

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAPSABET
CRIMINAL DIVISION
CRIMINAL CASE NO. E022 OF 2021

REPUBLIC:.....

:.....PROSECUTOR

VERSUS

BONFACE

IRAKI:.....1ST

ACCUSED

FLORENCE

MUSIMBI:.....2ND

ACCUSED

PROTUS

ALITSI:.....

3RD ACCUSED

JOHN

ONGANYA:.....4

TH ACCUSED

JUDGMENT

1. Bonface Iraki [Accused 1], Florence Musimbi [Accused 2], Protus Alitsi [Accused 3] and John Onganya [Accused 4] are jointly charged with the offence of murder, Contrary to Section 203 as read with Section 204 of the

Penal code. It is alleged that on the 5th September 2020 at Bondeni Village Nandi East - Nandi County with others not before the court they murdered **Augustine Likare Muyeku [deceased]**.

2. The prosecution case was grounded on the facts that the Four Accused are members of one family, the Second Accused Florence being the matriarch and mother to the First Accused **[Bonface]**, the Third Accused **[Protus]** and the Fourth Accused **[John]**. They all lived at Bondeni Nandi East and the deceased was one of their neighbours.
3. On the material date in the evening hours from about 9:00pm onwards other neighbours of the Accused including **John Asubwa [PW1]**, **Jane Kerubo Asieka [PW3]** and **Jane Kadenyi [PW5]** where at their respective homes when they were attracted by screams of the second accused and her daughters. The three neighbours and others ventured outside their houses to enquire as to what was happening.
4. **Asubwa [PW1]** then saw the sons of the Second Accused including the First, Third and Fourth Accused leaving their mother's house and entering the homestead of the deceased with their mother in tow. The deceased was at the time carrying goods away from his house with the help of others. He was attacked and beaten up along with his helpers by the

four Accused using whips. In a bid to rescue himself, the deceased ran away towards a nearby river with the four accused and other members of the family including two daughters in hot pursuit.

5. Asubwa [PW1] did not follow the group to the river and could not tell what happened at that scene. He contended that he witnessed the deceased being assaulted by the four Accuseds before he [deceased] escaped towards the river which was hundred [100] meters away. He **[PW1]** also said that the deceased was assaulted with a club although he saw the two daughters of the second accused holding a machete [panga].

6. Asieka [PW3] heard shouts from the sons of the second accused to the effect that “you killed our father.” The said sons [Accused one, three and four] and their sibling brothers and sisters directed the shouts at the deceased who then ran towards a river while being beaten by the children of the Second Accused. The children followed the deceased to the river and continued to assault him using machetes [pangas]. She **[PW3]** witnessed the assault at the river together with other neighbours, but feared to intervene to save the deceased.

7. Kadenyi [PW5] heard the Second Accused screaming and shouting “*kill, kill*” when her sons including the First, Third

and Fourth Accused appeared at the scene and set upon the deceased using rungus [club] and pangas [machetes]. The deceased then left his home and escaped towards the nearby river while being followed by the attackers. She [PW5] did not go to the river but heard shouts of kill, kill” coming from that scene. A village elder advised her to call the police and she did not.

8. The police received a report of the deceased having been assaulted and killed. **Chief Inspector Samuel Magut [PW6]**, the then Deputy Commanding Officer at the Nandi Hills Police Station, led a team of police officers to the scene of the assault and found that all the suspects had fled from their home. A search was conducted in their house and the weapons suspected to have been used by the assailants were found therein. These included two pangas **[P. Exhibit 2[c]** and **[d]**, one slasher **[P. Exhibit 2[b]** and one axe **[P. Exhibit 2[a]**.

9. The witness **[PW6]** and his team then went in search of the suspects who included the Four Accuseds herein. They found the First and Fourth Accused within Nandi Hills Town while the Second and Third Accused were found at their home in Bondeni Nandi. They were all arrested and in the course of investigations the police gathered that a long standing family dispute existed between the Second Accused and the deceased. Two suspect daughters of the Second

Accused were never arrested nor arraigned in court with the Four Accused.

