



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

COUNTY COURT NAME: MIGORI HIGH COURT

CASE NUMBER: HCCRC/E010/2024

THE REPUBLIC VS MOKONO MWERA

### JUDGMENT

The Accused Mokono Mwera is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars of the charge are that the accused person on the 14th Day of January 2024 at Ntimaru village, Bwirege Central Sub-Location of Ntimaru Sub-County in Migori County murdered Charles Mwita Nchagwa.

The Prosecution adduced evidence of 6 witnesses in support of the charge.

PW1 Mwita Gasaya testified that on 14.1.2024 he had gone to buy bread from Ntimaru at 5.00pm. That after buying bread he stood at a kiosk when he saw people pulling and pushing each other outside club Bongo. That he saw the accused Mkonko pick firewood and used it to assault the deceased Charles. He hit the deceased at the back of his head and the deceased fell. He said that there were other people at the scene. PW1 said he went to tell the deceased that they should go home but he was speaking in low voice and could not walk properly.

PW1 said that the deceased was his cousin. That the deceased walked a bit then sat. PW1 said the accused person was known to him. He knew his home and even his children and he had been seeing him work in construction sites. PW1 said he left the deceased seated besides the road and the deceased told him he would go home. The next day when he was in the farm at 6.00am he heard screams coming from the deceased's home. When he rushed there and he learnt Charles had died at the hospital and he said that that he had seen the person who assaulted him. They proceeded to Ntimaru Sub County Hospital and confirmed the body of Charles had been taken to the mortuary. In cross-examination by Mr. Ouko Advocate PW1 said that on 14.1.2024 he was at Ntimaru trading center and he witnessed the accused assault the deceased outside club Bongo. He said he could not tell if they had come from the hotel or Club as he just saw them outside the club. PW1 also said he did not know what transpired between the accused and the deceased. He said the accused hit the deceased with firewood once on the head. He said accused was not drunk and the deceased was also not drunk. He also said that he did not know the deceased state of health before he was assaulted but it was a lie to say that he was suffering from some health conditions.



PW1 said he was not aware of any differences between the accused and the deceased person to this incident as they used to work together in construction sites. That later he learnt that the deceased confronted the accused and asked why he was eating in the hotel while he had children and this annoyed the accused. The deceased did not have any responsibility over the accused person's family. PW2 Titus Moherai Kehongo testified that on 14.1.2024 he was at Bongo Hotel in Ntitaru when I saw Mokono Mwera and Charles Nchagwa come from the hotel. That Nchagwa asked Mwera why he was eating beef in the hotel and his children will eat vegetables. That he saw Mwera pick firewood that was outside the hotel and hit Nchagwa at the back of his head and Nchagwa fell down. When Nchagwa fell down Mokono wanted to hit him again but people raised alarm and restrained him.

Mokono then left the scene. The deceased took sometime before he stood from where he had fallen. That when the deceased stood and crossed the road he fell down again. That he made phone call to Nyakimo Mwita the deceased's brother and they took him to Ntitaru hospital. That at 5.00am the following day I received phone call from deceased brother who told me Charles had died. PW2 said the accused was known to him and was his nephew. He said he also knew the deceased see the deceased who used to work in construction sites. PW2 said he went to record my statement on 28.2.2024.

In cross-examination by Mr. Ouko Advocate PW2 said he heard the deceased question why the accused was eating beef in the hotel whereas his family were going to eat vegetables at home. He said that he recorded his statement and said that what the deceased told the accused was true. He said the deceased was not married but was age mate to the accused as they were circumcised the same day. He said the accused was armed with firewood which he used to assault the deceased and it was after assault that people went to the scene. He said that among the people at the scene was Gabriel who was at Kiosk. PW2 said the people inside the hotel raised alarm and restrained the accused from beating the deceased a second time. He said he did not know if the people inside the hotel recorded their statements.

PW2 said further that the deceased stood from where he had fallen and started walking home while staggering but he was not drunk. He said the deceased had been injured and that is why he was staggering. He said he used to meet the deceased in Ntitaru and it is not true that he was drunk on the material day. It is after being beaten on the head that he started staggering. He said he knew the deceased as Charles Nchagwa and he used to walk with the accused.

