



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CRIMINAL CASE NO.62 OF 2012**

**LESIT, J.**

**REPUBLIC.....PROSECUTION**

**VERSUS**

**FRANCIS MUTISO KIMEU.....1<sup>ST</sup> ACCUSED**

**BENARD DIANON.....2<sup>ND</sup> ACCUSED**

**JUDGMENT.**

1. The accused persons **FRANCIS MUTISO KIMEU**, herein after the 1<sup>st</sup> accused and **BENARD DIANON**, the 2<sup>nd</sup> accused are charged with murder contrary to **section 203** as read with **section 204** of the **Penal Code**. The particulars of the offence are that:

***“On the 29<sup>th</sup> day of July 2012, at Pipeline area Embakasi District within Nairobi Province, jointly with others not before court, murdered JOSEPHAT KUTHATA LENA.”***

2. The prosecution called a total of seven (7) witnesses.
3. The summary of the prosecution case was that the deceased person alongside others was beaten by the two accused persons jointly with others not before this court. The deceased was alleged to having stolen a phone. The deceased tried to escape but he was too weak to run. He lost consciousness and was left in a pool of blood. He was taken to Kenyatta National Hospital by his workmate PW6 where he was admitted. On 1<sup>st</sup> August 2012 the deceased succumbed to his injuries and died.
4. PW1 Alex testified that he was with the deceased in this case at the house of one Kilonzo Stanley in company of Caleb Munyasia PW2, Betty Musembi and Pius Ndambuki PW3. After about 2 hours PW1 and the deceased decided to go to PW1’s house which was almost three hundred meters from Kilonzo’s house.
5. PW1 walked out with Josphat the deceased ahead of him. All of a sudden PW1 saw the deceased running back. PW1 noticed about 6 people following the deceased. PW1 ran back to Kilonzo’s house and locked the door. He heard the deceased run upstairs followed by others. PW1 could hear the deceased being beaten.
6. After a short while the men dragged the deceased to the door of Stanley’s house. The 1<sup>st</sup> accused stood at the door, which had a glass on the upper part so PW1 could see him. 1<sup>st</sup> accused addressed PW1 saying, “wewe mrefu toka inje.” Which interpreted to English means “You tall

