



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT VOI**

**CRIMINAL CASE NO 17 OF 2014**

**REPUBLIC**

**VERSUS**

**MOSES SEMBUA WAYO**

**JUDGMENT**

**INTRODUCTION**

1. The Accused person herein, Moses Sembua Wayo, was charged with murder contrary to Section 203 as read with Section 204 of the Penal Code Cap 63 (Laws of Kenya). The particulars of the offence were that on 16<sup>th</sup> November 2014 at Msengweni Area of Timbila Location within Taita Taveta County, he murdered Isaac Meja Sailoki (hereinafter referred to as “the deceased”).

2. This matter was initially heard by Muya J. He took the evidence of Samuel Meli Sailiki (hereinafter referred to as “PW 1”), Damaris Madi Mugambi (hereinafter referred to as “PW 2”), Emmanuel Leisa (hereinafter referred to as “PW 3”) and Priscilla Nduku Daniel (hereinafter referred to as “PW 4”), Simeon Mengi Sailoki (hereinafter referred to as ‘PW 5”).

3. This court took over conduct of the matter on 7<sup>th</sup> October 2015 and continued from where the said Learned Judge had reached after the Accused person, his counsel and counsel for the state confirmed to the court that it could proceed accordingly. At the time, there were only two (2) remaining witnesses.

4. The Prosecution called a total of seven (7) witnesses to demonstrate the following ingredients of murder found in Section 203 of the Penal Code:-

**a. Proof of the fact and cause of death of the deceased;**

**b. Proof that the deceased met his death as the result of an unlawful act or omission on the part of the accused; and**

**c. Proof that the said unlawful act or omission was committed with malice aforethought.**

5. On 28<sup>th</sup> March 2017, this court found that a *prima facie* case had been established against the Accused person to warrant him being put on his defence. His defence case was heard on 18<sup>th</sup> July 2017. At the conclusion of his case, he filed Written Submissions dated 24<sup>th</sup> October 2017 on the same date. The State filed its Written Submissions dated 11<sup>th</sup> October 2017 and on 12<sup>th</sup> October 2017.

6. When the matter came up on 8<sup>th</sup> November 2017, counsel for the Accused person and counsel for the

State informed this court that they would rely on their respective Written Submissions in their entirety without highlighting the same. The Judgment herein is therefore based on the said Written Submissions.

### **THE PROSECUTION'S CASE**

7. The State summarised the evidence that was adduced by the Prosecution witnesses. The same has been set out in detail later on in the Judgment herein. In demonstrating that it established proof of fact and cause of the deceased's death, it pointed out that although there were no eye witnesses who saw the Accused person hit the deceased resulting in his death, both PW 2 and PW 3 placed him at the scene where the deceased was found unconscious and stated that he was the one who started the argument. It added that the medical evidence that was presented before this court showed that the deceased did not die a natural death.

8. It was categorical that it was highly coincidental that immediately after the commission of the offence, the Accused person went to visit his relatives despite him not having adduced evidence that he had relatives at Malkroriti. Further, it submitted that the Accused person had not demonstrated that there existed a grudge between him on the other hand and PW 1, PW 2 and PW 3 on the other hand so that they could frame him for having caused the deceased's death. It was its submission that the evidence, though circumstantial, irresistibly proved that the Accused person caused the deceased's death.

### **THE ACCUSED PERSON'S CASE**

9. On his part, the Accused person adduced sworn evidence. He submitted that the evidence that was adduced by the Prosecution witnesses did not prove any of the ingredients of murder. He argued that the Prosecution did not tender evidence to show that the deceased met his death as a result of an unlawful act or omission on his part or that there was malicious aforethought on his part.

10. It was his argument that no one saw him beat the deceased and no murder weapon was recovered. He suggested that the deceased may have fallen down during the commotion during the rains and thus injured himself. He relied on the evidence of Dr Kagona Gitau (hereinafter referred to as "PW 6") who testified that a fall from a high height or high impact trauma could cause the injury the deceased sustained.

11. It was his submission that his sworn evidence was consistent and reliable and thus urged this court to acquit him under Section 215 of the Criminal Procedure Code Cap 75 (Laws of Kenya).

### **LEGAL ANALYSIS**

12. In determining whether or not the Accused person was guilty as charged, this court analysed the evidence that was tendered by the Prosecution witnesses and the Accused person.

