



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT MACHAKOS**  
**CRIMINAL CASE NO. 55 OF 2015**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**FELIX MUNYAO KIOKO.....1<sup>ST</sup> ACCUSED**

**JOEL MUNYAO MBUVI.....2<sup>ND</sup> ACCUSED**

**JONATHAN WAMBUA KIIO.....3<sup>RD</sup> ACCUSED**

**JORAM MULWA NZAU.....4<sup>TH</sup> ACCUSED**

**RULING**

The four Accused persons herein are charged with of one count of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars thereof are that on the night of 13<sup>th</sup> and 14<sup>th</sup> June 2015 at Kwa Munuve area along Miumbuni – Misuuni Road in Mitaboni Location, Kathiani sub-county within Machakos County, they murdered Joseph Mulela Sendi (hereinafter referred to as “the deceased”). The Accused persons pleaded not guilty to the offence on 30<sup>th</sup> September 2015, and the trial commenced before me on 28<sup>th</sup> September 2016 when PW1, the wife of the deceased, commenced her testimony.

In the course of PW1’s evidence, she testified that on the morning of 14<sup>th</sup> June 2015, she was called and went and saw the body of the deceased which was lying next to a road, and the body was then taken to the mortuary. She then went back to her house, and while there, a girl who was not known to her called Wilfred Muthikwa Nzioka came to the house and told PW1 that she wanted to inform PW1 on the persons who had killed her husband.

At this juncture Mr. Muema, Mr. Kamolo, Mr. Kituku and Mr. Mutinda Kimeu and the respective learned defence counsel for the 1<sup>st</sup>, 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Accused Persons, objected to the said evidence on the ground that it was hearsay, as they had been informed that the said Wilfred Muthikwa Nzioka has since died. Reliance was placed in this regard on section 63 of the Evidence Act. The said witness was stood down awaiting a ruling on whether her evidence on the statements made by the said Wilfred was admissible or not.

Similar objections were also made when PW3, Boniface Muthembi Muthoka, gave evidence on the information he received from the said Wilfred upon interviewing her, and Mr. Muema for the 1<sup>st</sup> Accused person sought to have this information expunged from the record.

Ms Mogoi, the learned prosecution counsel responded that the said evidence was not hearsay, as PW1

was narrating what she was told by the said girl. In addition although the said girl is deceased, her statements are on record and the Prosecution will be seeking to produce them as exhibits.

Section 63 of the Evidence Act which was relied upon by the learned counsel for the Accused persons provides as follows:

**“(1) Oral evidence must in all cases be direct evidence.**

**(2) For the purposes of subsection (1) of this section, “direct evidence” means**

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**(a) with reference to a fact which could be seen, the evidence of a witness who says he saw it;**

**(b) with reference to a fact which could be heard, the evidence of a witness who says he heard it;**

**(c) with reference to a fact which could be perceived by any other sense or in any other manner, the evidence of a witness who says he perceived it by that sense or in that manner;**

**(d) with reference to an opinion or to the grounds on which that opinion is held, the evidence of the person who holds that opinion or, as the case maybe, who holds it on those grounds:**

**Provided that the opinion of an expert expressed in any treatise commonly offered for sale, and the grounds on which such opinion is held, may be proved by the production of such treatise if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the court regards as unreasonable.**

**(3) If oral evidence refers to the existence or condition of any material thing, other than a document, the court may, if it thinks fit, require the production of such material thing for its inspection.”**

The evidence by PW1 and PW3 of the fact that they talked with Wilfred is to this extent direct evidence and therefore cannot be excluded on account of section 63 of the Evidence Act. It is the evidence of what Wilfred told them she saw or heard on the other hand that is indirect evidence and is hearsay evidence.

The rules on the admissibility of hearsay evidence were enunciated in **Kinyatti vs Republic (1985) KLR 562**, where the Court of Appeal held that the rule against hearsay is that a statement other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of a stated fact. The Court went on to hold that the evidence of a statement made to a witness by a person who is not called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. Therefore evidence of the fact that the witnesses did talk with Wilfred is admissible on this account.

For the content of this conversations to be admissible, Wilfred’s statements would have to fall within the exceptions to the hearsay rule. This Court in this regard finds that the exceptions provided in section 33 of the Evidence Act as to when the statements of deceased person may be admitted are not applicable to the circumstances of this case, as the said Wilfred was not the victim of the charge the Accused persons are charged with. There is however an additional exception to the hearsay rule under the *res gestae* principle that this Court finds is applicable to the facts of this case.

The said principle was explained in **Kinyatti vs Republic (supra)** and is that where a statement made by an observer or participant is admissible as evidence in criminal proceedings, if made on an approximately contemporaneous occasion so as to exclude any possibility of its having been concocted to the makers

advantage, and regardless of whether or not he testifies at the trial. Further, that such a statement may be proved as original evidence when the fact that it was made as distinct from its truth is in issue whether or not it was made; is relevant to an issue regardless of whether it is true or not; or it affects the credit of a witness.

In the present application therefore the only requirement that I must satisfy myself to admit the evidence as to the statements made by Wilfred is that the statements was made in contemporaneous circumstances that exclude any possibility of concoction. I note in this regard that the said statement was made to the PW1 and PW3 the next morning after the killing of the deceased, and was therefore contemporaneous. In addition, the said Wilfred also did record a statement with the police before her death. This in my view excludes any possibility of concoction by witnesses as to what the said Wilfred said, and her statements are therefore admissible under this exception to the hearsay rule.

Orders accordingly.

**DATED AND SIGNED AT MACHAKOS THIS 3<sup>rd</sup> DAY OF AUGUST 2017.**

**P. NYAMWEYA**

**JUDGE**