



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 28 OF 2015**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**MUTISYA WAMBUA.....ACCUSED**

**J U D G M E N T**

1. **Mutisya Wambua**, the Accused, 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**. Particulars of the offence are that on the **8<sup>th</sup> day of March, 2014** at **Ndalani Village, Kalia Sub-location, Matinyani Location** within **Kitui County** he murdered **Wambua Ngutho** (Deceased).

2. Facts of the case are that on the **8<sup>th</sup> March, 2014**, PW1 **Muema Nguthu** a younger brother of the Deceased went to his home at about **5.30 p.m.** and found him lying on the ground near the door to his house. The Accused, his son who lived with him at the homestead was within the homestead pacing up and down with his hands raised up in the air. He notified people, amongst them PW3 **Patrick Mwendwa Wambua** the brother of the Deceased. They reported the matter to the police who visited the scene and removed the body to the **Kitui District Mortuary**. They re-arrested the Accused who had been restrained by members of the public. They also took possession of some two (2) pieces of timber that were suspected to be murder weapons. Investigations were concluded which resulted into the Accused being charged.

3. When put in his defence the Accused denied having killed his father. He stated that on the material date he left home at **8.00 a.m.** and returned at **6.00 a.m.** to find his father having died. That he found people present. He denied having knowledge as to what caused his father's death.

4. At the close of the defence case it was submitted by **Mr. Kalili**, learned Counsel for the Accused that PW1 found the body of the Deceased and also found the Accused. That there were grandchildren of the Deceased but their ages or names were not mentioned. PW1 never talked to the Accused and he did not know the cause of death. He alerted PW3 the brother of the Deceased who was at a nearby trading centre, PW2 **Kiteme Nguthu** his brother who was at home. PW4 **Jacinta Katunyu Wambua** the wife of the Deceased was also away from home.

5. He urged that the burden of proof was upon the Prosecution to prove beyond reasonable doubt that the Accused murdered the Deceased, a burden that was not discharged because there was no eye witness to testify as to who caused the death. That PW1 found the Accused with grandchildren of the Deceased who never recorded statements. That the Accused was confirmed to be of unstable mind at the time as confirmed by **Doctor Munga Edgar** on **26<sup>th</sup> March, 2014**. He was therefore in a state of mind that could not explain himself but the grandchildren who were conveniently left out could have shed some light on the Deceased's death. That had the murder weapon or even the body been dusted for finger prints the results would have exonerated the Accused. Therefore scanty circumstantial evidence does not connect the Accused with the offence.

6. This being a case of murder, the Prosecution had the duty of proving:

- i) The fact of death.
- ii) The cause of death of the Deceased.
- iii) That the death was a consequence of an unlawful act or omission perpetrated by the Accused.
- iv) That it was done with malice aforethought.

7. Evidence adduced by all witnesses who went to the scene was that they found the Deceased dead. Ultimately, an autopsy was conducted by PW5 **Doctor Cosmas Mutisya** who found the Deceased having sustained a depressed occipital fracture and linear fracture on the

occipital to the frontal region of the skull with massive intracranial haematoma. As a result he formed the opinion that the cause of death was severe head injury, with an intracranial haemorrhage and skull fracture. This was proof of the fact of death.

8. There was no direct evidence as to who caused the death of the Deceased. Therefore evidence adduced was circumstantial in nature.

9. In the case of **Sawe vs. Republic (2003) KLR 364** the Court of Appeal held that:

***“In order to justify on circumstantial evidence, 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 guilt.”***

10. In the case of **Abanga alias Onyango vs. Republic Criminal Appeal No. 32 of 1990 (UR)** the Court of Appeal stated that:

***“It is settled law that when a case rests on circumstantial evidence, such evidence must satisfy three tests:***

***(1) The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;***

***(2) Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;***

***(3) The circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”***

11. PW4 the wife of the Deceased stated that she lived at the homestead with the Deceased and on the fateful date when she left home the Accused was there but the Deceased had gone to some construction site. No evidence was called from any person who was at the stated site to tell the Court if indeed the Deceased went to the site and circumstances in which he left going back home.

12. The Deceased was found at his homestead, a place that could be accessed by any individual. When the Accused appeared in Court at the outset, per the Psychiatrist who examined him he had a mental condition (Schizophrenia) that was characterized by among other symptoms a disorganization in speech and behavior. His mother (PW3) stated that he was not of sane mind but he would have lucid moments. It was for this reason that he was blamed. But the Investigating Officer failed to prove if indeed he is the one who did the act that caused the death of the Deceased. It could have been him or any other person who may have had the opportunity of occasioning the injury upon the Deceased that he succumbed to.

13. In the premises, circumstances that prevailed do not unerringly point at the Accused as the guilty one. Therefore the case against him is not proved beyond any reasonable doubt. In the result, he is acquitted of the offence of murder.

14. It is so ordered.

**Dated, Signed and Delivered at Kitui this 22<sup>nd</sup> day of January, 2019.**

**L. N. MUTENDE**

**JUDGE**