



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL CASE NO. 73 OF 2013**

REPUBLIC.....PROSECUTOR

VERSUS

PETER MAYEKA MOYONGU.....ACCUSED

**JUDGEMENT**

**Introduction**

Peter Mayeka Moyongu (herein the accused) is charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence state that on 27<sup>th</sup> June 2013 at Kware Slums in Ongata Rongai Township within Kajiado County he murdered Job Maina Samuel. The plea was taken on 11<sup>th</sup> July 2013. The accused denied committing this offence.

The trial commenced on 29<sup>th</sup> October 2014. The prosecution called six witnesses in support of its case. At the close of the prosecution case this court placed the accused on his defence. He testified under oath and was the only defence witness.

**Prosecution case**

The prosecution presented evidence in court to support the case that the accused stabbed the deceased following a disagreement. The main witness is James Rioba Bogoye, PW2, (Rioba). He testified that on 27<sup>th</sup> June 2013 he met the accused who was his neighbour around 9.00pm at Kware where they lived. Both of them went out to buy food. At the time the accused looked angry and did not order food. After Rioba finished eating, both left intending to go home. They met the deceased, Mary Kanini who was Rioba's girlfriend and Emily who was accused's girlfriend. They all started walking towards their home with Rioba and Kanini walking behind the other three. Rioba heard the accused ask the deceased "Kwanini unanifanyia hivi"? This roughly means, "Why are you doing this to me"? Rioba saw the accused punch the deceased on the face and the chest. The deceased is said to have fallen down on some iron sheets and the accused ran away. The deceased attempted to stand up but fell again. Rioba noticed he was bleeding on the face and stomach. Rioba notice bloodstains on the T-shirt the deceased was wearing. A taxi was hired and deceased was taken to Nairobi Women's Hospital Ongata Rongai Branch. The doctors there demanded Kshs 150,000 before taking the deceased in for treatment. This money was not available. An ambulance was hired and the deceased was taken to Kenyatta National Hospital where he died later that night while undergoing treatment.

Daniel Mogere Onyiego, PW1, who is father to the deceased, was informed about the injuries sustained by his son and talked to him while admitted at Kenyatta National Hospital. The deceased told PW1 that he had been injured in a fight but he did not mention the person he had fought with. PW1 called Kodek

Onchong'a, PW3, (Kodek) who is related to him and told him to go to Kenyatta National Hospital to check on the deceased. Kodek went to Kenyatta National Hospital in the morning and found the deceased had died. He informed PW1 who travelled to Nairobi and arrived later that day.

Dr. Daniel Zuriel, PW5, examined the body of the deceased on 1<sup>st</sup> July 2013 after the same was identified to him by deceased's father, PW1, and uncle PW3. The doctor found the following injuries on the body of the deceased:

- a. Stab wound on the left side of the face near the nose measuring 1cm long penetrating to the bone.
- b. Stab wound on the upper lip measuring 1cm long.
- c. Stab wound at the junction of abdomen and chest measuring 4cm penetrating to the heart.
- d. Stab wound on the right lower abdomen measuring 3cm long penetrating into the intestines

The doctor found that the right lung had collapsed. The heart had been punctured with a 3cm wide wound on the right side. The small intestines had been punctured. There was blood in the chest cavity and a surgical tube had been inserted to drain the blood. At the time of performing the post mortem the surgical tube was still inserted and the wound in the heart had been repaired. The doctor formed the opinion that the cause of death was due to severe chest injury due to multiple stab wounds.

After investigations the accused was arrested and charged with this offence. He was taken to Dr. Joseph Maundu, PW6, on 9<sup>th</sup> July 2013. He was examined and found fit to stand trial.

### **Defence Case**

The accused testifying under oath told the court that on 27<sup>th</sup> June 2013 he returned home around 4.00pm and found Emily Nyarima his wife not at home. He testified that his friend Rioba joined him at home; that both left to buy food; that he did want to eat; that Rioba called his girlfriend Mary Kanini who joined them; that he saw Emily and the deceased coming out of a lodging nearby; that he asked Emily where she was coming from but the deceased interjected and said he had not been with Emily; that as the accused and Emily were walking away the deceased blocked their way and told the accused that he had slept with Emily and there was nothing the accused could do about it; that the deceased approached Emily and the accused and the accused pushed him away; that the deceased fell over the vegetable sheds; that Emily ran away and the accused walked home.

