

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MAKUENI**

**HCCR E003 of 2021**

**REPUBLIC.....**

**PROSECUTOR**

**VERSUS**

**JOHN NZINGI NDIVO .....**

**ACCUSED**

**JUDGMENT**

1. The accused **JOHN NZINGI NDIVO** was charged with two counts of murder contrary to section 203 as read with section 204 Procedure Code. That on the 27<sup>th</sup> January 2021 at MIUI village KIIMA KIU location MUKAA sublocation MAKUENI County he murdered NDIVO NDOLO aged 100 years, and BENEKA NDIVO aged 86 years, his parents.
2. He took plea on the 11<sup>th</sup> March 2021 and pleaded not guilty.
3. The matter proceeded before Hon Dulu J on 18<sup>th</sup> October 2022.

4. The two deceased persons were the parents of the accused person.
5. PW1 Joshua Kiume Ndivo his younger brother on the morning of 27<sup>th</sup> January 2019 was in his house sleeping not far from his parents' home. He heard screams from his brother Musyoka Ndivo, and he woke up. The screams were from his parents' homestead. He rushed there and met the accused armed with a panga and a knife chasing their mother . His attempt to save her was met with threats cut him with the panga and he ran away about 3metres . From where he was, he saw his brother cutting his mother . It was between 6;30 am and 7;00am. He saw the accused try to cut his own neck and then ran towards the river. He did not move but other people chased the accused and brought him back from where the police took him away. He said he did not know what happened to his father but he knew he too had died. His mother had fallen outside her house, his father was found inside.
6. On cross examination he testified that he ran into the shrubs not far from where the accused cut his mother. He said the neighbours were not far away about 8m away.

7. PW2 Philip Ndivo another son of the deceased persons and brother to the accused also heard screams that morning, woke up, took a knife and ran towards the screams. He saw neighbours running . He saw the accused running towards the river with the people chasing him. At the river accused picked stones . and threw at the people but they surrounded and overpowered him. He was taken home where it was found that he had killed both his parents . His mother was lying outside while his father was inside the house.
8. That the accused dropped the knife, he was disarmed of the panga. The knife was blood stained as he had stabbed himself in the abdomen.
9. On cross examination he told the court he did not see the accused kill their parents .
10. PW3 Mary Ndunge David a granddaughter in law of the two deceased persons . she told the court that the accused was father to her husband, hence her father-in-law.
11. On the material date about 6;30am she was milking. She was in the boma with one Dorcas John her mother-in-law

when she heard screams from her grandfather's homestead. On coming out she saw her father-in-law coming out of his father's house. She saw him enter his house then leave . she went to the grandfather's house an found him in the kitchen, she said, *alikuwa amekatwakatwa kichwa*. She said that she saw her father-in-law later being carried by people.

12. She said she was aware of disagreements between the accused and his father over the land whereby his father stated that he would sell his land to his daughters something that the accused disagreed with. She said she heard that her grandmother had also been killed.
13. On cross examination she said she did not know where the accused was going when she saw him running. She also said she saw him leave his house and run towards the bushes.
14. PW4 Jacqueline Mueni Mwanzia the area chief KIIMA KIU location knew the family of the deceased for over 20 years and their children. That the accused was the 1<sup>st</sup> born son in a family of 5 sons and 2 daughters.

15. She testified that their relationship with the accused person was not very good from 2020. That this began after the father decided to distribute his land to his children. He had decided to share it to his 7 children. The others had no objection but the accused objected to the same saying that the land belonged to him.
16. He enlisted her assistance to obtain the title deed. She told him that the title deeds for the area were ready for collection and together with PW2 they went to the land's office at Wote and dealt with the paper work. The chief would be informed when it would be ready.
17. On 26<sup>th</sup> January 2021 she got the title deed , she went to his home and handed the title deed to the two deceased persons.
18. The next day at about 6:00am she heard screams from the direction of Mzee's home. She went there. There were villagers. She found the mother of the deceased lying dead near the house of her 2<sup>nd</sup> last born KIUME NDIVO with a panga beside her - she identified the panga. The villagers told her that the Mzee was lying inside. She

went in and confirmed, then called the DO and then the police.

19. The accused was arrested by the villagers . He had an injury on the neck and smelt as if he had taken a poisonous substance. She identified the knife.
20. She testified that on the 20<sup>th</sup> October 2020 the Mzee had recorded a statement with the police at Salama Police Station to the effect that the accused had threatened to kill him. Mzee later withdrew the complaint to enable a family discussion.
21. She testified that the accused had also threatened her on the ground that she was siding with his father as he was opposed to his father giving land to his sisters.
22. PW5 Muuo Munyao was informed of the screams in the home of the Ndivos. He went there and found the couple dead. He found One KIUME NDIVO who told him the person who had done it was his elder brother and he had gone towards the river. He joined the people who went after the accused whom they found bleeding. They brought him back home.