In re-examination PW2 said the accused and the deceased came from the hotel and it is after the deceased talked to accused that accused picked firewood and used it to assault the deceased.

PW3 sworn -Christian Gabriel Maseke testified that on 14.1.2024 he was on his way to Ntitaru at 5.00pm when he found Nchagwa who is his brother lying besides the road unconscious. That he made phone call to Nyakemwi Sakaya who came and they took him to hospital and he was admitted. The deceased had an injury at the back of the head. That at 1.00am the deceased developed difficulty in breathing and when he found a doctor at 5.00am he was pronounced dead and the body was then taken to Kehancha Sub County hospital mortuary. PW3 said he deceased didn't talk to him. In cross-examination by Mr. Ouko Advocate PW3 said he did not witness assault. He said that the people who were passing by are the ones who told them that his brother was assaulted by Mokono. He said Titus is one of the witnesses to the assault. He said that his brother used to stay at home and he knew him well. He was healthy but he was mentally retarded/challenged from his childhood. He was however hardworking. PW3 said it was not true that his brother had pre-existing health condition. He said his brother was at work on the material day and he was not drunk. PW3 admitted that his brother used to take alcohol but he was not a drunkard. He said that his mother accompanied them to hospital when we they took the deceased but she did not record a statement.

He said the accused and deceased used to work together and they had no differences and he could



not tell if the accused planned to kill his brother



In re-examination PW3 said that his brother was mentally challenged but he had no other pre-existing condition.

PW4 sworn Dr. Mark Oduor a medical officer at Migori County Referral Hospital examined the body of the deceased on request police officer Thomas Oloo. He said that the postmortem was conducted in Kuria West Sub County Hospital mortuary on 24.1.2024 after the body had been identified.

The Doctor observed that the body had lacerations and bruises on the hand on left side/left frontal (parietal temporal region) central and peripheral cyanosis - indicative of reduced airflow/deficiency in breathing. There was bruising in left hand. There was right sided swelling in the groin region. There were no fractures of the limbs. There was blood oozing from ears, nose and mouth with massive scalp haematoma; left frontal parietal region had fracture. There was massive extradural haematoma with multiple intracerebral bleeding.

As a result of the examination the doctor was of the opinion that death was caused by severe head injury secondary to assault. He also opined that the swelling on the groin was not associated with cause of death. He said that whenever one has traumatic injury on the head there is usually pressure on the brain pushing it towards the neck and the brain stem is usually strangled. This compromises respiratory system. PW4 produced post mortem report as EXP 1

In cross-examination by Mr. Ouko Advocate PW4 said that he observed blood come from the mouth, nose and ears of the deceased. This was an indication of trauma and injuries on the head. He said bleeding is usually an acute problem and happens immediately. That in most cases bleeding arises out of fracture of the skull. The deceased may have died earlier but he had bruising which is an indication of intervention. He said that for head injuries the minimum time allowed before you rule out fatality is up to 2 weeks. PW4 estimated age of injuries to have taken 24 hours from time of death based on skull fracture. PW4 observed a swelling on the groin of the deceased and said that it was coincidental finding and was not in any way related to cause of death as it was a treatable finding.

In re-examination by Mr. Oimbo PW4 said the swelling was not associated with the death of the deceased. He also said that he undertook basic training in pathology which is sufficient to enable medical officer perform post mortem which can be done by pathologist or medical officer.

PW5 Mwita Nyakimwi Gesaya testified that on 14.1.2024 at about 5.50pm he was informed by his brother Gabriel Moseke that their brother Charles Nchagwa had been beaten and injured by Mokono Mwera and that he was in critical condition and was lying near a posho mill at Ntimaru centre.

PW5 proceeded to where Charles was lying and on inquiring from the people who were nearby and they were told that their brother was walking home when he fell near the posho mill. They took Charles to Ntimaru Sub County Hospital as he had an injury on the left side of the head which was swollen and he was unconscious. That at the Sub County Hospital he left Charles with his mother and went back home. At 1.00a.m he received phone call from his brother Gabriel that Charles' condition was worsening. PW5 said he went back to hospital to seek for referral. But while he was looking for means of transport the medics at Ntimaru told them that Charles had died. They took the body to Kehancha Sub County Hospital mortuary and reported matter to police.