10. The suspected assault cum murder weapons [**P. Exhibit 2[a] - [d]**] were examined by a Government Chemist, **George Lawrence Ogudo [PW4]**, who thereafter compiled and signed his report [P. Exhibit 3[a] indicating that the blood stains on the slasher belonged to the deceased while the blood stains on the axe and the pangas belonged to unknown persons.

11. Dr. Flavian Linguyani [PW2], carried out a post mortem on the body of the deceased and compiled the necessary post mortem report [**P. Exhibit 1**] showing that the deceased suffered multiple deep cut wounds resulting in excessive bleeding and death.

The doctor [**PW2**] opined that the deep cut wounds were caused by a sharp weapon.

12. After the conclusion of the investigations all the four accused were charged with the present offence which they all denied. The first Accused [**Boniface**], three [**Protus**] and four [**John**] raised alibis in their respective defence indicating that they could not have committed the offence since none of them was at the scene of the offence when it happened on the material date and time. They all implied

that they were implicated by their mother's neighbours for no good reasons.

13. Accused one stated that he was at his house at a place called west view, about two kilometers from his mother's home when his mother called and informed him of some fracas at her place prompted by a notice to vacate issued to her neighbour. He then instructed her mother to report to the police at Nandi Hills Police Station even as he left for the same police station where he met his mother and his brother [Accused 4]. After they reported the matter he [Accused one] returned to his home only to hear on the following day that a person was killed during the fracas. Later, police officers went to his barber shop and arrested him.

14. Accused three stated that he lived at Keteng Village Nandi Hills about nine [9] kilometers from his mother's home and indicated that he was at home throughout the day and night of the material date. It was on the following day that he learnt that the deceased had been killed. He further indicated that he was arrested simply because the deceased had a land dispute with his family.

Accused four said that he stayed at Gate Barrack Nandi Hills and was a carpenter by occupation. He arrived home from work at 8:00pm and spent the night over there on that material date. He went to church on the following day and

later learnt that his mother had been arrested on suspicion of killing the deceased. Thereafter, he was confronted by a mob of people and apprehended for being a son of the “killer”.

15. The Fourth Accused further stated that he lived two kilometers away from his mother’s home where the deceased was her neighbour. He contended that he was arrested simply because he was a member of his father’s family.

On her part, the Second Accused indicated that she was a former tea plucker at a tea plantation in Nandi Hills where she lives at a place called Bondeni. That, on the material date at about 7:00pm while it was raining heavily her children prepared tea for her. It was then that she heard noises and shouts outside her house and on enquiring she saw her neighbour, the deceased, in the company of some men.

16. The Second Accused stated that the deceased and his group of men were shouting and singing while mentioning the name of her deceased husband, she became fearful and called the village elder who told her to be calm. In the meantime, the group of men threw things here and there before leaving and saying that they would return. Indeed, the group returned and started throwing stones and

construction debris towards her house. She again called the village elder who advised her to escape from the scene even as her daughters came to her rescue.

17. The Second Accused stated further that she was in the process hit, fell down and was injured. She went to look for the village elder for him to report to the police about the invasion in her house. She failed to find the village elder and went to the police station where she found her sons. She made her report and returned home. Her sons also returned to their respective homes. She was on the following day arrested and taken to the police station where she found the First and Fourth Accused. It was alleged that she killed the deceased. She was surprised and shocked by the allegations. She denied killing the deceased and contended that she did not know how he died, even though he had a land dispute with her late husband and not herself. She indicated that she was arrested while at her home with the Third Accused and that her farming implements were collected from her house by the police. She further contended that she was never involved in the death of the deceased and was implicated for nothing.