23. PW6 Cpl David Maingi from DCI Mukaa visited the scene where he found police officers from Salama. He saw the elderly lady first. She had cuts on her head, arm and there was a panga next to her with blood stains. About 20m away in the kitchen he found the body of the elderly man. He was seated on a broken plastic chair and had been cut on the head. He was told the son had done it and had attempted to kill himself and was bleeding. They took the weapons, they took away the bodies, the accused was taken to the Salama Police station, booked and taken to Machakos level 5 hospital. On 2<sup>nd</sup> February 2021 he witnessed the post-mortems , The accused was discharged from hospital and charged with this offence.

24. His evidence was based on the statements of the witnesses and he agreed with the chief that the issue was the land . He produced the panga and the knife as exhibits

25. PW7 Dr. Patrick Mugwanja Kihui testified tat he conducted the post-mortems.

26. Mbeneka Ndivo had cut wound on the back of the head , both right and left sides, cut on the left hand , thumb, 5<sup>th</sup>

and 5<sup>th</sup> fingers. The cerebral tissue had been cut. The cause of death was severe head injury due to penetrating head trauma. He produced the Post-mortem as PEx 3.

27. For Ndivo Ndolo he had a deep cut on top of his head cutting an 'X' 20 cm long. He had cut wound on right hand side and at the elbow . Cause of death was severe head injury due to penetrating head trauma. He produced the Post-mortem as PEx 4.

28. He said the weapon could be heavy and sharp- axe or panga.

29. At the close of the case for the prosecution the accused was put to his defence.

30. He made a sworn statement and did not call any witness.

31. When the charge was read to him, he stated: *'hasira ilikuwa imenipanda , nilikuwa naugua ugonjwa wa pressure, nikashitukia nimeua wazazi wangu... nikashitukia niko jela'*

32. He told the court that Jackline Mwanzia had began to persuade his elderly father to sell her their family land . That when he asked his father why he was selling land to Jackline he told him that his years on earth were near and

he could sell the land for whatever amount, and that made him angry.

33. He continued to say; *Naomba hii korti iniachilie, inionee huruma, najua hio kitendo ni mbaya.*

34. On cross examination he said the shamba was 40 acres and it belonged to his father. That his father had shown all his sons where to put up their houses. He said Jackline was persuading his parents without his involvement to sell the land to her and that really angered him.

35. He said his brothers were alcoholics and were not angered by the intended sale. He said his father wanted to give his married sisters an acre each and he had no issue with that . That the land was distributed while he was in prison.

36. Cross examined by the court as the cause of his anger, he told the court that it is because he wanted to sell land yet at his age, he could not tell the value of money. When his father refused to listen to him, he killed both of them to prevent them from selling the land.

37. Defence Counsel filed written submissions relying on **R vs Nicholas Onyango Nyolo [2014]eKLR** on the

critical elements of murder as defined by s. 203 and 206 of the Penal Code. He also emphasized that the prosecution bore the burden to prove the charge against the accused beyond a reasonable doubt.

38. It was argued for the accused person that the condition of high blood pressure may have contributed to his rage. Counsel submitted that there are studies to the affect that when one has hypertension and that person gets provoked the that can lead to rage. It was submitted that hypertension sometimes contributes to '*anger expression together with frustration and emotional dyscontrol*', For this he cited **R vs Campbell (1977) 17 Q. R 2d 673 CA which I found cited in [Republic v Riziki Karisa Yeri \[2020\] KEHC 4157 \(KLR\)](#)** where the court addressed the issue of provocation.

*I am not even sure that there was any iota of evidence of provocation as defined in Section 207 of the Penal Code perhaps and precisely the passage in **R v Campbell {1977} 17 Q. R 2d 673 CA** sums the principles which can apply in context of this case:*

***“There may, however, be cases where the conduct of the victim amounting to provocation produces in the accused a state of excitement, anger or disturbance, as a result of which he might not contemplate, the consequences of his acts and might not, in fact, intend to bring about those consequences. The accused intent must usually be inferred from his conduct and the surrounding circumstances, and in some cases, the provocation afforded by the victim, when considered in relation to the totality of the evidence, might create a reasonable doubt in the mind of the jury or judge whether the accused had the requisite intent. Thus, in some cases, the provocative conduct of the victim might be a relevant item of evidence on the issue of intent, whether the charge be murder, provocation in that aspect, however does***

***not operate as a defence, but rather as a relevant item of evidence on the issue of intent.***

39. It appears to me that the defence is arguing that the accused had an underlying condition- hypertension- and was provoked by the actions of his father of wanting to sell the land to Jacqueline Wanza, which caused anger, making him lose control hence killing his parents. The argument is that at the material time he had diminished capacity and did not have the mens rea for murder and that what he did happened at the heat of the moment.