That on 24.1.2024 PW5 and police officers went to Kehancha where he identified body of his brother Charles and also witnessed post mortem. The doctor who did post mortem told him that death was caused by severe head injuries.

In cross-examination by Mr. Ouko Advocate PW5 said he did not know the reason why accused attacked his brother. He said Charles used to drink alcohol. He also said that the deceased was his follower and he was in good health.

PW6 No. 78874 Corporal Thomas Oloo from DCI Ntimaru investigated the murder. He said that on 15.1.2024 he was assigned the duty to investigate the murder incident which was reported at Ntimaru police station that Mokono Mwera had killed Nchagwa. That he recorded statements and



visited scene in Ntitaru trading centre along the tarmac road going to Kehancha. That on 24.1.2024 he witnessed post mortem which was done on the body of the deceased at Kehancha Sub County Hospital.

That on 25.2.2024 PW6 managed to arrest Mokono Mwera for further investigations. That the witnesses who saw the accused assault the deceased led them to arrest the suspect and from the statements he learnt that on 14.1.2024 the deceased passed by a hotel Ntitaru trading centre where he met Mokono Mwera and he asked him why he was eating in the hotel and his children were starving at home. They started exchanging and Mokono Mwera picked firewood followed the deceased beat him and he fell down unconscious. That the witnesses who saw the deceased made phone call to relatives who took him to Ntitaru Sub County Dispensary and at 1.00am his condition worsened and he died as arrangements were being made for referral to County Hospital. That the body was taken to Kehancha Sub County Hospital where post mortem was done. PW6 said the the deceased was not armed but the accused was also armed with a piece of firewood.

In cross-examination by Mr. Ouko Advocate PW6 said that from the witnesses account there was no differences between the accused and the deceased. He said the followed the deceased after picking firewood and hit him on the head but he did not know how many times the accused hit the deceased. The deceased told the accused that he was eating in the hotel and his family were starving at home. PW6 said he visited the scene on 15th January 2024 and didn't find anything. He said he was present when post mortem was done by Dr. Mark Oduor.

When the accused was placed on defense at the close of prosecution case he gave sworn statement and said the deceased herein is known to him.

The accused said further that on 14.1.2024 at 5.00pm he was at Ntitaru town where he had gone for a walk. That the deceased insulted him and they quarreled. He said the deceased insulted him when they were in the hotel. He said the deceased was known to him and they used to meet in town but they were not friends. He said he had no differences with the deceased prior to the date of the incident. He said he did assault the deceased with a small stick on the back. That when he assaulted the deceased once he left to go home and the deceased also went on different way. He said the deceased did not fall at the scene. He said the deceased told him that he was not buying food for his children and that even his mother didn't like him. That he asked why the deceased was bringing the issue of his children and mother.

The accused said he did not have the intent to kill the deceased. He said that the deceased had come from hospital and had taken medicine but he had also taken beer and he suspected that he died due to his illness in his private parts. He said he did not plan to kill the deceased and he had no bad motive with the deceased and he pray to be pardoned.

In cross-examination by Mr. Oimbo for the state the accused said the deceased insulted him by telling him that he was eating beef in the hotel and his children were eating vegetables. He said he was in the hotel eating beef. He said the deceased was his friend. He said he heard from the relatives of the deceased he was sick and he saw him with medicine. He said picked a stick along the road and used it to hit the deceased and then left to go. He said the deceased followed him. He said he hit the deceased due to anger when he insulted him. The accused said he was also drunk on the material day. He admitted that it was true he hit the deceased.

In re-examination by Mr. Ouko Advocate the accused claimed the deceased was drunk and he was also drunk. He said they were eating in the hotel

DW2 52 years old Augustine Mwise Mwera testified and said that Mokono Mwera was his elder brother and he was his second follower. He said he knew the accused very well. He said he also knew Charles Mwita Nchagwa who was from a neighboring village. He said Charles used to do casual labour together with his brother and they were friends and also used to drink together. He said he was not aware of any differences between the accused and deceased prior to the incident



herein. He said the accused never planned to kill the deceased.