13. According to PW 1 who was the deceased's brother, on the material day he had worked together with the deceased at a construction site until 4.00pm. At about 8.00pm, they went to the shops whereafter the deceased went to the Accused person's house. The Accused person was their cousin. After a short while, he heard a commotion in the Accused person's house and upon reaching there, he found the Accused person who was demanding to be given a machete (panga). He separated them and he ensured the deceased went to his house.

14. In the morning, he was informed by his brother PW 3 that the deceased had been injured seriously. He went to PW 3's house and found the deceased lying outside his house with injuries at the back of his head and was bleeding. He arranged for transport and took the deceased to hospital. He stated that he recovered the Accused person's cap where he had witnessed him fighting with the deceased.

15. During his Cross-examination, he stated that he did not see what the Accused person was using to beat the deceased and that he was not aware of what the dispute of the panga was.

16. PW 2 was PW 3's wife. Her evidence was that on the material date at about 11.00 pm, she heard a

person walking outside her house. She asked PW 3 to confirm who it was. They established that it was the Accused person. At the time, he was wailing saying that he had been beaten by the deceased and PW 1. She asked him to enter their house. The deceased followed shortly and also entered their house. The Accused person then hit the deceased on his eyes upon which PW 3 asked them to take their fight outside his house.

17. She said that the Accused person cut the deceased twice and ran away and that they could not take him to hospital because it was raining heavily. She said that the deceased was taken to hospital in the morning.

18. In her Cross-examination, she stated that the Accused person had no injuries and that she only heard the sound of someone being hit. She was emphatic that it was the Accused person who hit the deceased. She said she heard the Accused person demanding to be given back his panga. When she was re-examined, she contended that there was no other person outside their house at the material time.

19. PW 3's evidence was on all fours with that of PW 2. During Cross-examination, he stated that he did not know what caused the deceased's injuries as he never followed the Accused person and the deceased when he ordered them to leave his house and fight outside. He reiterated PW 2's evidence that it was raining at the material time and that there was no other person in their compound. In his Re-examination, he stated that he tried chasing the Accused person but he managed to escape.

20. PW 4 testified that the Accused person went to her house on 17<sup>th</sup> November 2014 at about 8.00pm. The Accused person told her that he had wanted to go to Rasta's home but that the river was flooded. She knew Rasta who worked for the County Council. She invited him in her house because it was raining and gave him directions on how to cross the river but he said that he was not able to. She also asked him to give her his Identity Card (ID), which he did.

21. The following day, 18<sup>th</sup> November 2014, she returned from the farm and found him still in her house. He did not appear in a hurry to leave her house. Later she received information that someone had been killed. She became suspicious and called the Area Chairman and Assistant Chief. Police came the following day on 19<sup>th</sup> November 2014 and took the Accused person away. She said that the Accused person's clothes did not appear dirty or torn.

22. PW 5 testified that the Postmortem that was conducted on the deceased, who was his younger brother, showed that he had died as a result of head injuries, a fact that was confirmed by PW 6 who tendered in evidence the Postmortem Report that had been prepared and signed by Dr Chai. He pointed out that there were no witnesses during the Postmortem examination. The deceased had a scalp wound, fracture of the skull and a fracture of the mid-parietal occipital area. There was also a haematoma beneath the cut wound depressing the brain.

23. The conclusion was that the cause of the deceased's death was intracranial bleeding with massive epidural haemorrhage. PW 6 was emphatic that a low impact fall could cause the scalp to be injured and bleed but it could not cause any fracture. Counsel for the Accused person did not Cross-examine him.

24. No 72650 Corporal Silvanus Madegwa (hereinafter referred to as "PW 7") was the Investigating Officer herein. He testified that on 18<sup>th</sup> November 2014, he was at Taveta Police Station when they received news that the deceased had died at Taveta Sub-County Hospital while receiving treatment after having been injured by the Accused person, the deceased's nephew.

25. He proceeded to the Accused person's grandfather's homestead at Timbila and established that PW 1, Isaac Sailoki and the Accused person stayed in separate houses in the said homestead. He picked a bunch of keys at the compound and he was informed that the same belonged to the deceased. PW 1 also gave him a marvin cap that belonged to the Accused person.

