

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MIGORI
CRIMINAL CASE NO. E011 OF 2023

THE REPUBLIC THRO' ODPP
VERSUS

JOSEPH CHACHA MOREGAACCUSED

JUDGEMENT

The Accused Joseph Chacha Morega was charged for the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars are that Joseph Chacha Morega on 10th April 2023 at Kendege village, Nyatara Sub-Location in Kuria East Sub-County within Migori County in the Republic of Kenya murdered Peter Wanchara Mwita.

The Prosecution adduced evidence of 6 witnesses to support the charge and the Accused when placed on defense gave sworn statement and denied the charge and also called a witness to support his case.

PW1 Dr. Mark Oduor Otieno produced post mortem form of Peter Wanchara Mwita which was done on the 13.10.2023 under escort of Corporal Thomas Oloo and identified by Joseph Muhono and Thomas Salima Marwa at Kehancha Sub-County Hospital at 12.30pm

PW1 observed multiple lacerations on upper and lower limbs with obvious cut wounds on the head and back. He said the first cut wound was on the head 8cm X 2cm X 6cm in depth. He said that

the cut was traversing the occipital region to the temporal parietal region; cut through the skin scalp and the skull had leakage of brain tissue with massive extradural haematoma.

PW1 said the second cut wound was the on back- upper thoracic region 10cm x 4cm x 6cm depth and it cut through the skin, the subcutaneous tissues and fracture of the left posterior 2nd rib with upper surface of the lung tissue with hemothorax (blood in chest). PW1 formed the opinion that cause of death was severe head injury secondary to assault by sharp object.

Cross-examination by Ms. Okota PW1 said that cause of death was severe head injury and injury to the back. He said injury to head was more immediate and more pronounced but injury to the back would contribute to cause of death because there was bleeding in the chest.

PW2 Thomas Mogesi Marwa **testified that he came** from Kendege village Kuria East and that he was a businessman at Kendege. He said that on 10.4.2023 at a bout 10:30pm he was asleep when Paul Nyaitichi went to his home and woke him up and told him that somebody was injured on the road near his home. That he went up to the place and found that the person was already dead. That he asked Nyaitati what happened and he said the person cut on the back and head.

PW2 said he knew the person by appearance and not by name. He called the chief of Maeta, Muringa who promised to send police officers. That when the Assistant chief and police came arrived at the scene they observed the body and inquired from

villagers and went to the home of accused that night. That they went to the scene with the accused and took body. PW2 said he did not know why accused was arrested.

PW2 said he knew the accused who was his neighbour, for long. He said his home to accused's is about 100 meters and the body was nearer his home than accused's home. He said that the accused person was arrested about 11:00pm while in the house. He also said that Nyaitichi would say how he knew about the body as he did not get anybody near the body and he did not know who caused the death.

PW3 Paulo Nyaitichi testified that the accused was his brother's son and that the deceased a Tanzanian National had married Tabitha Chacha the sister to the accused person. He said that on 10th April 2023 at 9.00pm he was sleeping when he heard someone call and when he went out of the house the person calling was outside his compound and told him someone had been injured and that he should go and help him. He said the person who spoke to him did not identify himself and he could not recognize his voice. That he proceeded where the person who had been injured was about 2km/ or 30 minutes walk from his home he found the person had died. That he recognized the person as an in-law in their home. That he then went to call Thomas Mogesi and they went back to the scene together and raised alarm for members of the public and neighbours to wake up. That neighbours looked for the Chief who in turn instructed the Assistant Chief to call the police who went to the scene and collected the body.

PW3 said that when he accompanied the police to the mortuary he went and recorded his statement. He said that it was not true as

recorded in his statement that the accused person is the one who knocked at his door and told him to go and help someone who had been injured.

In cross examination PW3 said he did not know how to read and write and that when recording his statement he spoke in Kuria language but the statement was not read back to him. He said that he could not have recognized if it was the accused or any other person who called him at night.

PW4 Godwin Khamalwa Walama a Government Analyst based at Kisumu Government Laboratory testified that he received exhibits from P.C Kipsang from Kuria East DCI office with a request to examine them and ascertain whether they had any biological evidential material and establish relationship. That upon examination and analysis he found that the panga was heavily stained with blood of human origin and the DNA profile on the blood stain on the panga was the same as the DNA profile generated from the shirt and vest belonging to a single unknown male person. He prepared a report and produced it as Ex P2(a) and the exhibit Memo form as Ex P2(b).