DW2 said that on the material day the brother of the deceased Nyakimwe Gesanya called around 5.00pm in the evening and informed him that his brother and the deceased fought when they were eating in a hotel in Ntimaru. He told him that Nchagwa's condition had worsened and he had been taken to hospital. He told him they were near the police station. That as their home is near the police station and he went to where they were but found they had already gone to Ntimaru hospital. He said he found a crowd at the scene who told him that his brother fought with the deceased around 11.00am and thereafter each one of them went their own way. As Mwera went to herd our elder brother's cattle Nchagwa went to a drinking place and it is later in the evening he was found lying near a posho mill. That when he learnt Nchagwa had been taken to hospital he was told by one of the medical officers that they were trying to neutralize the alcohol he had used before he could be treated. DW2 said he left with instructions that if he was needed, they could contact him. That the following day Gesanya called and informed him that Nchagwa died and they were taking the body to the hospital. DW2 said he joined them to make funeral arrangements and post mortem was done.

DW2 said that when his brother went back home, he asked what he had done and the accused told him that they fought early in the morning and he went his way. That DW2's mother send him to the station to find out what was going on. That Thomas Oloo the investigating officer promised to tell him when post mortem was to be done but he didn't. That when he called later, Thomas Oloo gave him the contact of the pathologist. That he spoke to the pathologist Dr. Benard who him that the deceased had swelling in his private parts. He said the doctor who testified in court was not the one who conducted post mortem. He said investigations were not properly conducted and that there were inconsistencies in the witness statements by the police. DW2 said he suspected that there could have been other underlying issues which caused the death of the deceased. He said there is a home where people drink changaa and that is where the deceased died. His death was not the first one in that home. DW2 also said that the accused was not represented during post mortem. He said the accused is a very polite and quiet man and had never been arrested or accused. His only mistake is drinking changaa. He said that if the accused person hit and killed the deceased it was intentional. He the accused does casual jobs to fend for his family and currently one of the children had dropped out of school. He said they are neighbors with the deceased and they had reconciled. DW2 prayed that the accused be assisted to enable him support his family.

In cross-examination by Mr. Oimbo DW2 said he recorded a statement and signed. He said the incident happened on 10.1.2024 but he did not witness the fight as he was not there when the accused beat the deceased and he was not there when the deceased was taken to hospital. He said he was not present when post mortem was done. He said Dr. Benard is well known to him but he was not coming to testify. He said It was the investigating officer who informed him that Dr. Benard was the one who conducted post mortem. He said Mr. Oloo contacted him and send him text message with contact of the doctor who did post mortem.

In re-examination DW2 said that the absence of a family representative during post mortem prejudiced the accused. He said he was following up on date of post mortem but he was not informed. He said he personally went to the clinical officer who was attending to the deceased and they told him what they were doing and I suspect he may have died due to some other underlying illnesses

DW3 Christopher Chacha testified that on 14.1.2024 at about 10 to 11 am he and Mokono were doing some work together. That Mokono accompanied him to go and buy food. That Mokono ordered for food for Kshs. 50 but he was told that the last price was Kshs. 60 for ugali and sukuma and he offered to add for him Kshs. 10. That before long Nchagwa arrived and started insulting the accused. He said that Mokono was eating in the hotel and yet his children were starving and were not even able to take a bath. That Mokono stood in anger and picked timber 6 X 1 and used it to hit the



deceased. The deceased walked like he was unstable and left. He said that he then went to Lolgorian and later learnt Nchagwa was found at Marwa Nyagonchera where alcohol is sold behind the police station having died. It was claimed it is Mokono who beat him but he told the people who were saying that Mokono killed the deceased that the one blow could not have killed Nchagwa. He said Nchagwa was a drunkard. He said he could not tell what happened between the time he was with Mokono in the hotel and in the evening when Nchagwa was found dead as he had gone to Lolgorian. DW3 said there was no quarrel between the accused and the deceased prior to the incident herein as they were friends and used to work in construction sites together. E said the 2 hey could also work at his employer's place together. He said the accused did not have the intentions to kill the deceased and he should be release.

In cross-examination by Mr. Oimbo for the state DW3 said that he saw the accused hit the deceased. That the deceased told the accused he was eating in the hotel and his children were starving and the accused got angry. That the accused followed the deceased to the kitchen, picked timber and hit the deceased on the back. That after beating the deceased he staggered and left. He said he didn't see where the deceased went and he didn't see if he fell. He said he was told the deceased died in the home of Nyagochera

In re-examination by Mr. Ouko Advocate DW3 said that he was told the deceased died at the home of Nyagochera but he didn't go to where the deceased died.