He testified further that he continued working on the following day and travelled to Kipkaren on duty; that his phone's battery was low and he could not call; that he learned later that the deceased had died and that he was suspected to have caused that death; that he travelled to Nairobi and went to see his uncle at Kahawa Sukari who advised him to report to the police; that he voluntarily went to report to the police but he was arrested and detained. He denied killing the deceased.

### **Determination**

The law places the burden of proving a criminal case on the prosecution which must prove the offence charged beyond reasonable doubt before the accused can be convicted. In a murder trial like this one, the prosecution must prove that the deceased's death was caused by the accused person before the court through an unlawful act or omission and that the accused person had intended that death.

The witnesses who testified do not include any police officer. The reasons for this are captured in the court record. After taking the evidence of PW1 on 29<sup>th</sup> October 2014 and PW2, PW3 and PW4 on 30<sup>th</sup> October 2014 the prosecution took time to avail the remaining witnesses. On 25<sup>th</sup>/26<sup>th</sup> November 2014; 2<sup>nd</sup>/3<sup>rd</sup> March 2015 and 18<sup>th</sup>/19<sup>th</sup> May 2015 the prosecution did not bring any witnesses to court. Record shows that the Investigating Officer (I.O) named as CPL Ndunda and the Arresting Officer were not available and due to absence of the I.O, the other witnesses, the doctors were also not present. On 19<sup>th</sup> May 2015 the court allowed the final adjournment on account of the witnesses issue and fixed hearing for 16<sup>th</sup> June 2015. On that date two doctors attended court and testified. The I.O did not attend court due to

lack of transport according to the prosecution. The court declined to allow any further adjournment. The prosecution counsel Ms Magoma told the court that as a prosecutor she found it difficult to close the case. The court ordered the case for the prosecution closed and directed that submissions be made.

I have examined the evidence on record. As stated, that evidence excludes that of the I.O. I will examine the available evidence and determine whether it proves the case against the accused person beyond reasonable doubt.

In my considered view the death of the deceased has been proved beyond reasonable doubt. Dr. Daniel Zuriel confirmed the death due to chest injury due to multiple stab wounds. The injuries on the deceased were also confirmed by Rioba who told the court that he saw a cut on the deceased's chest and abdomen. He also told the court that at the scene he had observed that the deceased was bleeding on the face and that his T-shirt had blood on the chest and abdomen. Kodek who saw the body of the deceased at the hospital also confirmed those injuries.

On the issue as to who caused those injuries, the prosecution case is that it is the accused who did it while the accused denies the same and attributes the injuries to deceased falling on iron sheets. The defence counsel submitted that the prosecution left out evidence of crucial witnesses, the I.O and the arresting officer as well as Mary Kanini and Emily and that intention to kill the deceased on the part of the accused has not been proved. Counsel cited Jamleck Mwaniki Njururi v. Republic [2013] eKLR and James Omondi Were v. Republic [2014] eKLR to support the point that where the prosecution fails to call a crucial witnesses the court can presume that the evidence of that witness would have been unfavourable to the prosecution.

It is true that the I.O and the two women mentioned in evidence did not testify. The prosecution counsel faced serious challenges as I have explained, however, there is evidence on record which is not denied by the accused that he was with Rioba on that material date and that they were joined by the deceased and the two women. There is evidence to show there was some confrontation between the accused and the deceased and that there was physical contact between the accused and the deceased. The accused said he only pushed the deceased. Rioba's evidence is captured as follows:

**“Emily, “Yogesh/Yobesh” and Peter were ahead of us some distance about 10 metres. I heard Peter ask “Yogesh” “why did you do this to me” and he punched him. I heard the words. He said, “Kwa nini unanifanyia hivi” and he punched Yogesh on the face. I intervened to stop Peter. But Peter hit Yogesh (punch) on the chest. Yogesh fell down on the iron sheets of a kiosk. Peter ran away. Yogesh stood up and I saw he was bleeding on the nose and his front T-shirt on the stomach..... Yogesh fell again.”**

Rioba did not leave the deceased, expect for a brief moment when he went to look for a taxi. He was present up to hospital where he said he saw the injuries properly. His description of what happened shows that the accused physically contacted the deceased on the face and chest. To Rioba it looked like a punch. Rioba witnessed bleeding on the areas he thought he saw the accused punching the deceased. This was at the scene soon after the attack.

