



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 7 OF 2015**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**JACKSON MULONZYA MWANZA.....1<sup>ST</sup> ACCUSED**

**MARY MAWIA MULONZYA.....2<sup>ND</sup> ACCUSED**

**JUDGEMENT**

**Introduction:**

1. The 1<sup>st</sup> and the 2<sup>nd</sup> Accused Persons herein were charged with the offence of Murder Contrary to section 203 as read with section 204 of the Penal Code. They are alleged to have committed three offences of murder. The Particulars being that on the 3<sup>rd</sup> of April, 2008 at Muruu Village, Kyuso Location in Kyuso sub county within Kitui County murdered David Mulonzya and Musyoka Kitheka, and also that on 4<sup>th</sup> April,, 2008 at at Muruu Village, Kyuso Location in Kyuso sub county within Kitui County murdered one Kyalo Syengo.
2. The prosecution summoned a total of 9 (nine) witnesses in support of its case while the defence called two witnesses, the accused and his wife who was also the co accused herein.

**Prosecution's Case:**

3. **PW1 Titus Kilonzi Kitheka** testified that he was the area Councilor when the three deceased persons herein died, and that one of the deceased person by the name Musyoka Kitheka was his step-brother. It was his testimony that on 1/4/2008 he was informed that his step brother Musyoka Kitheka was sick and admitted in hospital. He visited the hospital where he realized that three other persons were also sick with similar symptoms being the other two deceased persons and one Sammy Mulonza. Additionally, he told court that the deceased persons and the survivor Sammy Mulonzya told them that they had drunk some alcohol by the name karubu from the 1<sup>st</sup> accused person house on 30<sup>th</sup> March, 2008. It was also his testimony that David Mulonzya (deceased) and Sammy Mulonzya are the sons of the accused and also confirmed to him having drunk the karubu. Further, he told court that he attended the postmortem for his brother Musyoka Kitheka on 10/4/2008 when police took specimens to the Government Chemist, which later gave a report that 'bygone' poison was detected.
4. **PW2 Ronald Muthami Kiembeni** testified that he is the Snr Asst. Chief Gai sub location, he recalled that on 1/4/2008 he was called and informed that some people were admitted in hospital for having taken karubu, he visited the hospital and talked to David Mulonzya one of the deceased who informed him that they had taken karubu prepared by his father the 1<sup>st</sup> accused. He immediately rushed to the accused home, however he found that the karubu had been poured, but found muratina, which he took and handed it over to the public health officer for testing, which results he doesn't have to date. He stated that the Public Health Officer on seeing the muratina suspected aflatoxin as the cause of the poisoning. Additionally, he stated that the accused had prepared the karubu for purposes of having people do his farm work, which is the practice reiterating that the accused did not engage in the business of preparing karubu for sale. Further, he told court that on interrogating the accused, he told him that he had also taken a glass of the karubu as he was sick from malaria.
5. **PW3 Dr. Kiema Anson Mwangi** testified that he is a Medical Doctor working at Mwingi Hospital, and was not there during the admission and demise of the deceased persons herein, however he produced the Postmortem report prepared by one Dr. Mwangi who has since left the hospital. He stated that from the report Musyoka Kitheka cause of death was multiple organ failure secondary to poisoning. And that no particular poison was identified despite samples of stomach, liver, kidney and lungs being taken. The same also applied to David Mulonza. In respect to Kyalo Syengo, he produce a postmortem report by one Dr. Ndegwa who conducted the postmortem at City Mortuary, where the cause of death is indicated as being chemical poisoning. He told court that he has never worked with the two doctors who authored the medical report and doesn't know their signatures and handwriting; however his role was to produce and interpret their respective reports.

6. **PW4 Samuel Sila Mulonzi** testified that the accused person is his father and that on 30/3/2008 together with his brother David Mulonzya and their friend Kyalo Syengo drank karubu prepared by his father for personal consumption. He denied seeing Musyoka Kitheka one of the deceased person taking the alcohol stating that he only saw him in hospital while they were all sick. Additionally, he told Court that he has been drinking alcohol for 9 years and from his experience the alcohol was normal and suspected nothing and that the accused is the one who served them the alcohol after having tested the same. Furthermore, he stated that all of them voluntarily visited his father's home and took the alcohol and absolved the accused from any blame.