26. He reiterated PW 1's, PW 2's, PW 3's, PW 4's and PW 5's evidence and confirmed that he recorded

their statements. He added that when he interrogated the Accused person, he told him that he had had an argument with the deceased who was his uncle regarding a panga that he was demanding from the deceased. In his Cross-examination, he reiterated the evidence that had been adduced by the Prosecution witnesses and was emphatic that there was malice aforethought on the part of the Accused person.

27. In his sworn evidence, the Accused person stated that on the material day, he was in his house when someone knocked on his door. When he opened the door, he found it was his uncle, the deceased herein. He invited him to dinner. At about 9.40 pm, the deceased asked him to go and buy him alcohol but he told him that he did not have money. The deceased then started abusing and insulting him telling him to vacate the homestead because he was an illegitimate child. He started slapping him.

28. It was then that he ran to PW 3's home and as he was explaining what had transpired, the deceased followed him to PW 3's house and when PW 3 asked him why he was beating him, the deceased started insulting and abusing PW 3. He added that he left the deceased and PW 3, who was drunk, arguing.

29. The following morning, he went to town and because he was late, he decided to go to another uncle's house. This was his mother's brother. When he got to the river, he found that the same was flooded. It was then that he sought for shelter at PW 4's house. He said that he left the following morning and went to his uncle's house and found that they had vacated the house. He slept at her place on that day because it had also rained. He confirmed that he was arrested from her house on 19<sup>th</sup> November 2014. He said that he did not go home because he had been beaten and told to leave the homestead by the deceased.

30. In his Cross-examination, he denied that PW 1 went to his house at 8.00am on 17<sup>th</sup> November 2014. He was emphatic in his Cross-examination and Re-examination that he left PW 3 and the deceased arguing.

31. A careful perusal of the evidence herein showed that the case was based on circumstantial evidence. Although no one witnessed the Accused person hit the deceased, the Prosecution was emphatic that the fact that he went to PW 4's house after his fight with the deceased was proof of malice aforethought on his part.

32. On the other hand, the Accused person was categorical that the deceased chased him from the homestead because he was an illegitimate child and that he decided to go to his maternal uncle's house at Malkroliti. However, he sought shelter at PW 4's house because it was raining heavily and the river was flooded. All the witnesses spoke of the heavy rains with swollen rivers and inability to move. In fact, PW 2 and PW 3 stated that they could not take the deceased to hospital on the night of 17<sup>th</sup> November 2014 because it had rained heavily.

33. Evidently, the Prosecution's case and that of the Accused were so diverse that it was difficult to know which version was the truth. There was, however, convergence that the deceased was the one who went to the Accused person's house at night, an argument between the deceased and the Accused person ensued, the Accused person went to PW 2's and PW 3's house and was wailing, PW 3 went outside and established that the person who was wailing was the Accused person, the Accused person entered in the house and told them that the deceased had beaten him, the deceased followed the Accused person at PW 2's and PW 3's house, PW 2 and PW 3 asked the deceased why he had beaten the Accused person and that it had rained that night.

34. It was evident to this court that the deceased died as a result of a fight. None of the Prosecution witnesses saw him with any weapon or hit the deceased. Whether the fight was between him and the Accused person as had been contended by PW 1, PW 2 and PW 3 or it was between PW 3 and the deceased as had been averred by the Accused person could not be established from the facts of the case herein.

35. There were also inconsistencies in PW 2's and PW 3's evidence. While PW 2 stated that the Accused person cut the deceased twice and started running, PW 3 testified that after he chased both the Accused person and the deceased to continue their fight outside his house, he heard one of them beating the other

and he did not hear what they talked about. In her Cross-examination, PW 2 admitted that she heard the sound of someone being hit. At this point, it was evident from both their evidence that they did not know who had been hit.

36. It was not clear from PW 3's evidence at what point he went outside and started chasing the Accused person. This is because in his Cross-examination, PW 3 said that he never followed the Accused person and the deceased outside and he did not know what caused the injuries to the deceased. He did not also mention PW 2 having followed the Accused person and the deceased outside. PW 2 did not also contend that PW 3 followed the Accused person and the deceased outside the house.

