



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**CRIMINAL CASE NO. 49 OF 2014**

**REPUBLIC .....PROSECUTOR**

**VERSUS**

**MUSEMBI MUSYOKA alias KASSANG'A .....1<sup>ST</sup> ACCUSED**

**KYALO MUSYOKA alias NGUU.....2<sup>ND</sup> ACCUSED**

**BONFACE MUENDO MUTUNGA alias NZOKA .....3<sup>RD</sup> ACCUSED**

**RULING OF THE COURT**

1. The three (3) accused persons herein **MUSEMBI MUSYOKI** alias **KASSANGA**, **KYALO MUYSOKA** alias **NGUU** and **BONIFACE MUENDO MUTUNGA** alias **NZOKA** are charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the charge as per the information presented on behalf of the state are that on the nights between 7<sup>th</sup> and 8<sup>th</sup> days of August, 2014 at unknown time at Muaani Market, Sakai Sub-location, Waia Location in Mbooni East District within Makueni County murdered **OBADIAH MUNYAO MAVINDU**.

2. The prosecution’s case is that on the morning of 8<sup>th</sup> August, 2014 the body of the deceased herein **OBADIAH MUNYAO KAVINDU** was found lying outside Turks Homeland Bar and Restaurant within Muaani Market Sakai Sub-location, Waia Location in Mbooni East District within Makueni County. The body had injuries on the head and upper limbs and there was plenty of blood around the body. The area Assistant Chief Patrick Ngui Ndiku (PW.1) was alerted and he rushed to the scene and who in turn called the police. The deceased’s father John Maundu Netto (PW.2) also arrived at the scene and positively identified the body as that of his fourth born son. The police later picked up the body and investigations commenced. A post mortem was conducted on the body by Dr. Maundu Solomon (PW.7) who formed the opinion that the cause of death was cardiopulmonary arrest caused by severe head injury resulting from blunt trauma to the head. The three accused persons herein were subsequently arrested and charged with this offence. After calling eight (8) witnesses in support of its case, the prosecution rested its case.

3. At this stage of the proceedings the prosecution is under a duty to establish a prima facie case so as to enable the accused persons to be placed on their defence. A prima facie case has been defined in the case of **BHATT VS REPUBLIC [1957] EA 332** as one where a reasonable tribunal directing its mind to the law and evidence placed before it could convict an accused person if no explanation is offered by the defence. In a nutshell, if the defence were to elect to remain silent in defence, the evidence adduced herein must be sufficient to sustain a conviction against the accused persons. The charge of murder herein has been brought under Section 203 and 204 of the Penal Code. Section 203 of the Penal code provides that any person who with malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder and shall be liable to be sentenced to death as provided for under

Section 204 of the Penal Code. The prosecution has to prove the fact of death and further go ahead and establish the essential ingredients of the offence namely malice aforethought. The aspect of the *mens rea* is provided in Section 206 of the Penal Code thus:

*(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.*

#### **4. The Submissions:**

Both learned Counsels for the accused persons submitted that the prosecution has not made out a prima facie case to warrant accused persons to be put on their defence and urged this court to acquit the accused persons of the charges. Defence counsels further submitted that the alleged eye witness one Kisaa Ngonyo had been a person of unsound mind and eventually failed to testify as he later passed on. Counsels finally submitted that the said Kisaa Ngonyo might have been the alleged killer of the deceased since he had been found with some bloodstains on one of his shoes.

Learned counsel for the Prosecution submitted that the Prosecution had made out a prima facie case in that the injuries on the deceased had been inflicted with such viciousness and force to suggest that the attackers intended to cause death or grievous harm to the deceased and as such the accused persons be put on their defence.

5. I have considered the evidence of the eight (8) prosecution witnesses as well as the submissions of learned counsels. I have also considered the provisions of Section 203, 204 and 206 of the Penal Code. It is not in dispute that the alleged eyewitness Kisaa Ngonyo did not testify herein due to the fact that it had been claimed that he was of unsound mind and that he passed on afterwards. However, the manner in which the deceased met his death and the evidence of some of the witnesses appear to link the accused persons in one way or the other to this crime. For instance a brother to the deceased namely Francis Mutua Maundu (PW.3) stated in his evidence that at one time prior to the death of the deceased, he was in the company of the accused persons as well as the deceased drinking at a certain bar when the third accused herein accosted the deceased and punched him while demanding for money that had allegedly been kept on his behalf by the deceased. The witness stated that he intervened and separated them. Again the evidence of Muyua Wanjohi (PW.4) who was the wife of the deceased is that prior to the incident, the deceased and 1<sup>st</sup> accused herein had picked up a quarrel over some money and in which the deceased had hit the first accused with a piece of wood prompting the said witness to intervene and seize the weapon. Also the evidence of the arresting officer Paul Mutunga (PW.5) is worthy for mention in that he found some blood stains on the 1<sup>st</sup> accused's trousers (fly area) during the arrest. Hence it is clear from the evidence that there had been some disagreement between the deceased and the accused persons over some money and which could have provided a motive for the commission of this offence either directly or circumstantially.

For the foregoing observations, I come to the finding that prosecution has established a prima facie case against all three (3) accused persons to warrant them to be put on their defence. Consequently, I find that all three (3) accused persons have a case to answer and now called upon to elect to conduct their defence in line with the provisions of Section 306(2) of the Criminal Procedure Code.

Dated, Signed and Delivered at Machakos this **28<sup>th</sup>** day of **March** 2017.

**D. K. KEMEI**

**JUDGE**

In the presence of:

Tamata for accused.....

Machogu for state.....

C/A: Muoti .....