7. **PW5 Jones Syengo Mulingu** testified that he is the father of Kyalo Syengo one of the deceased. And that they are related to the 1<sup>st</sup> accused person. It was his testimony that on 30/3/2008 at night while at home he heard someone vomit outside and when he came out it was his son Kyalo Syengo, who told him that he was suffering from abdominal pain and that he had taken alcohol at the 1<sup>st</sup> accused home together with Sammy and David who were his age mates. He recalled that the following day a friend of his son visited and took him to hospital where they found Musyoka Kitheka, David Mulonzya and Sammy Mulonzya who were both sick. It was his further testimony that his son health deteriorated and they took him to Kenyatta Hospital where he passed on. He absolved the 1<sup>st</sup> accused from any blame stating that if there was any poison it would have been put by someone else.

8. **PW6 Samuel Kilonzo Nzoka** testified that he is a cousin to Musyoka Kitheka one of the deceased person, and in his testimony he narrated what he was told transpired being that the three deceased took alcohol at the accused home, which he says led to their death, all which he says he was told.

9. **PW7 Mutuku Kitheka** testified that he is the brother of Musyoka Kitheka and that on 29/3/2008 his brother proceeded to the accused homestead to plough and came back at around 6:30pm and at round 7pm he complained of stomach pains. He told court that he had taken alcohol after ploughing. His condition deteriorated and was taken to hospital the following culminating in his passing at Kenyatta Hospital. It was his testimony that his deceased brother complained of the alcohol he took. Further he stated that they did not have any grudge with the accused.

10. **PW8 Samuel Gachiri Njoroge** testified that he works for the Government Chemist as an analyst with an experience of 31 years. He recalled that on 16/4/2008 he received exhibits of the deceased David Mulonzya, being stomach parts and liver, which he analyzed and prepared a report, which is to the effect that traces of pesticide were found in the deceased stomach. Additionally, he stated that he also received samples for Musyoka Kitheka being stomach, kidney, liver and lungs and after analysis prepared a report dated 25/7/2008 to the effect that a poisonous pesticide by the name bygone was found. He stated that the pesticide was available in shops locally and poisonous when ingested and can lead to death. In his opinion blood samples ought to have been taken to ascertain cause of death, as other substances such as ethanol can cause death in large quantities.

11. **PW9 Eunice Wamuyu Njogu** testified that she works at government chemist as an analyst. It was her evidence that she received exhibits for one of the deceased herein Kyalo Syengo, being stomach, liver, kidney and blood for toxicological analysis, where she prepared a report dated 27/6/2008 and in her report she detected ethanol in the deceased blood, concentration of 77 m/g per 100ml of sample-minimum intake of 2 half little bottle beer, or 4 tots of whiskey. It was her further evidence that no other chemical was detected. Moreover, she noted that there is circumstantial evidence that ethanol can cause death.

#### **The Defence Case:**

12. At the close of the Prosecution case, this Court ruled that the 1<sup>st</sup> Accused person had a case to answer and put him on his Defence and acquitted the 2<sup>nd</sup> accused. DW1 the 1<sup>st</sup> accused **Jackson Mulonzya Mwanza** gave sworn testimony, he told the court that on 29/03/2008 that was on Friday, he brewed alcohol known as karubu using honey and muratina as he is a farmer and had beehives. He stated that he had no experience of brewing and only brewed for his own consumption. And on Saturday the alcohol was ready, and he consumed it with other seven people, being his two sons David Mulonzya and Sam Mulonzya, others were Musyoka Kitheka, Kyalo Syengo and that out of the seven people who consumed the alcohol 3 of them died, being the deceased persons herein.

