



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL CASE NO. 17 OF 2016

REPUBLIC PROSECUTOR

VERSUS

MWENDWA KILONZO ACCUSED

J U D G M E N T

1. **Mwendwa Kilonzo**, the Accused, is charged with the offence of **Murder** contrary to **Section 204** of the **Penal Code (Cap. 63), Laws of Kenya**. Particulars of the offence are that on the **25th day of May, 2016** at **Kanzauwo Market, Nzambani Sub-County** within **Kitui County** he murdered **Bismark Musee** (Deceased).

2. Facts of the case were that on the **25th day of May, 2016** the Deceased was assaulted. He sustained an injury on the head which required medical attention. He was subjected to medical treatment but passed on the **3rd day of June, 2016**. The case was reported to the police who investigated, arrested the Accused and charged him.

3. To prove the case the Prosecution called seven (7) witnesses. PW1 **Rose Nduku Musee** the wife of the Deceased stated that he was taken home after sustaining the injury by a motorcycle rider. The Deceased told her that he disagreed with the Accused, they argued and he hit him with a stone. They took him to hospital for treatment, he was treated as an outpatient. On **3rd June, 2016** he was rushed to hospital but pronounced dead on arrival.

4. PW2 **Wambua Mutia** a cousin of the Deceased on learning that he was injured visited him at home. He stated that the Deceased mentioned the Accused as his assailant.

5. PW3 **Paulina Wanzuu Kilindi**, PW4 **Elizabeth Nzou** and PW5 **Robert Ndibo Mbuvi** saw the Deceased after he was injured. PW6 **No. 54346 Corporal Joseph Karanja** received a report after the Deceased had passed on. He caused the body to be transferred from **Jordan Hospital** to **Kitui District Hospital Mortuary**. A postmortem was conducted by PW7 **Dr. Edward Kiatu** who concluded that the cause of death was severe head injury secondary to subdural haematoma.

6. When put on his defence the Accused stated that just like him, the Deceased was a 'bodaboda' operator. That on the **25th day of May, 2016** he went to work as usual. The Deceased carried two (2) pillion passengers. He (Accused) also carried a passenger. At about **12.15 p.m.** he got a report from his uncle and fellow "bodaboda" operator **Muteti Tom** to the effect that the Deceased had fallen off the motorcycle. They visited him at home and noticed an injury that was bandaged on the left thigh. He did not notice any injury on the head. On the **27th day of May, 2016** the Deceased went to their place of operation but he did not work. He left going home at noon. He learnt of his death on **4th June, 2016**. He denied having caused his death.

7. It was the submission of learned Counsel for the Defence, **Mr. Mwalimu** that the Prosecution presented a very weak case founded on hearsay and circumstantial evidence. That no one placed the Accused at the scene where the Deceased was first seen with injuries. That the family of the Deceased admitted that he had been attended to in various hospitals and discharged before he developed complications on the **3rd June, 2016**. That no report of assault was made to the police regarding being injured by someone known to him. That the Accused maintained that the Deceased fell off his motorcycle that he operated and his family withheld treatment notes where he was being treated for injuries sustained as a result of the fall.

8. The State through the learned Prosecuting Counsel **Mr. Vincent Mamba** submitted that the cause of death was indicated as severe head injury and the Accused had the necessary *mens rea* as he foresaw the consequences of his action. That the Accused hit the Deceased with a stone on the back of his head an act that caused his death.

9. The Prosecution was duty bound to prove:

(i) The fact of death.

(ii) The cause of death.

(iii) That the death was caused as a result of an unlawful act or omission perpetrated by the Accused.

(iv) The act was done with malice aforethought.

10. A report was made to the police after the Deceased passed on. A postmortem conducted on the body established the fact of death. A Certificate of Death No. 719055 was issued in that respect. The cause of death per the opinion of the Doctor who did the autopsy was severe head injury. The Deceased sustained a fracture of the occipital/temporal bone of the head.

11. None of the witnesses who were called to testify by the Prosecution were eye witnesses. PW1, PW3 and PW5 stated that the Deceased told them that he was assaulted by the Accused. The Deceased sustained the injury on the 25th May, 2016 and ultimately died on the 3rd June, 2016. The issue to be determined is whether the alleged utterances were a dying declaration as it is an exception to the hearsay Rule. Section 33(a) of the Evidence Act provides thus:

“Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases—

(a) relating to cause of death when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person’s death comes into question. Such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question;”

The Court of Appeal in considering the admissibility of a dying declaration stated in the case of **Pius Jasunga s/o Akumu vs. Republic (1954) 21 EACA 333** that:

“The question of the caution to be exercised in the reception of dying declarations and the necessity for their corroboration has been considered by this court in numerous cases and a passage from the 7th Edition of Field on Evidence has repeatedly been cited with approval.... It is not a rule of law that in order to support a conviction there must be corroboration of a dying declaration (R-v-Eligu s/o Odel & Another, (1943) 10 EACA 9) and circumstances which go to show that the deceased could not have been mistaken in his identification of the accused..... But it is generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person made in the absence of the accused and not subject to cross-examination unless there is satisfactory corroboration.”

