and her mother. That his job could not allow him to stay with the boy since he used to go on long safaris, at times. He said he left PW2's home that night because Beatrice had called him a thief and people had come. He reported at Ithiongo police station and even PW5 came there. He denied ever surrendering to the police.

### **Prosecution's submissions**

29. The prosecution's submissions are dated 4<sup>th</sup> February, 2025 having been filed by M/s Emma Okok Principal prosecution

counsel. Counsel did a summary of the evidence by the prosecution witnesses. She outlined the three (3) ingredients to be established for proof of a charge of murder. She submitted that the death of the deceased is not disputed, and the same had been proved by the evidence of PW1, PW2, PW3 and PW6 who all saw the deceased's body. That the cause of death is not also disputed as the post mortem report was produced by consent through PW7.

30. On whether the accused committed the unlawful act which caused the death of the deceased, counsel submitted that the accused was placed at the scene of crime by PW3, whose evidence was direct. Further that the report by the government chemist confirms that the blood stains that were found on the panga, blue jeans trousers and vest belonged to the deceased. That the trousers and vest belonged to the accused. She thus submitted that it is the unlawful act of assault that led to the deceased's death.

31. Counsel further submitted that the accused had an intention of killing somebody, as he went to the homestead where his son lived while armed with a sharp panga. He removed the panga from the box threatening to kill all those present. Thus, to her malice aforethought has been established.

### **Accused's submissions**

32. These were filed by Sabaya & Associates Co. advocates and are dated 4<sup>th</sup> June, 2025 counsel gave a summary of the

evidence by the prosecution witnesses. She submitted that the key witness (PW3) was not able to explain the exact place of the assault. Besides this she pointed out that the investigating officer did not conduct any independent investigations. He relied on the witness accounts given. Further that no other witness testified to corroborate PW3's evidence.

33. On the evidence of a single witness counsel submitted that it was unsafe to rely on the evidence of PW3 alone to base a conviction. She cited the case of **Murage & another V Republic Criminal Appeal No. 9 of 2022** where the court stated thus

*"25. On the testimony of a single eye witness, this Court in Titus Ngamau Musila Katitu v Republic eKLR expressed itself as hereunder;*

*"As the Court warned in Abdalabin Wendo & another v R. (1953) 20 EACA 166, Cleop.has Otieno Wamunga v R (1989) eKLR and Paul Etole & Reuben Ombima v R, (2001) eKLR, and a host of others, the testimony of a single witness respecting visual identification or recognition must be received with the greatest care, especially when the conditions favouring a correct identification are difficult. In such circumstances the court ought to examine closely the circumstances in which the identification by the witness came to be made. In addition, and of significance. the court must*

*look for some other corroborating evidence. Pointing to the guilt of the accused person. so as to minimize the error in the identification by a single person. Those authorities also warn that, although recognition may be more reliable than the identification of a stranger, mistakes are sometimes made in recognition of even close relatives and friends. They emphasize that when the quality of the identification evidence is good the danger of mistaken identification is lessened”.*

Also referred to is the case of **Zadock Otieno Nyamhore V Republic - Kisumu Criminal Appeal No. 160 of 2014.**

Counsel contended that the minor (PW3) was under a great deal of stress, it was at night and lighting was poor, among others which caused diversion from the face of the assailant.

34. Counsel while relying on the case of **Republic Vs Tubere s/o Ochen [1945] 12 EACA 63** cited with approval in **Kajiado Criminal Case No. 20 of 2015 - Republic V Benard Mbuvi** submitted that the evidence on record does not point to the existence of malice on the part of the accused. Referring to the cordial relationship between the accused and the deceased’s family counsel submitted that there was nothing to show any intention by the accused to commit a murder. Further that the accused never ran away but went to the police to seek assistance.

## **Analysis and determination**

35. The accused is facing a charge of murder contrary to section 203 as read with section 204 of the penal code

Section 203 of the Penal Code provides:

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

From the above provision it is clear that the essential elements of this offence which must be proved beyond reasonable doubt are as follows:

- (i) The fact and cause of death
- (ii) That the accused committed the unlawful act that caused the deceased’s death (actus reus)
- (iii) Proof of ill intentions/malice aforethought (mens rea) in the commission of the unlawful act.

See:

**(i) Antony Ndegwa Ngari V Republic [2014] eKLR**

**(ii) Republic V Andrew Omwenga [2009] eKLR**

### **(i) Death of the deceased**

36. From the evidence of PW1 – PW4, PW6 and PW7 and the post mortem report (Exb 2) there is no dispute about the death of the deceased. Exb 2 gave the cause of death as:

- a. Massive blood loss
- b. Decapitation at the level of medulla – sharp trauma

### **(ii) The unlawful act that caused deceased’s death**

37. From the evidence on record the biological parents of the deceased (“Givan Ongeru” OR “Fabian Ombati”) were the accused and PW4. However, the deceased lived with PW2 and his family. PW2’s wife is Beatrice Kwamboka while PW3 (Gabriele Peter Nyamweya) is their son.
38. In his evidence PW2 said the deceased was in Std. 5 while PW4 (deceased’s mother) said the child was 3 years old. The accused also said the child was three (3) years old. A perusal of the post mortem (Exb 2) shows the age of the deceased as 13 years. Infact PW1 said the child was in Std. 8. A three (3) year old child would not be in Std 5 let alone Std 8. It is important for the court to bring out these contradictions in the evidence of the witnesses.
39. PW3 told the court that on 4<sup>th</sup> February, 2022 him and his siblings arrived home from school and went to play. They returned home at 7pm, and were instructed by their mother to peel potatoes. It is after that, that the accused arrived. It was at night and so it was obviously dark.
40. PW3 did not state with clarity what he actually witnessed. At one point he said he saw the accused cutting the deceased on the head and hand, as his mother followed the accused. That the accused chased her and she escaped through the window. He again stated that he remained in the house as the accused and son went outside. He saw the accused holding the deceased at the gate. He heard the accused tell his mother not to follow him or he kills her. The mother went

screaming and rushed outside the fence. Again, he says the accused let off the child and rushed towards the door, which he opened. He rushed to the bedroom and saw the accused cut the deceased's hand and neck. That the accused came towards him and he hid inside the blanket. After this he came outside and found the deceased injured. From this narration of back and forth it is not clear as to what really happened and the sequence of events.

41. There was no mention of the presence of any lighting on the compound, house or even at the gate. What enabled PW3 to see all these things in darkness? In cross examination he said he saw all these through the window which faced the gate. There is nothing wrong with the window facing the gate. The issue is what enabled him to see in darkness. There is no mention of light at the gate or outside or inside the house. This was the duty of the prosecution to ask the witness who was a minor to explain.

42. The evidence by PW3 cannot without support be relied on to form the basis of a conviction. I am well guided by the decisions of the Court of Appeal cited by the defence in the cases of **Zadock Otieno Nyamhore V Republic 2020 eKLR** (supra) and **Murage & Another V Republic** (supra).

43. PW2's wife Beatrice Kwamboka was said to have been present when this incident occurred, and was screaming all over. Why was she not presented to court to testify of what

happened that night, in order to corroborate the minor's evidence?

44. In his sworn defence the accused told the court that this aunt (Beatrice) had complained that the presence of the deceased was hindering her from doing her work. The complaint if true ought not to have been taken lightly. It was not however clear whether it was the three (3) year old that PW4 and accused were talking about or the Std 5 or Std 8 pupil that PW1 & PW2 talked about let alone the 13 year old whose body was examined by Dr. Titus Ngulungu and not Dr. P. Irungu as stated by PW7, the investigating officer, that was the victim.

45. Beatrice Kwamboka (PW2's wife) was a very crucial witness and failure to have her testify in this case has not done justice to this case. Her evidence would have filled the gaps created by the evidence of the minor - PW3.

46. The accused is said to have come to the home of PW2 with a box and a panga but no box was recovered. A panga was allegedly recovered by PW6 after the children showed it to him and his sister in law one - Jackie Bonareri. This witness (PW6) who recovered the panga (EXB 1) never identified it in court. This panga was also not identified by PW3 as the sharp panga he said he is said to have seen the accused with. It was the duty of the prosecution to link the accused to this particular panga (EXB 1) by way of evidence.

47.PW5 told the court that the accused had gone to the Githioro police station and surrendered himself as having killed, someone. According to PW7 this report was recorded in the station O.B as No. 2 of 5<sup>th</sup> February, 2022 NOT 4<sup>th</sup> February, 2022 as stated by PW5 who received him. The said O.B was never produced as evidence. The accused in his evidence said he went to the station to report as he had been accused of stealing by PW2's wife, and people had arrived in the home. Had the O.B from the police station been produced, it would have dispelled the accused's defence on that. Further more if indeed the accused reported himself which would have been treated as a confession, why did PW5 and PW7 not present him to a qualified officer to record a confession from him as provided for by the Evidence Act? PW5 also said the accused had a booklet showing he would teach people a lesson. The said booklet was never produced yet he is alleged to have had it at a police station.

48.According to PW7 the pair of blue trouser jeans (EXB 3) and grey vest (EXB 4) which were blood stained belonged to the accused, which the accused denied. PW7 explained that arrangements had been made for the accused to change the cloths while in police custody. He admitted that the accused never signed for them. If indeed that happened, it amounted to a recovery and a document ought to have been prepared

for the accused and whoever recovered them to sign. This never happened.

49. The omissions pointed out above are very serious and cannot be taken as simple ones. The evidence left out by the said omissions would have corroborated PW3's unstable evidence to make a strong case for the prosecution. After weighing all the evidence and the several gaps pointed out, I do find that the prosecution failed to prove its case against the accused beyond reasonable doubt as is the requirement in criminal cases. The upshot is that the accused will benefit from the doubt created in the circumstances. He is hereby acquitted under section 322(1) of the Criminal Procedure Code. He will be released forthwith unless otherwise lawfully held under a separate warrant.

50. Orders accordingly.

**Delivered, virtually dated and signed this 9<sup>th</sup> day of October, 2025 in open court at Nakuru.**

**H. I. ONG'UDI  
JUDGE**