37. Indeed, it was also not clear to this court what informed PW 3's decision to start chasing the Accused person because his evidence was that he came back and found the deceased lying on the ground with injuries on the head. What informed his decision to chase the Accused person was a pertinent issue because at that point he did not appear to have known that the deceased had been injured.

38. This court also noted PW 3's evidence that there was little rain. This contradicted PW 2's evidence that it had rained on the material night heavily making movement difficult, a fact that was confirmed by PW 7 in his Cross-examination which is she said that they did not take the deceased to hospital that night but only took him in the morning.

39. If there was little rain as PW 3 had averred, the question that arose in the mind of this court was why they never took him to hospital that night. The incident was right outside PW 3's house making this court to entertain doubts and ask itself if the Accused person's version that he left PW 3 and the deceased arguing was the correct one. Indeed, PW 1 testified that he found the deceased outside PW 2's and PW 3's house and he was bleeding.

40. Further, this court entertained the thought that the Accused person's going to PW 4's house could have been coincidental for several reasons. Firstly, the Accused person had told this court that he was an orphan and an illegitimate child who was not wanted in the homestead. The deceased is the one who went to his house and an argument and/or fight between them ensued. Could this have been the reason why the Accused person fled from his homestead and found himself in PW 4's house?

41. Secondly, it was the view of this court that if the Accused person was a fugitive and had intended to escape, he would not have stayed in PW 4's house. It would also not have been expected that he would have given her his ID to keep as he stayed in his house for the two (2) days.

42. Further, the Accused person's clothes did not appear torn or dirty as would have been expected considering that it had rained heavily at night and there was mud that made it difficult to walk. If the Accused person escaped from the homestead on the material night when it was raining as PW 2 and PW 3 had contended, then it would have been expected that his clothes would have been torn. The Accused person stated that he slept in the homestead but did not return the following day. The disparities in the evidence herein were too diverse.

43. All in all, something was just not adding up in this case due to the gaps, contradictions and inconsistencies in the Prosecution's case. The circumstantial evidence against the Accused person did not appear to be consistent and cogent. He presented co-existing circumstances that weakened or destroyed this court's inference of his guilt as was set out in the case of **Musoke vs Republic [1958] EA 715**.

44. This is because PW 1 was clear in his evidence that the deceased was the one who went to the Accused person's house PW 2 and PW 3 corroborated the Accused person's testimony that it was the deceased who followed him to their house while he was wailing.

45. In addressing the issue of circumstance evidence, in the case of **Republic vs Mjomba Jason Mwambili [2016] eKLR**, this very court rendered itself as follows:-

**“Circumstantial evidence can be accepted when an accused person's guilt can be inferred**

**based on the evidence adduced by the prosecution in which case it can only be displaced by an accused person giving his side of the story. The chain of events in a case based on circumstantial evidence must be so connected that an accused person would find it difficult, if not impossible, to extricate himself or herself from the unlawful act he is being accused of. In this case, the Prosecution completely failed to prove its case that was based on circumstantial evidence.”**

46. Having carefully considered the evidence that was adduced by both the Prosecution and the Accused person, the court found that the Prosecution had not proven that there was any malice aforethought on the part of the Accused person. It adduced insufficient evidence to demonstrate that the Accused person was the person who caused the injuries that resulted in the deceased’s death. In fact, none of the Prosecution witnesses saw him hit the deceased on his head.

47. It failed to demonstrate that the Deceased met his death as a result of the unlawful acts or omissions on the part of the Accused person or that the alleged unlawful acts or omissions were committed with malice aforethought. It did not displace its burden of proof warranting it to move to the Accused person as envisaged in Section 111 (1) of the Evidence Act Cap 80 (Laws of Kenya) that stipulates as follows:-

**“When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:**

**Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:**

**Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence.”**

## **DISPOSITION**

48. For the foregoing reasons, this court has no option but to find that the Accused person was not guilty of the offence that he had been charged with.

49. This court therefore orders and directs that the Accused person be and is hereby acquitted under Section 322(1) of the Criminal Procedure Code and that he be set free forthwith unless he be held for any other lawful cause.

50. It is so ordered.

**DATED and DELIVERED at VOI this 30<sup>th</sup> day of January 2018**

**J. KAMAU**

**JUDGE**

In the presence of:-

Muthami for Accused person

Miss Anyumba for State

Susan Sarikoki– Court Clerk