- one, come out*". That was when PW3 identified himself as an Army Officer and advised the men to call the police if they thought the two men were thieves. The accused persons declined and said that even the police officers are thieves. PW3 opened the door after they threatened to kill the deceased and set the house on fire.
7. PW1 alongside PW2, Betty and PW3 were ordered to go outside the building and sit down on the ground which they obliged. The group started beating them but they focused more on PW1 and the deceased. The deceased and PW1 were thoroughly beaten. According to him, PW1's arms and legs were broken and he also sustained a head injury. PW1 said that he tried to escape by entering sewer drainage but he was fished out by the accused persons.
  8. PW1 said that he went to Kenyatta National Hospital where he was treated and discharged. He managed to see the deceased at the ward who had been admitted in the same hospital. The deceased could not talk. He had injuries on the head, arms and legs. He died four days later.
  9. PW2 testified that he was in company of Betty, PW1, PW3 and the deceased at his house. After sometime PW1 and the deceased left at around 11.00 p.m. to go to PW1's house. Immediately after they left they heard people shouting outside. PW2 corroborated the evidence of PW1 and 3. He confirmed that the accused persons and others were alleging that Alex (PW1) and Josphat (deceased) were thieves. They also said they were not interested in police officers saying that they are also thieves. PW2 saw the 1<sup>st</sup> accused who was the caretaker beating the deceased. There were four attackers including 1<sup>st</sup> and 2<sup>nd</sup> accused. He said that the 2<sup>nd</sup> accused dragged PW1 and the deceased outside. PW2 testified that he managed to escape and went to his uncle's house about 200 to 300 meters away.
  10. PW6 Riverrance Makalama testified that he was a workmate of the deceased in this case and was his immediate supervisor. He stated that on 19<sup>th</sup> July 2012 at 6.00 a.m. he received a phone call from one Jackson Mwanje informing him that the deceased had been beaten at night by people who thought he was a robber. He woke up immediately and rushed to the scene near Salasha Bar. He found the deceased surrounded by a crowd. He was seriously injured, his head was covered with mud and blood and his leg had blood. The deceased was breathing when PW6 arrived at the scene, but he was unconscious.
  11. PW6 took the deceased to Kenyatta hospital where he found a huge crowd of injured awaiting treatment due to an accident. The deceased was admitted in hospital but after 7 hours. On 18<sup>th</sup> August, 2016 PW6 learned of the deceased death on the same day he was admitted for treatment. PW6 testified that the deceased was a hard worker, quiet and honest person.
  12. PW7 No.53661 P.C. Edward Amwayi Indeché the Investigating Officer in this case testified that on 30<sup>th</sup> July, 2013 at 12.15 a report of violent robbery and beating was made at their Police Station. The report was made by the one Gladys Musembi who had since died, and 2 other persons. The report was of assault causing bodily harm. PW7 visited the scene, house no.3 and found things scattered all over. There was evidence of struggle inside the house. The watchman and caretaker in collaboration with others were involved in the assault.
  13. PW7 took both accused persons to the police station and both were taken to Makadara Law Court where they were charged with assault. Two days later PW7 received a report that the victim who had been admitted in hospital had died. PW7 had the case at Makadara withdrawn. The two accused were then charged with murder contrary to section 203 of the Penal Code in this court.
  14. PW4 the pathologist who conducted the post mortem on the body of the deceased testified that in his opinion the cause of death was severe head injury due to blunt force trauma.
  15. The accused persons were placed on their defence after the close of the prosecution case. They opted to give unsworn statements. 1<sup>st</sup> accused Francis Mutiso Munyau denied committing the offence charged in his defence. He said that he was sleeping when he heard noise, commotion. He looked through the window to see where the noise was coming from. He went down and found the main gate opened. He then called Bernard the watchman to close the gate. He was later accused of assault at Makadara court on 3<sup>rd</sup> August 2012 where he denied the charge. On 6<sup>th</sup> August 2012 he was arrested and charged with murder. 1<sup>st</sup> accused denied being part of a mob that beat the deceased.
  16. The 2<sup>nd</sup> accused Benard Dianon on his part said that he was at his place of work as a watchman at 3.00 a.m. when he saw two people PW1 and the deceased being chased by a mob. One managed to go to door no.5. The mob followed the alleged thief demanding him to get out or else they

would burn down the plot. He said that he went to the first floor where the caretaker's house was and requested him to make a phone call to the plot owner. He said that the mob beat the alleged two thieves. The 2<sup>nd</sup> accused said that the following day a group of people came to the plot and that one identified himself as a police officer. The 2<sup>nd</sup> accused alongside 1<sup>st</sup> accused were arrested by the Embakasi police officer for assault and taken to Makadara court. He stated that the charge was eventually withdrawn and both he and his co-accused charged with murder. The accused denied the charges.