#### ANALYSIS AND DETERMINATION

The accused, Mokono Mwera, is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code (Cap 63 Laws of Kenya). To secure a conviction, the prosecution must prove, beyond reasonable doubt, the elements as set out in Section 203 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.

Section 204 of the Penal Code provides:

Any person convicted of murder shall be sentenced to death

In the case of Anthony Ndegwa Ngari v Republic [2014] eKLR the elements to be proved in the charge of murder are:

1. The fact of death
2. Cause of death;
3. That the death was caused by an unlawful act or omission on the part of the accused (actus reus);
4. That the accused had malice aforethought as defined under section 206 of the Penal Code

On whether the death and cause of death of the deceased was proved, the evidence of PW3, PW4, and PW5 leaves no doubt that the deceased died shortly after being assaulted. PW4 the Medical Officer attributed death of the deceased to severe head injury secondary to assault, consistent with eyewitness accounts. This court therefore finds that there is no dispute as to the death of the deceased Charles Mwita Nchagwa. PW1 and PW2 directly saw the accused strike the deceased with a piece of firewood on the back of the head. The accused himself admitted doing so. There is thus no dispute as to the identity of the assailant or the act of assault. The act was unlawful, as the deceased was unarmed and there was no justification such as self-defence or accident. I therefore find that the accused caused the death of the deceased through an unlawful act. The two elements have been proved beyond reasonable doubt.

On whether malice aforethought was established Section 206 of the Penal Code defines malice aforethought which is deemed established by evidence showing intention to cause death or grievous harm, or knowledge that death or grievous harm will probably result from the act.

The evidence in this case shows that the accused and deceased were friends and co-workers with no previous grudge. That the quarrel arose spontaneously over insulting remarks about the accused's



family. That the accused picked nearby firewood and hit the deceased once on the head and that he did not pursue the deceased or continue the attack. In such circumstances, there was no premeditation. The act was impulsive, committed in anger following provocation.

In *Nzuki v Republic* [1993] KLR 171, the Court of Appeal held that to prove malice aforethought, the prosecution must establish an intention to cause death or grievous harm, not mere recklessness or sudden anger.

Similarly, in *Republic v Tubere s/o Ochen* [1945] 12 EACA 63, the Court outlined that the nature of the weapon, the manner of use, and the conduct of the accused before and after the attack are crucial in inferring malice.

Further, in *Republic v Musungu s/o Musa* (1931) 1 EACA 111, it was held that where a killing occurs in the heat of passion caused by sudden provocation and without time for the passion to cool, the offence is manslaughter and not murder.

This Court also takes guidance from *Peter King'ori Mwangi & 2 Others v Republic* [2014] eKLR, where it was held that a single blow in a sudden fight, without evidence of an intent to kill, negates malice aforethought.

The prosecution witnesses confirm that the deceased provoked the accused by ridiculing his family responsibilities. The accused reacted impulsively. The weapon used—a piece of firewood—was not inherently lethal but became dangerous because it struck a vital part of the body.

Taking the totality of circumstances, I find that the accused acted in the heat of passion upon sudden provocation, and though the act was unlawful and fatal, malice aforethought was not proved.

In conclusion this court therefore find that the prosecution has proved beyond reasonable doubt that the accused unlawfully caused the death of the deceased but failed to prove malice aforethought.

Accordingly, the offence of Murder under Section 203 of the Penal Code is not proved, but the lesser offence of Manslaughter under Section 202 as read with Section 205 of the Penal Code is proved.

The accused MOKONO MWERA is hereby convicted of the offence of Manslaughter contrary to Section 202 as read with Section 205 of the Penal Code.

DATED, SIGNED AND DELIVERED AT MIGORI THIS 13TH DAY OF NOVEMBER, 2025.

SIGNED BY/FOR:  
HON. LADY JUSTICE ANNE ONG'INJO



THE JUDICIARY OF KENYA.

MIGORI HIGH COURT

HIGH COURT DIV

DATE: 2025-11-18 16:36:37

