



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KITUI**  
**CRIMINAL CASE NO. 67 OF 2015**  
**REPUBLIC.....PROSECUTOR**  
**VERSUS**  
**TITUS KASELA MUSYOKA.....ACCUSED**

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

1. **Titus Kasela Musyoka**, 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 **8<sup>th</sup>** day of **December, 2011** along **Tulia – Migwani Road** near **Kwambelu Shopping Centre, Kangondi Location** within **Kitui County**, murdered **Jackson Muthangya Malingi** (deceased).

2. Facts of case are that on the **8<sup>th</sup>** day of **December, 2011** at about **9.30 p.m.**, the Accused called PW1 **Shadrack Muema Muswa** on his cellphone and requested him to pick him up from **Kwambelu Shopping Centre**. He complied. On their way home they saw a person lying on the road. It turned out to be the Deceased and the Accused insisted that they take him along with them. On reaching **Kwademwa** the Accused alleged that the Deceased was putting his hands into his pockets. They almost struggled. They continued with the journey and he dropped them off. On reaching **Kwasiku** he received a phone call from the Accused who told him that he had been stabbed. He turned back and encountered him, he was injured and still bleeding. He took him to **Kwasiku Clinic** and advised him to report the matter to the police.

3. In the meantime the Accused contacted his parents PW3 **Sabina Musyoka** and PW4 **Musyoka Wa Kasele** and informed them that he had been assaulted and was injured. They reported the matter to PW2 **Antony Muthui** the Assistant Chief. The following morning the body of the Deceased was found. PW2 led the police to where the Accused was, at **Migwani Sub-District Hospital**. Having sustained injuries, he was treated prior to being arrested. The jacket he had was taken by the police as an exhibit. It was sent to the Government Chemist for analysis. The DNA profiles generated from the blood stains on the jacket matched those of the Deceased.

4. When put on his defence the Accused who gave sworn evidence stated that on the material date he came from where he was doing his masonry work at **Kwa Ndemwa's** place, passed via the market then got means of transport where he was carried as a pillion passenger. As they rode on, they came across the Deceased who was drunk. He was known to the owner of the motorcycle therefore they carried him. He sat behind him. The person put his hands into his pockets with an intention of pick pocketing him an act that prompted him to protest. The motorcyclist dropped the Deceased off. He rode on until **Kwa Ndemwa**, some **100 meters** away and dropped him off. As he walked towards **Ndemwa's** homestead he was accosted by three men who took away the items he had purchased. They ordered him to give them the keys to the house but he resisted. The person who had alighted from the motor cycle (Deceased) joined them and held his hands from behind. One of the persons aimed at stabbing him with a knife, he

dodged and the person stabbed the Deceased's neck as he held him from behind. The person aimed at him, he dodged and he fell down. He was however stabbed on the right thigh. He kicked the attacker, ran and jumped over the fence. He ran through a nearby school and got onto the road. He rang the motorcyclist (PW1) and informed him. He went back and took him to the dispensary where he got first aid. He was assisted by **Ngondi Kavindu**. He rang his parents who went to his aid and reported the matter to the Assistant Chief. The following morning he reported the matter to the police and went to seek treatment at **Migwani Sub District Hospital**. While there he was arrested and subsequently charged.

5. This being a case of murder issues to be determined are whether;

- Death occurred.
- The death of the Deceased was caused by the Accused.
- The act/omission that caused the death of the Deceased was accompanied with malice aforethought.

6. The fact of death of the Deceased was proved by evidence adduced by PW6, **Dr. Patrick Mutuku** who conducted a postmortem on the body of the Deceased. On examination of the body it had a cut wound on the right elbow and also a penetrating wound on the chest wall below the neck. The upper right lobe of the lung had a puncture that caused the lung to collapse. He opined that the cause of death was cardiopulmonary collapse due to massive internal haemorrhage secondary to punctured lungs.

7. Indeed, as correctly submitted by Counsel for the Accused, **Mr. Kilonzi**, there was no direct evidence as to who inflicted injuries on the person of the Deceased that he succumbed to. Evidence adduced against the Accused is circumstantial in nature. The Accused and the Deceased were pillion riders on PW1's motorcycle. Although the Accused alleged that the Deceased was dropped off prior to him alighting from the motor cycle some approximately **100 meters** away, PW1 stated that he dropped off both of them at the same place. The Accused was hence the last person with the Deceased while he was alive. Secondly, the Accused was found wearing a jacket that he had the previous night. The jacket was subjected to analysis. The DNA profile generated from the blood stains that were detected on it matched that of the Deceased. This was proof that the Accused came into contact with the Deceased after he was injured.

8. These being circumstantial evidence I must consider principles that guide one on relying on such pieces of evidence that could make this court reach a conclusion that it was the Accused who caused the death of the Deceased.

9. Principles to be applied in such a case were stated in the Court of Appeal Case of **Abanga alias Onyango vs. Republic CRA No. 32 of 1990 (UR)** thus:

***"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:***

- 1. The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;***
- 2. Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;***
- 3. The circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."***

In the case of **Teper vs. Republic (1952) AL 430** it was stated thus:

***"It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or***

***destroy the inference.”***

10. Evidence adduced at the outset tending to connect the Accused with the offence is of PW1. Although the Accused denied having known the Deceased prior to the fateful date, PW1 who knew both the Accused and Deceased stated that it was the Accused who insisted that they carry the Deceased who seemed drunk. As they rode on, the Accused actually protested saying that the Deceased was inserting his hands into his pockets an action that was almost derailing the motorcycle. They prompted PW1 to drop them off.

11. Evidence that remains unchallenged is that after PW1 moved for **20 meters**, the Accused rang him and informed him that he had been knifed by the Deceased. He turned back and found him injured. PW3 and PW4 stated that the Accused said he was attacked by thugs. This prompted them to report to PW2, an Administrator who advised them to report the matter to the police and seek treatment in respect of the Accused.

12. At the point of leaving the Accused and Deceased they were almost struggling according to the evidence adduced by PW1. They had an altercation. When PW1 reversed the motor-cycle he encountered the Accused running and having been injured. PW6, **Corporal Charles Wahome** who arrested the Accused found him at **Migwani Sub-county Hospital** where he had gone to seek treatment. Although treatment notes were not produced, he stated that the Accused had a stab wound on his right leg. The explanation he gave was that he had been stabbed by unknown people. He had a jacket which had blood stains therefore he arrested him. The blood stains were analyzed and they turned out to be for the Deceased's blood group.

13. In his defence the Accused gave a tale of having been attacked by people who must have been the Deceased's accomplices. He explained circumstances in which he came into contact with the deceased and how his jacket was lightly stained by human blood that belonged to the Deceased's blood group. Considering evidence adduced by PW1 that at the point of his departure the two had an altercation because of the Deceased's act of inserting his hands into the Accused's pockets, it is possible that they could have fought and injured one another with the Deceased sustaining fatal injury. However, there is no evidence to vouch for such a possibility. The Accused herein was suspected to have caused the death of the Deceased because of circumstances that prevailed prior to PW1 leaving them. It has been held time and again that suspicion however strong cannot provide a basis for conviction (**See Sawe vs. Republic (2003) KLR 364**). With the explanation given by the Accused which is not disapproved, circumstances that prevailed are not of the nature that would point irresistibly at the Accused as the person who caused the death of the Deceased. In the circumstances, I find him not guilty and acquit him of the offence of **Murder**.

14. It is so ordered.

**Dated, Signed and Delivered at Kitui this 17<sup>th</sup> day of August, 2016.**

**L. N. MUTENDE**

**JUDGE**