17. Mr. Muoki represented the accused at the trial and Ms. Wafula Prosecution Counsel represented the State. Ms. Wadegu gave submissions on behalf of Mr. Muoki. The defence counsel in her submissions argued that the prosecution had not adduced sufficient evidence to prove their case. She argued that the evidence from the prosecution was disjointed and full of contradiction. Ms. Wadegu urged that the deceased was suspected to have stolen a mobile phone, some money and a compact disk and that the crowd decided to give a chase. Counsel also challenged the prosecution for failing to call a material witness one STANLEY KILONZO who she said was a direct tenant where the two persons were attacked. The defence counsel also argued that the delay in taking the deceased to the hospital could have contributed to the death of the deceased.
18. The State Counsel Ms. Wafula in her submissions urged that the 1<sup>st</sup> and 2<sup>nd</sup> accused were seen attacking the deceased. The two accused persons were part of the mob and it was not necessary to prove who gave the fatal blow as long as it was jointly done. Learned Prosecution Counsel submitted that the injuries the deceased were very independent of the hospital intervention and that the delay was not significant to cause the deceased death but that death was caused by the injury inflicted on the deceased by the accused persons. Counsel further submitted that Stanley Kilonzo was not a crucial witness.
19. I have carefully considered the entire evidence adduced by the prosecution and the defence together with the submissions by both counsels. The burden in this case like in all criminal cases lies with the prosecution to prove its case against the accused beyond any reasonable doubt.
20. The charge is that of murder contrary to **section 203** of the **penal code**. That section stipulates as follows:

***“203. Any person who of malice aforethought causes the death of another person by an unlawfully act or omission is guilty of murder”.***

21. The prosecution must show that the accused are the ones that attacked the deceased, causing him injuries which resulted in his death. The prosecution must adduce evidence to establish that the accused persons had formed necessary the necessary malice aforethought or intention to either cause death or grievous harm to the deceased.
22. Upon evaluating the facts of this case, I am of the view that the issues for determination in this case are as follows:

- I. **Whether the prosecution adduced sufficient evidence to establish that the accused persons were involved with the death of the deceased?**
- II. **Whether the prosecution had established common purpose to commit the offence?**
- III. **Whether Stanley Kilonzo was a key witness?**
- IV. **Whether there was delay in taking the deceased to hospital and whether that contributed to his death?**
- V. **What was the cause of death of the deceased and what were the actual injuries he suffered?**

23. In the evidence before this court there is no dispute that the deceased was thoroughly beaten and left lying in a pool of blood. The evidence of PW1, PW2 and PW3 is corroborative and confirms that the accused persons were part of the mob that beat PW1 and the deceased. PW1 used to visit Stanley and Caleb frequently therefore he was able to recognize the two accused persons as the Caretaker and watchman of the plot. His testimony clearly demonstrates that he was attacked by the two and their accomplices for some time. He shows that the two accused pulled him out of Kilonzo's house where he had hidden himself to escape assault. There was ample light in the house and the main door was made of glass on the upper part. That gave PW1 ample opportunity to clearly see the identity of the persons who were attacking him and the deceased. PW1 therefore

- had ample time to see and recognize the two accused, having known them before.
24. The evidence of identification of both accused by PW1 receives corroboration from PW2 and 3 both who were at the scene throughout the time of this attack. I am therefore satisfied that the accused persons were properly identified as two out of the six who attacked and injured the deceased and PW1.
25. The accused persons deny being part of the mob justice. The evidence by the prosecution established firmly that the accused persons were part of the mob justice that thoroughly beat the deceased. The prosecution has firmly and cogently established the facts that the two accused persons jointly with others were seen beating the deceased on the night in question. The deceased was left lying in a pool of blood after this attack until next morning when a workmate, PW6 carried him from the scene and took him to Kenyatta National Hospital.
26. The accused persons are charged jointly with others not in court of assaulting the deceased. It is the duty of the prosecution to establish that there was common intention between both accused and or with those others not in court.
27. **Section 21** of the Penal Code defines what common purpose is in the following words:

**“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”**

28. The Court of Appeal in the case of NJOROGE VS. REP [1983] KLR 197, considered the meeting of common intention and stated as follows at page 204.