Rioba did not give evidence as to whether there was light at the scene given that it was around 10.00pm. However it is clear that the accused had been with him all through and that the only other people to join them were the two women and the deceased. PW1 said he was told one “Sikombe” had stabbed the deceased and identified the accused as the person known by that name. The person who gave him this information did not testify. Further Rioba told the court that the accused called him and told him he had stabbed the deceased. Hesborn Marigi, PW4, also told the court that the accused when he called the accused on his telephone the accused told him that he had stabbed the deceased. The evidence by Rioba and Hesborn that the accused admitted to him that he stabbed the deceased is not admissible in evidence by virtue of section 25A of the Evidence Act.

I have carefully examined the evidence of Rioba in respect to the stabbing of the deceased. It is evidence of a single witness as to the identity of the accused as the person who inflicted injuries on the deceased

that led to his death. The law allows proof of facts by a single witness. It however cautions that such evidence must be examined critically to ensure miscarriage of justice does not occur especially where conditions favouring correct identification are difficult (see **Benjamin Mugo Mwangi & Another v Republic [1984] eKLR**).

I have stated in this judgement that Rioba could not have mistaken the accused for any other person. They were together up to the point when he ran away after attacking the deceased. I have no doubt that what Rioba thought was a punch was more than just that. The accused must have had a weapon capable of inflicting stab wounds. The accused ran away after the attack. A mere punch cannot make the attacker run away after the victim falls down. In my considered view the accused ran away because he knew what he had done was not just a punch. The wounds were deep and very serious. The facial stab wound penetrated up to the bone. The chest stab wound penetrating deep and punctured the heart. The stomach stab wound penetrated deep and punctured the small intestines. The accused was a man enraged. It is recalled that when Rioba met him the accused looked very angry and refused to eat. Rioba also told the court that when he went to accused's home he found no one other than the accused. The accused also confirmed that Emily who he called his wife was not at home. This must be the reason behind the anger. This evidence coupled with the question directed at the deceased "Kwa nini unanifanyia hivi" depicts a man who was very angry and who had formed an intention to harm the deceased.

Is the omission of the evidence by the investigating officer or the arresting officer fatal to prosecution case? In **Alex Kimathi v. R [2014] eKLR** the Court of Appeal stated that:

**"In our view the real issue raised here is whether the failure by the prosecution to put the investigating officer on the stand was fatal to the prosecution case. There are consistent authorities that hold that it is good practice to always call the investigating officer, but whether or not failure to do so is fatal to the prosecution case must depend on the particular circumstances of each case. In *BWANEKA V UGANDA*, (1967) EA 768, Sir Udo Udoma decried the practice of not calling the investigating officer because it created the impression that the prosecution case was incomplete."**

In the same case (Alex) the Court of Appeal cited with approval **Kiriungi v R (2009) KLR 638** where it was held that:

**".....the effect of failure to call police officers involved in a criminal trial, including the investigating officer, is not fatal to the prosecution case unless circumstances of each particular case so demonstrate. We have examined the circumstances of this case and we are satisfied that evidence of the investigating officer and the arresting officer would not have been prejudicial to the prosecution case as it was established beyond doubt that the appellant was involved in the crime with which he was charged."**

The circumstances of this case are such that the accused was in company of Rioba who was known to him as a friend. The accused attacked the deceased by what Rioba thought were punches but which turned out to have been stabs with some weapon. The act of running away from the scene demonstrates that the accused knew the magnitude of what he had done. I have no doubt in my mind that the failure to call the investigating officer and the arresting officer, if any, is not prejudicial to prosecution case. This court has explained what happened to cause failure of the prosecution to bring the police officers.

In my considered view, the accused was properly identified as the person who stabbed the deceased. The deceased could not have been injured by iron sheets after he fell on the vegetable sheds. The injuries described by the doctor are clear that they are stab wounds which were deep. I also noted that the doctor was not cross examined as to whether the injuries he described could have been caused by falling on iron sheets. The prosecution has proved beyond reasonable doubt the death of the deceased occurred by an unlawful act of stabbing. The prosecution has also proved beyond reasonable doubt the intention on the part of the accused. The act of inflicting deep penetrating wounds on a human being shows the attacker had intended to kill or to cause grievous harm on the deceased.

In view of my finding above I hereby reject the defence of the accused that he pushed the deceased. I also reject his defence that the deceased was injured by iron sheets. Consequently I hereby find the accused guilty of murder as charged and convict him. Orders shall issue accordingly.

**Dated, signed and delivered this 17<sup>th</sup> March 2016.**

**S. N. MUTUKU**

**JUDGE**

**In the presence of:**

Ms Nduati for the prosecution

Mr. Oduor for the accused

Mr. Peter Mayeka Moyongu, the accused

Mr. Daniel Ngumbi, court clerk