12. It is stated that the Accused and the Deceased were very good friends. The Deceased could therefore not be mistaken as to his identity. As stated in the **Pius Jasunga case (Supra)**, however, it is unsafe to convict solely on such a statement. When the Deceased allegedly made the statement he was conscious. He did not imagine that his death was imminent. I say so because no report was made to the police even after he sought treatment at health facilities.

13. PW3 testified that ultimately the Deceased told her that he was hit with a stone by the Accused. At the point of testifying I did note her demeanor. There was reluctance in the manner in which she adduced her evidence. She stated thus:

“I hail from Kanzou Village – Nzambani Location. I am a butcher. I operate a butchery at Kanzou. On 25.5.2016 at noon I was behind the butchery washing utensils when I heard noise emanating from the road side. I came out. A person came asking me to assist him with tealeaves. Then I was called and asked to assist them with a piece of cloth. I got the piece of cloth which I gave them. I went back to the house. My nephew Kanda is the one who came for the cloth. When I heard noise I saw a crowd of people. There were two (2) men on the motorcycle. I saw the person who was tied with a piece of cloth. I cannot tell if he was the rider or pillion passenger. I had not closed my house therefore I went back. One of the persons on the motorcycle was Musee Kali. I did not know the other person. Musee called me and asked me to give him a piece of cloth to tie on the head. Before I asked him why he needed it they left. He was tied on the head. People were telling him to go to hospital.

After I closed the butchery it is when I went back and asked Musee what had happened. Musee who is also known as Kanda told me he was hit with a stone by Mwendwa Kilonzo. Musee used to sell Miraa and he used to be referred to as Kanda. Mwendwa Kilonzo is the accused in the dock. On 25.5.2016 he left going to hospital. On 4.6.2016 I heard that Kanda had died. I used to see Kanda with Mwendwa. They were friends.”

On cross examination she stated that:

“- I saw the deceased sitting on the motorcycle. I do not know if he was the rider of the motorcycle. He called me and asked for a piece of cloth to tie on the head.

- I gave him and he tied it. He said he had been hit by a stone.

- It is true he was being told to go to hospital but he refused and went off on the motorcycle. I do not know if he went to hospital. He was far away.

- I knew the work they used to do. The deceased was a businessman who used to sell Miraa while Mwendwa was operating a 'bodaboda'. They were friends they used to eat together. He told me he was hit with a stone."

14. PW4 found the Deceased injured, she stated thus:

"I stay at Kanzoni – Kitui County. I sell vegetables at Kanzoni Market. On 25-5-2016 at noon I was at home. I found people having gathered at the stall where I sell from. Musee was on a motorcycle. People were telling him to go to hospital. I did not know the reason why they were urging him, but he had tied a piece of cloth. He refused to go to hospital. He boarded a motorbike and carried another person and both of them left.

I know Mwendwa. On 4.6.2016 I heard Musee Kanda had died. I used to see Musee passing by on a motorcycle. Musee and Mwendwa had no disagreement."

15. Her evidence was silent on what PW3 alleged was stated by the Deceased. Her version suggest that the Deceased was the rider of the motorcycle and even after it was established that he was injured he refused to seek medical attention. That notwithstanding ultimately the Deceased sought treatment as he turned up at home with the wound bound by a bandage.

16. It is alleged by the Defence that the Deceased sustained the injury as a result of a fall from the motorcycle.

17. In the case of **Republic vs. David Ruo Mjambura & 4 Others (2001) eKLR** it was stated that:

"The cardinal principle of law is that in a criminal case the legal onus is always on the prosecution to prove the guilt of an accused person, and the standard of proof is proof beyond reasonable doubt. The burden of proof therefore lies on the prosecution throughout to prove the guilt of an accused."

18. The Deceased sought medical attention at a health facility. Treatment notes were not availed. PW6 the Investigating Officer stated on cross examination that he did not get any records from the dispensary where the Deceased was treated and that nobody volunteered to give him evidence as to how the Deceased was assaulted. With this kind of evidence from the officer who investigated the case, evidence of witnesses who were present when the act/omission occurred was crucial. The person who went to seek assistance from PW3, one **Kanda** was called as a witness. Then the person who took the Deceased to hospital and subsequently took him home, one **Muteti Tom** was also not called as a witness.

19. In the case of **Bukenya & Others vs. Uganda** the Court of Appeal stated that:

"(i) The prosecution must make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent.

(ii) The court has the right, and the duty to call any person whose evidence appears essential to the just decision of the case.

(iii) Where the evidence called is barely adequate the court may infer that the evidence of uncalled witness would have tended to be adverse to the prosecution."

Evidence adduced in this case having not been sufficient to dislodge the allegation that the Deceased sustained the injury as a result of a fall, it was crucial to call **Kanda** and **Muteti Tom**. These were the only persons who could have told the Court what actually transpired. Failure to call them leaves this Court to draw the inference that their evidence may have been adverse to the Prosecution. Consequently the alleged statement of the Deceased that was introduced in evidence during trial cannot be acted upon.

20. In the premises there is no proof beyond any reasonable doubt that the death of the Deceased was caused by an act/omission that was perpetrated by the Accused. Therefore, I find him not guilty and accordingly acquit him of the offence of **Murder**.

21. It is so ordered.

Dated, Signed and Delivered at Kitui this 25th day of July, 2018.

L. N. MUTENDE

JUDGE