**“If several persons combine for an unlawful purpose and one of them in the prosecution of it kills a man, it is murder in all who are present whether they actually aided or abetted or not provided that the death was caused by the act of someone of the party in the course of his endeavours to effect the common object of the assembly.”**

29. The prosecution has established that the accused and others flashed out the deceased and PW1 and beat him up outside the flat guarded by 2<sup>nd</sup> accused, and where the 1<sup>st</sup> accused was the Caretaker. They accused both men of being robbers. PW3’s attempt to speak reason and dissuade them from taking the law in their hands by administering “mob justice” fell on deaf ears. It is clear that the 1<sup>st</sup> accused led the pack, and that the 2<sup>nd</sup> accused was part of the group administering the “justice” to them. Common intention has therefore been proved.
30. The unlawful purpose that the accused persons and their collaborators were executing at the time of the incident was assault. The deceased suffered serious injuries out of the execution of the unlawful act. The prosecution has therefore established that the unlawful act which led to the deceased being fatally wounded was the direct result of deceased death.
31. The defence raised issue with whether the injuries the deceased sustained in the attack was the cause of death or the fact there was delay in taking the deceased to hospital and the delay in admitting him.
32. Ms. Wafula addressed that issue in her submissions. Counsel relied on the English case of Reg Vs. Chesire [1991] 1 WLR 844:

**“Even where it is necessary to direct the jury’s minds to the question of causation, it is usually enough to direct them simply that in law the accused’s act need not be the sole cause, or even the main cause, of the victim’s death, it being enough that his act contributed significantly to that result... Occasionally, however, a specific issue of causation may arise. One such case is where, although an act of the accused constitutes a causa sine qua non of (or necessary condition for) the death of the victim, nevertheless the intervention of a third person may be regarded as the sole cause of the victim’s death, thereby relieving the accused of criminal responsibility. Such intervention, if it has such an effect, has often been described by lawyers as a novus actus interveniens. We are aware that this time-honoured Latin term has been the subject of criticism. We are also aware that attempts have been made to translate it into English, though no simple translation has proved satisfactory, really because**

**the Latin term has become a term of art which conveys to lawyers the crucial feature that there has not merely been an intervening act of another person, but that that act was so independent of the act of the accused that it should be regarded in law as the cause of the victim's death, to the exclusion of the act of the accused."**

33. The issue raised by the defence was really that of causation. Which act caused the death of the deceased? It is true from the evidence of PW1 that the deceased was abandoned at the scene of assault after the fact. From the evidence of PW6 the deceased was still at the scene of attack seven hours after the attack. The attack had taken place at 11pm and the deceased was taken away from the scene by PW6 at 6am next morning. Another seven hours elapsed before he was finally admitted at Kenyatta Hospital as per evidence of PW6.
34. The post mortem form shows that the cause of death of the deceased was severe head injury due to blunt force trauma. The doctor testified that the deceased had subpneurotic haematoma and subdural haematoma in the skull and raised intracranial pressure.
35. These findings clearly show that the deceased died, not for delay in medical intervention, or negligence in the cause of it, but due to blunt force trauma to the head. The evidence of PW1 and 2 clearly shows that the assault against the deceased was caused by a club. It is the evidence of these two witnesses that the 1<sup>st</sup> accused took the 2<sup>nd</sup> accused club, which was his tool of work, and used it to hit the deceased repeatedly on the head. He then gave it to the 2<sup>nd</sup> accused who continued the assault using the same weapon.
36. The evidence of PW6 was to the effect that when he took the deceased from the scene, he noted that he had visible injuries and blood on the head and legs. He was also unconscious by then. I find that the cause of death can be attributed to the actions of the two accused persons to clobber the deceased on the head using a blunt object. I am satisfied that the cause of the death of the deceased was independent of the acts of intervention by the hospital and from the delay in delivering him to the hospital for treatment. No other party can be blamed for causing the deceased death than the two accused and their accomplices.
37. The defence counsel argued that the failure of the prosecution to call crucial witness was fatal to its case as it cast doubt to the credibility of the prosecution evidence. Counsel challenged the prosecution and argued that they failed to call the material witness STANLEY KILONZO who was a tenant for a period of one month before the incident occurred and also a direct tenant where the two accused persons were employed.
38. In **BUKENYA & OTHERS VS. UGANDA [1972] E.A. 549**, the prosecution has a duty to call all the witnesses necessary to establish the truth even though their evidence may be inconsistent with the prosecution case. Likewise that case also makes it clear that the court itself has the duty to call any person whose evidence appears essential to the just decision of the case.
39. I am mindful of the provisions of **section 153** of the **Evidence Act** which provides that in the absence of any requirement by any provision of law, no particular number of witnesses shall be required for the proof of any fact. That law is in tandem with the court's holding in **Bukenya** case, supra.
40. Considering the law as above it is clear that the prosecution needs only call witnesses with information to establish the truth and assist the court arrive at a just conclusion of the case. The prosecution does not have the duty to call all the witnesses it has on the case. Therefore failure to call a witness will only be fatal if the evidence presented by the prosecution is insufficient to establish the truth, and may contain gaps which could have been filled by a witness who was not called. I find that the witness complained of, one Kilonzo was not a necessary witness to the case as he was not present at the scene at the time of this incident. Nothing turns on this point.
41. The accused persons both denied any involvement in the deceased death. They do not however deny that the incident took place. The evidence adduced by the prosecution was overwhelming and proves that not only were the two involved in assaulting the deceased out of which assault he died; it shows that in fact the two of them were the ring leaders in this attack. The eye witnesses of the attack knew the accused persons very well before the incident as they were frequent visitors to the flat where both worked. I find accused defence a bare denial and cannot stand in light of the strong evidence adduced by the prosecution.
42. In the premises therefore, I find that the prosecution established the *actus reus* of the case. It established that it was the accused persons jointly with others not before this court that beat the