13. It is the accused position that his alcohol had no problem stating that all those who died had gone out and consumed alcohol elsewhere, case in point being that the two of those who died went to Katumbini and Kesyunoo where they consumed more alcohol, that is David Mulonzya and Kyalo Syengo and that the third deceased Musyoka Kitheka took more alcohol elsewhere thus causing his death. In support of this he stated that he and Sammy Mulonzya one of his sons took the said alcohol but are still alive because they never went elsewhere to drink alcohol. In sum he stated that he is innocent of the charges.

14. **DW2 Mary Mawia Muloynzia** testified that she is the wife of the accused and that together they have eleven children, 9 of whom are alive. She stated that David Muloynzia one of the deceased person herein was her 10<sup>th</sup> Child and the one who took the said alcohol. She added that the alcohol prepared by the accused on that date was not the first as he had been making some for his own consumption and there has never been a problem.

#### **Submissions:**

15. Only the prosecution filed their written submission dated 23<sup>rd</sup> July, 2019. The gist of the prosecution submissions case is that the circumstances from the evidence tendered proves their case against the accused person beyond reasonable doubt and urged the court to convict the 1<sup>st</sup> accused person.

#### **Analysis and Determination:**

16. I have carefully considered the evidence adduced by the prosecution and the defence as well as the written submissions by learned Counsel for the State.

17. The accused has been charged under **section 203** of the **Penal Code**. The section creates the offence of murder and provides as follows:

**“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”**

18. The circumstances upon which malice aforethought, a key ingredient of the offence can be established is provided for under Section 206 of the Penal Code which provides:

**“206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances –**

**a. 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;**

**b. knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;**

**c. an intent to commit a felony;**

**d. an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”**

19. The duty of the prosecution is to discharge the burden of prove, which is beyond reasonable doubt by adducing evidence establishing that the accused person unlawfully and by some act or omission caused the death of the deceased persons.

20. It is apparent in this case that the evidence adduced by the prosecution is circumstantial in nature as the witnesses allege that the alcohol that was brewed by the accused person and drunk by the deceased persons on 30<sup>th</sup> March, 2008 was harmful to their health and caused their death.

21. The court in the case *Republic vs Kipkering Arap Koskei & Another 16 EACA 135*, in regard to circumstantial evidence 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.”**

22. Additionally, in *Abanga alias Onyango vs Republic CR. A NO.32 of 1990 (UR)*, the Court of appeal set the principles upon which the circumstantial evidence adduced ought to be subjected to, it held:-

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

**i. the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;**

**ii. those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;**

**iii. 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.”**

23. In view of the foregoing, the following are the issues for determination in this regard:-

1) *Whether the prosecution has proved that the cause of the death of the deceased persons was illicit brew brewed by the accused?*

2) *Proof that the said death was caused by unlawful act of omission or commission on the part of the accused person - “actus reus”.*

3) *Proof that accused had malice afterthought.*

**1) Whether the prosecution has proved that the cause of the death of the deceased persons was illicit brew brewed by the accused?**

24. The prosecution case is that the brew by the accused person is what caused the deceased persons deaths and therefore making him culpable for the offence of Murder. The accused person in his defence testified that indeed he brewed the said alcohol for his own consumption. He does not deny that he gave the said alcohol to the deceased persons; however, it is his case that he also took the alcohol with PW6 who is also his son. He alleged that the deceased persons although took the alcohol, they went elsewhere and continued taking other alcohol and in his opinion, it is the other alcohol that they took elsewhere that must have contributed to their deaths.

25. PW8 the Government analyst in his evidence testified that he received stomach parts and liver for David Mulonzya and on analysis found traces of pesticide in the stomach and in regard to Musyoka Kitheka he received the samples of the stomach, kidney, liver and lungs

and after analysis he found a poisonous pesticide by the name bygone, which poison he said was available in shops locally and poisonous when ingested and can lead to death. However, it was his opinion that blood samples ought to have been taken to ascertain the cause of death. In his testimony, he could not with certainty conclude the cause of the deceased persons' death.

