



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT GARISSA**

**CRIMINAL CASE NO. 3 OF 2014**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**RICHARD MUTHUI MULI.....ACCUSED**

**JUDGEMENT**

1. The accused Richard Muthui Muli stands charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence being that on 26<sup>th</sup> January 2014 at Itaa village in Tseikuru District within Kitui County murdered James Nzilu Musyoka.

2. He has denied the charge. In proving their case, the prosecution has called a number of witnesses.

3. PW1 was Dr. Simon Kioko Muli from Matuu town. It was his evidence that he was required by Tseikuru Police Station to perform postmortem examination on James Nzilu Musyoka at Matuu Nursing Mortuary. He did so on 6<sup>th</sup> February 2014. The deceased was a male African aged about 38 years with blood stained clothes. When he removed the clothes, he found that the deceased had lost a lot of blood and the lungs had collapsed. His left carotid artery on the neck was severed. He formed the opinion that death was due to cardiorespiratory arrest due to massive bleeding as a result of the penetrating wound on the neck. He filled the postmortem report and signed it. He produced the postmortem report as an exhibit.

4. In cross examination, he stated that the injury was caused by a sharp object.

5. PW2 was a prison officer Johnstone Mbundi Musyoka currently of Industrial Area Prison and a brother of the deceased. He knew the accused Richard Muthui Muli though they were not related. He knew him by the name "Kange Njoroge". He came to know him because his brother the deceased had an affair with his daughter by the name Nduni Muthui.

6. On 26<sup>th</sup> January 2014 at 14.30 hrs while in church, he received a telephone call from his mother saying that there was tragic news about his brother. He boarded motorbike and proceeded there and saw a group of people talking in low tones. His mother explained to him what happened. He was initially confused but later made a telephone call to Tseikuru Police Station. He saw the deceased lying on a mat with blood oozing from his left side at the homestead of the accused near a granary. The public said that the culprit was Njoroge who was not present. They entered the house with police officers and found glass bottles stained with blood. They took the deceased to Matuu Nursing Home Mortuary. He was present during postmortem examination. He identified the accused in the dock.

7. In cross examination, he said that he was told by the public about the killing. He agreed that in that homestead, traditional liquor was sold. He did not know where the blood stained bottles were presently. He went to the scene between 5 pm and 6 pm. He did not bother to observe if there were signs of a struggle.

8. PW3 was C.I. Philemon Kipsang Langat current stationed at Mtamaru Police Station in Kuria East Migori County. Previously he was in Kitui as OCS Tseikuru Police Station.

9. On 26<sup>th</sup> January 2014 he was at Tseikuru as the OCS when he got information from a prison officer that a murder had occurred in that Richard Muthui Muli had murdered his brother James Nzilu Musyoka. He proceeded to the scene with other police officers. They found the body outside the house of his girlfriend with a deep cut on the left side of the neck inflicted by an empty bottle. They took the pieces of the empty bottles to the Government Chemist as they had blood stains. They also recovered the blood stained shirt of the accused at the scene and took it to the Government Analyst. According to him, the pieces of broken bottle were found inside and outside the house. He identified the bottle pieces as well as shirt. The accused was not at the house. They collected exhibits and took the body to Matuu Nursing Home on the request of Hon. Kalonzo Musyoka. He proceeded to the police station and was told that Titus Muthui wanted to see him. The chief then

pointed the accused to him and he arrested him and put him into the cells. He stated that the accused told him that the deceased had an affair with his daughter but had not married her. The accused however denied using the broken bottles to attack the deceased. He talked to the daughter of the accused who admitted to have had a long friendship with the deceased and stated that they had three children. According to him, the daughter said the father used the bottle to hit the deceased who was drunk and was sleeping. He stated that he took possession of the items personally and he produced the bottle pieces as exhibit 2 and a green shirt as exhibit 3.

10. In cross examination, he admitted that traditional liquor was brewed in that house and that it was sold by a daughter of the accused. He maintained that the deceased had three children with the daughter of the accused. According to him, the accused was annoyed because the deceased was going against African Customs. He stated that the accused went on his own to the police station. He stated that the eye witnesses were people such as; Fundi and Musyoka Mutoni.

11. After this witness testified, the Prosecuting Counsel found it difficult to get any additional witnesses and though the case was adjourned a number of times, he could not get witnesses. He thus closed the prosecution case.

12. In his defence, the accused gave unsworn testimony. He said that he was a farmer and knew James Nzilu Musyoka but did not know where he was. On 26<sup>th</sup> January 2014 he was not at home and he did not kill him. He woke up at 4 am and went to his farm at Kalalani about 2½ hours walk. He left for home at 5 pm and arrived home at 8 pm. When he asked the children, he was informed that their mother's had been arrested by the police because of brewing traditional liquor. He proceeded to Tseikuru town and then to the police station and found his wife there. According to him, those arrested were about 10 people who were consuming traditional liquor. He said that the fight was between Nzilu and other young men because Nzilu asked those young men why they had sat on the bed which he had bought for his daughter. He said that Nzilu had three children with his daughter. He denied that he had any complaint against Nzilu. He merely went to the police station to look for his wife. He did not know the identity of the people who sat on the bed of his daughter.

13. That was the end of the defence case.

14. This is a murder case and the prosecution is required to prove all the ingredients of the offence beyond any reasonable doubt. The accused person is not required to prove his innocence. The prosecution is required to prove their case beyond any reasonable doubt, even if the accused raises a defence of alibi. See the case of **Leonard Aniseth vs Republic [1963] EA 206**.

15. Did the deceased die? The evidence of the prosecution is that indeed the deceased died. His body was found outside a house on a mat. He had serious injuries in the neck. He was already dead. The body was taken to Matuu Nursing Home Mortuary, and postmortem was conducted. The death was caused by excessive bleeding. I find that the prosecution proved beyond reasonable doubt that the deceased died.

16. Was the death unlawful? No suggestion has been made that there was a lawful reason why the deceased should have died the way he died. I find that the death was unlawful.

17. Did the accused cause the death of the deceased? The deceased was found dead at the homestead of the accused person. It was outside the house of the daughter of the accused where traditional liquor was brewed and sold. The police found pieces of broken glass in the house and outside which were said to be blood stained. The Government Analyst did not testify as to whether indeed the pieces of glass were blood stained and whether the blood matched the blood group of the deceased. No one testified to having seen the accused kill the deceased. The person who gave information about the accused killing the deceased is not known to this court, as he or she did not testify. From the evidence on record, the evidence about the accused having killed the deceased is all hearsay evidence. The prosecutor also found it very difficult to get witnesses to testify in this matter. The accused has put up a defence that the deceased was killed by the customers of the traditional brew of his daughter who sat on the bed which provoked a quarrel between them and the deceased and they killed him when he asked why they were sitting on the bed which he had bought.

18. The accused does not have a burden to prove his innocence. From the evidence on record, the prosecution failed to connect the accused to the death of the deceased. The evidence on record is merely that of suspicion which however strong cannot be a basis for a conviction in a criminal case. See the case of **Sawe vs Republic [2003] KLR 364**.

19. I find that the prosecution did not prove beyond reasonable doubt that the accused caused the death of the deceased.

20. With regard to malice aforethought, since I have found that the prosecution did not prove that the accused killed the deceased, I cannot find that the accused had malice aforethought.

21. Consequently, from my above findings, I find that prosecution did not prove the offence of murder against the accused and I find him not guilty and acquit him accordingly.

**Dated and delivered at Garissa this 20<sup>th</sup> day of December, 2018.**

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**George Dulu**

**JUDGE**