- deceased causing him severe injuries. These injuries were the direct cause for the deceased death.
43. As regards to *mens rea*, there is no evidence to establish that at the time the accused persons attack the deceased they had formed an intention to cause either death or grievous harm to the deceased. The accused were reacting to accusations against the deceased that he was a thief.
  44. The deceased was not a thief. There is ample evidence from PW2 that he had gone to Kilonzo's house to meet PW2 and tutor him in preparation of University examinations which PW2 was about to sit. In fact PW6, deceased workmate was clear that the deceased had no criminal tendencies. On the other hand PW1 and 3 also establish clearly that the deceased had barely left the house than he was chased back by a mob accusing him of stealing a phone just then. Clearly the deceased or even PW1 had had no opportunity to commit any such offence. This was clearly a case of mistaken identity.
  45. As for the accused persons they were administering instant justice. I do not underrate the seriousness of their action, especially appreciating that it resulted in the death of an innocent man. Nevertheless I am not satisfied that malice aforethought has been proved against them.
  46. I have considered the entire evidence adduced herein and find that the prosecution has adduced sufficient evidence to establish that the accused persons were involved with the death of the deceased. I am also satisfied that the prosecution had established common purpose to commit the offence with each other and those others not before the court.
  47. I find that Stanley Kilonzo was not a key witness in this case and failure to call him was not fatal to the prosecution case. I am also satisfied that the delay in taking the deceased to hospital did not contribute to his death. I am satisfied that the deceased died as a result of injuries inflicted on him by the accused persons and their accomplices. The actual cause of death was head injuries due to blunt force trauma.
  48. I find that the prosecution has proved each and every one of the above ingredients beyond any reasonable doubt except that of malice aforethought as stated herein above.
  49. Consequently I find that the prosecution has proved the lesser charge of manslaughter contrary to section 202 of the Penal Code. Accordingly, I substitute the charge against the accused from murder contrary to section 204 of the Penal Code with the offence of manslaughter contrary to section 202 of the Penal Code. I find both accused persons guilty of the lesser offence of manslaughter contrary to **section 202** of the **Penal Code** and convict them accordingly.

**READ, DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28<sup>th</sup> APRIL, 2016.**

**LESITT, J.**

**JUDGE.**