40. The first challenge with this argument is that the accused has not availed any evidence to support his claim that he suffers from hypertension. And even if he did, the source of the alleged research was not cited. Expert evidence would have been of assistance considering the novelty of the argument.

41. The second one is, the accused acknowledges that the land belonged to his father and he had already assigned he, the accused and his brothers' parts of that land where they had constructed their own homes. The accused

person has not demonstrated how the alleged proposed sale of land would anger him yet this was not his land or ancestral land? In any event no evidence was produced before court to support the claim that the father wanted to sell land. His own daughter in law told the court that the issue had been that the accused was resisting his father's decision to give his (accused) sisters land.

42. Thirdly, the accused person was reported in October 2020 as having threatened to kill his father. His father recorded a statement at the Salama police station which he withdrew for purposes of dialogue.

43. Fourthly, I am well aware that there are many circumstances that can amount to provocation but this depends on the evidence. I note that the research referred to regarding the relationship between hypertension and provocation and diminishing capacity has not been cited for the court's consideration.

44. Fifthly, s. 207 of the Penal Code provides for provocation.

It states:

*When a person who unlawfully kills another under circumstances which, but for the provisions of this*

*section, would constitute murder, **does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, is guilty of manslaughter only.** (Emphasis added)*

**45. Section 208 defines Provocation thus;**

(1) *The term "provocation" means and includes, except as hereinafter stated, **any wrongful act or insult** of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, **parental**, filial or fraternal **relation**, or in the relation of master or servant, **to deprive him of the power of self- control** and to **induce him to commit an assault** of the kind which the person charged committed upon the person by whom the act or insult is done or offered.*

(2) *When such **an act or insult** is done or **offered by one person to another, or in the presence of another to a person who is under the immediate care of that other**, or to whom the latter stands in any such relation*

*as aforesaid, the former is said to give to the latter*  
***provocation for an assault.***

***(3)A lawful act is not provocation to any person for an assault.***

*(4) An act which a person does in consequence of incitement given by another person in order to induce him to do the act and thereby to furnish an excuse for committing an assault is not provocation to that other person for an assault.*

*(5) An arrest which is unlawful is not necessarily provocation for an assault, but it may be evidence of provocation to a person who knows of the illegality.*

46. When the father of the accused told him that he could sell the land if he wanted to, was that an insult or wrongful act? In fact, s. 208(3) states clearly that a lawful act cannot be provocation. The accused's father's proposal if at all there was one, to sell his land was neither an insult nor a wrongful act. In the circumstances this argument that the accused acted at the heat of the moment does not hold water. What kind of argument could he have had with his 100 year old father? How does

he explain that after he cut his father when his mother ran out, he followed her and cut her too? What did she say to provoke him?

47. He had a sharp panga, he cut the father on the head twice, and when he defended himself, he cut the arm too. His mother too, he cut her hands when she tried to defend herself and cut her head.

48. S. 206 of the Penal Code defines malice aforethought.

In **Nzuki v Republic (1993) KLR 171** the court held :

***“Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused:***

***(i). The intention to cause death***

***(ii). The intention to cause grievous bodily harm***

***(iii). Where the accused knows that there is a serious risk that death or grievous bodily harm will ensure from his acts, and commits those acts deliberately and without lawful excuse, with the intention to***

***expose a potential victim to that risk as the result of those acts, it does not matter in such circumstances whether the accused desires those consequences, to ensue or not and in none of these cases does it matter that the one who succumbed the mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder."***

And in **Tubere s/o Ochen v R [1945] 12 EACA 63:**

*"Intention is to be manifested in the various acts of the accused for a positive inference to be drawn in favour of the prosecution. Thus, the prosecution must show the **nature of the weapon in possession of the accused, the manner it was used, the severity of the injuries inflicted and vulnerable parts of the body targeted and finally the conduct of the accused person."***

49. The weapon here was a sharp panga. It was used to cut two defenceless , unarmed, elderly persons aged 100 years, and 86 years respectively. It targeted their heads, and the accused had earlier threatened the act that he had committed.

50. I am not persuaded that there was provocation as defined by s. 207 of the Penal Code.

51. All that said there was an eye witness to the cutting by the accused of his mother. His own brother saw him. In addition, his daughter in law saw him leave his father's house just before she went in to find him dead. There was evidence of bad blood over the Mzee's parcel of land over which the accused had no entitlement for as long as his father was alive. It was not worth killing both his parents.

52. There is sufficient evidence that the accused killed both his parents with malice aforethought as defined by s. 206 (a) of the Penal Code.

53. I find him guilty of each count of murder under c/s 203 as read with s. 204 of the Penal Code and convict him accordingly.

**Dated, signed and delivered virtually this 8<sup>th</sup>**

**January 2026**

**Mumbua T Matheka**

**Judge**

CA Chrispol

Accused present at Makueni Main

For the State: Mr. Musyoki

For the Accused: Mr. Hassan