26. PW9 who also testified that she works in the Government chemist as an analysis testified that she received the exhibits for one of the deceased Kyalo Syengo, being stomach, liver, kidney and blood and on conducting toxicological analysis, she detected ethanol in the deceased blood, concentration of 77 m/g per 100ml of sample-minimum intake of 2 half little bottle beer, or 4 tots of whiskey. It was her evidence that no other chemical was detected. Moreover, she noted that there is circumstantial evidence that ethanol can cause death.

27. From the foregoing, it is apparent to this court that there was no conclusive evidence of what actually caused the deaths of the deceased persons herein. In respect to David Mulonzya and Musyoka Kitheka, it was the conclusion of PW8 that the blood samples would have actually unearthed the cause of the deceased persons' deaths. Equally for PW9 in respect to the deceased person Kyalo Syengo, her finding was that there was no poison detected and in her finding she only detected ethanol in the deceased person blood and therefore it seems his death may have been as a result of taking too much alcohol, hence an increase in ethanol in the body causing his death.

28. Therefore in the circumstances of this case, the important question to ask is as to whether there is a possibility that the deceased persons took the alleged poison detected in their bodies from elsewhere, and in my view that possibility exists as the accused and PW6 took the same alcohol as the deceased persons but survived and therefore creating doubt, which doubt ought to benefit the accused person herein. Further, it is not in dispute that after taking the alcohol, the three deceased persons left the accused person compound, thus creating a possibility that they might have taken something poisonous elsewhere.

29. In view of the foregoing, it is my finding that the prosecution failed to prove beyond reasonable doubt that the only inference that can be made in the circumstances is that the alcohol brewed by the accused herein and given to the deceased persons herein is the cause of their deaths making him culpable.

**2) Proof that the said deaths were caused by unlawful act of omission or commission on the part of the accused person "actus reus".**

30. In regard to this element of the crime of murder facing the accused person herein, it is my considered view based on the foregoing that the prosecution failed to prove beyond reasonable doubt that the deaths of the deceased persons were caused by the unlawful acts of omission or commission of the accused. There is no direct and clear link between the deceased deaths and the accused actions herein.

31. The critical evidence in this respect, which is the evidence of the Government chemist analysts herein PW8 and PW9 failed to establish conclusively the causes of deaths of the deceased persons. The fact that poisonous pesticides were found in two of the deceased persons bodies that is Musyoka Kitheka and David Mulonzya and none was traced in the body of Kyalo Syengo further raises doubt as to whether the source of the poison is the alcohol brewed by the accused person herein.

32. It is therefore my finding that this element of the offence was not proved beyond reasonable doubt.

**3) Proof that accused had malice aforethought:**

33. As noted hereinabove, in order to sustain a conviction for the offence of murder, malice aforethought must be established. The Court of Appeal In Nzuki vs Republic [1993] KLR 171 noted in this regard that before an act can be murder, it must be aimed at someone and in addition it must be an act committed with the Intention to cause death or Intention to cause grievous bodily harm and where the accused actually knows that there is a risk that death or grievous bodily harm from his actions would arise and actually proceeds to commit the said harmful acts without lawful excuse.

34. In this case the prosecution did not tender any evidence establishing malice aforethought from the accused herein. It is not disputed that one of the deceased persons, one David Mulonzya is the son of the accused herein. Additionally, it was also established that the accused person also took a glass of the said brew. Additionally, PW6 who is also the son of the accused drank the said brew together with the accused and the deceased persons. This in my view creates doubt as to the inference on malice, as there is no evidence that the accused wanted his son's dead or neither has any dispute between his son or any of deceased persons been established to warrant an inference that there might have been intention from the accused to have the deceased persons dead.

35. In conclusion this element of the offence has equally not been proved.

**Conclusion:**

36. Consequently, I have come to the conclusion that the state has failed to prove the case against the accused person beyond reasonable doubt. The Accused is therefore found not **guilty** of the offence of murder and he is accordingly acquitted.

**DATED, SIGNED AND DELIVERED AT GARISSA THIS 28<sup>TH</sup> DAY OF OCTOBER, 2019.**

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**C. KARIUKI**

**JUDGE**