PW5 Esther Robi Bisogwe testified that on 10th April 2023 her brother in-law had gone to her home around 6.00pm and she prepared food and served him. That after eating he left to go to his son's home. PW5 said that shortly thereafter it started raining and she went to sleep. That later in the night she saw some light in the homestead and heard her father in-law Paul Nyaitichi calling her. That when she opened her father in-law asked what she had done and she told him she did not understand what he was saying. That Paul Nyaitichi told her to accompany them to Mugesu's gate and see what had happened. That she woke up her son Thomas to accompany her and when they arrived

at the scene they found body of the deceased lying on the ground and there was a large crowd. She said the body of the deceased was bleeding. She said they remained at the scene until police arrived and collected the body. PW5 said she knew the accused who was brother to her late husband. She said that after the death of her husband she cohabited with the accused but after some time they started having trouble and they went to the chief who resolved that each of them should live on their own and their relationship ended in 2023 before the deceased died. She said the deceased and his wife went to her home and constructed for her a kitchen and she did not have an affair with him.

PW6 CPL Thomas Oloo from DCI Kuria East testified that on 11th April 2023 at about 02.00hours he received a phone call from Chief Inspector Kangethe who informed him that there was murder incident at Kendege area and he was requested to join them at the scene. That when he proceeded to the scene he found the body of Peter Wanchara lying on the road side with injuries. That he processed the scene by taking photographs and interviewed the members of public and learnt that Joseph Chacha was the prime suspect. That they went to the accused person's house and recovered a blood stained panga in the house. PW6 said it is the accused who led them to where the panga was. That when the accused was interrogated he said he had been attacked by a group of people and that he had cut one of them. The accused was arrested and body removed to the mortuary.

That on 13th April 2023, postmortem was conducted and it was established cause of death was excessive bleeding due to assault by sharp object. That the deceased persons red torn vest and navy-blue torn T shirt together with the panga recovered from the accused

person's house were taken for analysis at the Government Chemist and it was established that the DNA profile on the blood stains on the panga matched the one on the clothes recovered from the body of the deceased. PW6 prepared an inventory for the panga and it was duly signed by P.C Sang and P.C Salim as well as the accused person. He also forwarded the photographs and the same was processed and certified.

According to PW6 the accused person's house was some 50m from the scene where the body of the deceased was found. He produced the panga as Ex P3; He also produced the blood stained blue shirt Ex P 4 which had a tear made by a panga cut at the back. He also produced the blood stained red shirt Ex P 5. The photographs and certificate were also produced as Ex P6(a) to (c) and Ex P 7.

In cross examination PW6 said that he recorded the statement of Paul Nyaitichi who adversely mentioned the accused person. He said other witnesses were not ready to testify. He said he was with P.C Sang and P.C Salim when they recovered the panga in the accused person's house. He said Esther was the last person to see the deceased alive. He also said that the clothes he produced in court were recovered from the body of the deceased. He also said that the accused claimed he had been attacked but he had no injuries on the body. He said there was no witness who saw accused commit the murder but the panga recovered from his house had blood stains that had the same profile as the blood stains on the deceased clothes.

When the Accused was placed on his defense he gave sworn statement and said the deceased was his brother in-law and that on 10th April 2023 he was at home in Kendege with his wife DW2. He said that when he woke up in the morning, he went to the farm but fell ill

and went back home and the wife went to buy for him medicine which he took and went to sleep. That while sleeping at 11.30pm he heard the voice of the Chief call from outside. That when he responded he was told to open the door. That his wife stood from the bed and opened the door and police officers entered and told him they wanted him to assist them with investigations. That he accompanied them to the police station and he was not told what he had done.

The accused said that the next day he was taken to court and charged with murder but nothing was recovered from him to connect him to the murder. He said he did not resist arrest. He said while at the police station someone who wore a suit cam and removed him and took him to another room where he was made to thumb print some papers. He said that that person testified as the last witness for the prosecution. He said he was not shown what was on the paper on which he was made to thumb print. He said he was a class 3 drop out. The accused said he did not kill the deceased herein and he was his brother in-law and they respected each other and they had not differed. He said the charge of murder is fabricated and malicious.

