



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KITUI**

**CRIMINAL CASE NO. 37 OF 2015**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**KITONGA NZOKA.....ACCUSED**

**J U D G M E N T**

1. **Kitonga Nzoka**, the Accused, is charged with the offence of **Murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code (Cap. 63), Laws of Kenya**. Particulars of the offence are that on the **11<sup>th</sup> day of March, 2011** at around **7.00 p.m.** at **Wikithuki Sub-location, Kyethani Location** of **Mwingi District** within **Kitui County** he murdered **Kanini Mutemi** (deceased).

2. Facts of the case are that on the **11<sup>th</sup> March, 2011** at about **7.00 p.m.** the Accused an employee of PW1, **Naomi Mutai Sammy** embarked upon an act of praying for the Deceased. As he prayed, he hit her claiming to exorcise bad spirits that had seized her. He seized the Deceased's neck tightly and she fell down. On realizing that she had died he forced PW1 to lock up the house and follow her. Having threatened her she complied. He led her to a hill within **Thama Village** where he had carnal knowledge of her without her consent.

3. On **12<sup>th</sup> March, 2011**, PW2 **Daniel Muli Mutisya** was at his place of duty when his mother (now Deceased) went and informed him about the death of the Deceased. He went home and confirmed. He went to PW4, **Peter Malonza** the area Chief with an intention of acquiring a burial permit. The Chief went to the home and found the body of the Deceased. Suspecting foul play following information received he reported the matter to the police. In the course of investigations the police learnt that the Accused and PW1 were at **Daleomanzi Village** near **Migwani**. They were apprehended. PW7 **Dr. Allan Balongo** conducted the autopsy on the body of the Deceased and formed an opinion that the cause of death was cardiopulmonary arrest secondary to asphyxia, due to respiratory failure.

4. When put on his defence, the Accused who gave unsworn evidence stated that he was requested to pray for the Deceased who alleged that she had lost her son. His employer (PW1) joined them as they prayed. As they prayed he noted that the Deceased had fallen down. He stopped praying and confirmed that she was dead. They left her and went to sleep. He woke up in the morning and found her lying at the same spot. He went and called his employer. They notified people. He was arrested. He denied having intended to kill the Deceased.

5. Issues to be determined are:

1. Whether the Deceased committed the act that caused the death of the Deceased.

2. Whether he acted with malice aforethought.

6. From evidence adduced by the Prosecution, it is not in doubt that the Deceased was found dead at the homestead where PW1 resided with her family. The postmortem was conducted on her body and the Doctor who did it, PW7 concluded that the cause of death was due to pulmonary cardiac arrest secondary to asphyxia due to respiratory failure.

7. The key witness to the incident was PW1. In his defence the Accused admitted having been at the place of the incident on the fateful night and having engaged in prayers as stated by PW1. In her evidence PW1 stated that the Accused took her to the thicket where he raped her. She accompanied him after he threatened her to choose between life and death.

8. This particular witness was an employer of the Accused. Being commanded anyhow by the Accused, an employee leave a lot to be desired. It is for that reason that I must be cautious in basing my decision on her evidence.

9. The Deceased died of asphyxia. This meant that she was not able to get enough oxygen through breathing for a long duration. PW1 stated that the Accused seized her neck as he hit her continuously under the pretext of exorcising evil spirits from her. This was consistent with the act of denying the opportunity to breathe regularly. It is therefore evident that the unlawful act which caused the death of the Deceased was committed by the Accused.

10. This brings in the issue whether he acted with malice aforethought? **Section 206** of the **Penal Code** defines malice aforethought as:

***“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—***

***(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;***

***(c) an intent to commit a felony;***

***(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”***

11. In **Republic vs. Ndalamia & 2 Others (2003) KLR Osiemo J.** held:

***“For the offence of murder, malice aforethought is deemed to be established by evidence of knowledge that the act or omission causing death or grievous harm will probably cause death or grievous harm to some person whether that person is actually killed or not although such knowledge is accompanied by indifference whether such death or grievous harm will occur.”***

12. In his defence the Accused explained that the Deceased asked him to pray for her. On cross examination PW1 said that he would hear the Accused saying that he used to pray for people. As he prayed he commanded evil spirit to leave the Deceased. Such a person cannot be said to have intended to kill the Deceased. It is however apparent that he acted recklessly by holding the neck so tightly that the Deceased failed to inhale air. This was acting with some indifference whether serious harm would result from his actions.

13. From the foregoing I find that the charge of **Murder** is not proved by the Prosecution, but the lesser

charge of Manslaughter contrary to Section 202 as read with **Section 205** of the **Penal Code** has been proved against the Accused beyond any reasonable doubt. Therefore, I find him guilty of that particular charge and convict him accordingly.

14. It is so ordered.

**Dated, Signed and Delivered at Kitui this 27<sup>th</sup> day of July, 2016.**

**L. N. MUTENDE**

**JUDGE**