18. Due consideration of the evidence is its totality together with the final submissions by both the prosecution and the defence invariably leads this court to find that the

fact that the deceased met his death after being attacked and fatally assaulted by some of his neighbours was not in dispute. Indeed, there was sufficient evidence from the prosecution through **Asubwa [PW1]**, **Asieka [PW3]** and **Kadenyi [PW5]** establishing that the deceased was attacked and fatally injured by a group of people who were their neighbours especially at the nearby river where the deceased sought refuge when the assault intensified.

19. The witnesses **[PW1, PW3 and PW5]** zeroed in on the scene at the river as the actual place where the assault upon the deceased intensified and became fatal. This was a strong inference that the fatality of the assault occurred nowhere else, but at the river or river bank. This meant that the initial attack against the deceased before he escaped towards the river was of a lesser degree incapable of being fatal.

20. Under **Section 203** of the **Penal Code**, a person is guilty of murder if he/she causes the death of another of malice a forethought which is imputed in circumstances were [inter-alia] the assailant or assailants act with an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not. The evidence adduced herein by the prosecution left no doubt that the assailants were bent on causing the death of the deceased or occasioning him grievous harm especially

after they followed the deceased to the river and intensified their attack upon him.

- 21.** The evidence showed that the attack was vicious and brutal as clearly demonstrated by the degree or seriousness/severity of the injuries inflicted upon the deceased. This was by itself a manifestation of malice aforethought. It may therefore be safely stated that the deceased was indeed, murdered. The big question or rather the crucial issue for determination would be whether it was the four Accused or any one of them who murdered the deceased.
- 22.** In that regard, the evidence showed that the fatal attack occurred at a scene near a river. Therefore, any person who participated in that attack at that scene would be culpable for the death of the deceased. The incident occurred in the hours of darkness, but there was evidence from **Asubwa [PW1]** that there was clear moonlight at that time. **Kadenyi [PW5]** also said that the scene was well lit by electric light and moonlight.
- 23.** The condition favourable for identification in that hour of darkness were therefore in existence. Consequently, there was credible evidence from the key prosecution witnesses **[PW1, PW3 and PW5]** that in the initial episode of attack the witnesses saw and identified by recognition all

the Four Accused attacking and beating the deceased alongside daughters of the deceased who for unknown reasons were not also arrested and charged.

24. The same witnesses [**PW1, 3 and 5**] also indicated that in the second episode of attack which was the most important in linking the accused to the offence [i.e. at the river] the deceased was fatally attacked by the First, Third and Fourth Accused and others. The Second Accused did not, according to the witnesses, follow the deceased to the river. Therefore, she could not be linked to that second episode of attack which was the foundation of the present charge.

25. The sons of the Second Accused [i.e. **Accused 1, Accused 3 and Accused 4**] were linked to the second episode of attack because they followed the deceased to the river after they had initially beaten him outside his house. This was established by the evidence of **Asubwa [PW1], Asieka [PW3]** and **Kadenyi [PW5]**. Whereas **Asubwa [PW1]** and **Kandenyi [PW5]** did not witness the assault at the river side, **Asieka [PW3]** did. She [**PW3**] actually proceeded to the river side and was among those who witnessed the fatal attack first hand at that place. In confirming that the first, third and fourth accused were among those who attacked and fatally assaulted the

deceased at the river side, the witness **[PW3]** shattered, displaced and disproved the alibi defences raised by the First, Third and Fourth Accused.

26. It would therefore follow that the first, third and fourth Accused were part and parcel of those who attacked and fatally injured the deceased at the river side. Their defence proved to be nothing short of an afterthought. The charge against them was established and proved against them beyond reasonable doubt by the prosecution evidence. The three **[Accused 1, Accused 3 and Accused 4]** are therefore found guilty as charged and convicted accordingly. The Second accused **[Florence Musimbi]** is however, found not guilty as charged and acquitted accordingly.

Dated and Delivered this 19th day of February 2026

**HON. J. R. KARANJAH,
JUDGE**