The accused said further that no panga was recovered from him and he did not leave his house on the material night. He said that he suffered a gunshot wound when the Masai and Kuria had tribal clashes.

In cross examination the accused said that there are 3 houses in the compound where he stays. He said that his brother who is owner of one of the houses was arrested and was in prison. He said that their nearest neighbour is Thomas Mogesi but he is not related to them. He also said that Paul Nyaitachi is his uncle a younger brother to his father and they stay on the same parcel of land. The accused denied having told Paul Nyaitachi that he fought with someone and needed

assistance to take him to hospital. The accused said he was not aware that Paul Nyaitichi recorded a statement. He said Paul Nyaitichi lied in court for reasons not known to him. The accused further said that Esther was wife to his late brother and that there was a time he cohabited with her as husband and wife. He denied that Esther had a relationship with the deceased. He also admitted having contributed poles used to put up a kitchen for Esther. He said he had no grudge with the deceased

The Accused person's witness Mary Megendi Joseph testified that the accused was her husband. She said she knew the deceased who was her brother in-law. She said that she recorded her statement on 22nd May 2025 and wanted to rely on it. In cross examination she said that the accused was in the house on the night of 10th April 2023 and she bought brufen for the accused. She said that she was staying in the same compound with her mother in-law and Maria the wife of the deceased. She said that her husband did not inherit Esther. She said that the deceased married her husband's sister and she was not aware that the deceased had an affair with Esther. She said that Paul Nyaitichi lived some short distance from their home. She said that they had not differed with Paul and he cannot lie against the accused. She said that it was not true her husband requested Paul to help him take the deceased to the hospital.

Upon close of defense case submissions dated 13th June, 2025 were filed by the Accused person's Advocate Ms Okota. She submitted that the Prosecution did not establish that the accused committed the murder as PW3 who was the 1st Responder to the scene denied having been informed by the accused that there was someone who was injured on the road and said that he did not recognize the voice of the

person who called him to go and help the person who was injured by the road side.

It was also submitted that the DNA profile lifted from the panga allegedly recovered from the accused person's house was not sufficient as there was no DNA linking the accused to the panga. It was also submitted that the accused had denied recovery of the panga from his house.

It was further submitted that the narrative that the accused was bitter with the deceased for being in a relationship with PW5 was dumbfounded as PW5 denied it and it was confirmed that after the accused and PW5 ended their relationship they lived in harmony.

It was also contended that there was no evidence that the accused caused the death of the deceased and the Prosecution failed to prove the accused person's involvement in the death of the deceased to the required standard.

It was also submitted that malice aforethought had equally not been proven beyond reasonable doubt. The defense cited the holding in Miller Vs Ministry of Pensions (1947) 2 ALL ER 372 to argue that the prosecution had not discharged the burden of proof beyond all reasonable doubt.

The court was urged to acquit the accused who had given full account of the events of that day and that the circumstantial evidence relied upon by the Prosecution failed to prove the charge beyond reasonable doubt.

ANALYSIS AND DETERMINATION

This court has considered the evidence adduced by the prosecution and the defense as well as the submissions filed by the accused

person's Advocate and the court is to determine whether the Prosecution has proved the offence beyond all reasonable doubt considering that the burden of proof lies on them to prove the guilt of the suspect charged before court with the offence of murder.

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.

Section 204 of the **Penal Code** provides:

Any person convicted of murder shall be sentenced to death.

In *Republic v Andrew Muecha Omwenga*, Maraga J (as he then was) considered the provisions of section 203 of the *Penal Code* and expressed himself as follows with respect to what the prosecution must prove to establish the offence of murder:

“It is clear from this definition that for an accused person to be convicted of murder, it must be proved that he caused the death of the deceased with malice aforethought by an unlawful act or omission. There are therefore three ingredients of murder which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are:

- (a)the death of the deceased and the cause of that death;**
- (b)that the accused committed the unlawful act which caused the death of the deceased and**
- (c)that the accused had the malice aforethought.”**

In **Anthony Ndegwa Ngari Vs Republic [2014] KECA 424 (KLR)** the Court of Appeal held:

“For the offence of murder, there are three elements which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are:

- a. the death of the deceased and the cause of that death;**
- b. that the accused committed the unlawful act which caused the death of the deceased and**
- c. that the Accused had the malice aforethought.”**

From the definition given under Section 203 of the Penal Code and the authorities referred to above the ingredients to be proved by the Prosecution and which form the basis of issues for determination are:

1. The fact of death of the deceased, **Peter Wanchara**, and the cause of death.
2. Whether the death of the deceased was caused by an unlawful act or omission.
3. Whether the accused, **Joseph Chacha**, is the person who committed the unlawful act leading to the death of the deceased.
4. Whether malice aforethought was established.

On Proof of Death and Cause of Death

There is no dispute that the deceased died. All the witnesses (PW2, PW3, PW5, and PW6) found his body beside the road on the night of **10th April 2023**. PW6, CPL **Thomas Oloo**, confirmed that a post-mortem examination established the cause of death as **excessive bleeding due to assault by a sharp object**. The medical findings by PW1 were consistent with the physical injuries observed — deep cuts on the back and head as described by PW2 and PW3. It is therefore clear that death and cause of death were proved beyond reasonable doubt.

On **whether death was caused by an unlawful act** the nature of the injuries sustained by the deceased — multiple deep cuts caused by a sharp object — clearly rule out an accidental death or self-inflicted injury. The use of a sharp weapon to inflict such injuries shows an intentional and unlawful act by a third party. The death of the deceased was therefore caused by an unlawful act, satisfying the second ingredient of murder under **Section 203 of the Penal Code**.

On whether the accused caused the death the prosecution relied **entirely on circumstantial evidence**, as there was **no eyewitness** to the killing. The test for reliance on circumstantial evidence was settled in the case of **Sawe v Republic [2003] KLR 364**, where the Court held that:

“In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt.”

Further in the case of **Republic v Kipkering arap Koske & Another [1949] 16 EACA 135** the court held:

“In order to convict on such evidence, the entire chain must be complete and point to the guilt of the accused” incapable of explanation upon any other reasonable hypothesis than that of his guilt.”

The prosecution sought to link the accused to the murder through two strands of circumstantial evidence:

1. PW6 testified that on interrogation of members of public at the scene the accused was adversely mentioned and Paul Nyatichi recorded a statement informing the police that it was the accused who called and informed him that someone had been injured along the road and he should go and help take him to hospital. When PW6 together with P.C. Salim and P.C. Sang went to the accused person's house he led them to **recovery of a blood-stained panga** which upon analysis had **human blood**, and the DNA profile matched that of the blood on the deceased's clothes (as per PW4's forensic analysis). When the panga was recovered an inventory was prepared and the same was duly signed by the 3 officers together with the accused person. The said inventory was produced as exhibit in court and there was. The accused further told PW6 that he had been attacked by robbers and that explained why the panga recovered from his house had blood stains. The accused was not known to the officers prior to this incident and there was no reason why they would implicate him with commission of such a serious offence. In consideration that the panga with blood stains which DNA profile matched that on the deceased clothes was recovered from the accused person's house almost immediately on the same night the offence was committed makes this court believe that although there was no eye witness the accused person committed the offence.

The circumstantial evidence was therefore proved to the required standard by the prosecution. There was no possibility that someone else could have committed the offence and went to keep the murder weapon in the accused person's house without his knowledge and permission.

On whether malice aforethought was proved, under **Section 206 of the Penal Code**, malice aforethought is established by proof of intention to cause death or grievous harm. From the nature of injuries inflicted on the deceased it is clear that the accused was possessed of malice aforethought when inflicting fatal injuries upon the deceased who was known to him and husband to his sister.

Having carefully reviewed the entire record, this court is persuaded that: the death of the deceased was established and was caused by an unlawful act on the part of the accused person who was possessed of malice aforethought.;

In conclusion this court finds that the prosecution **has proved the charge of murder contrary to Section 203 as read with Section 204 of the Penal Code beyond reasonable doubt.** The accused person is found guilty and is convicted under Section 322(1) Of the Criminal Procedure Code.

DATED, SIGNED AND DELIVERED AT MIGORI THIS 16TH DAY OF OCTOBER, 2025.

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**HON. ANNE ADWERA ONG'INJO
JUDGE**

