



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KITUI**  
**CRIMINAL CASE NO. 11 OF 2015**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**DAVID WAMBUA MUTHYOTUKU.....ACCUSED**

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

1. **David Wambua Muthyotuku**, “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 **16<sup>th</sup>** day of **October, 2011** at **Muani Village, Maluma Sub-location, Nzambani Location** of **Kitui District** within **Kitui County**, he murdered **Peninah Kabutha David** (Deceased).

2. Facts of the case are that the Accused and Deceased were husband and wife. On the **16<sup>th</sup>** day of **October, 2011** at about **6.00 a.m.**, PW5, **Musyoka David** returned home from the river to find his parents, the Accused and Deceased quarreling over money to purchase seeds for planting. The Deceased came out of the house and was followed by the Accused who held a hammer. They went round the house. PW4 went to check on them only to find the Deceased having collapsed. His sibling was strapped on her back and she had urinated on herself. PW6 **Joshua Muviti David** the other son of the Accused and Deceased who had gone to fetch water returned home to collect money that he had forgotten to carry and found the Deceased having collapsed. The children ran to call PW1, **Peter Mwangangi** their paternal uncle who went to the scene of the incident and found the Accused holding the hammer which he took and later handed over to the village elder, PW4, **Jemimah Mauta Mutia** who thereafter handed it over to the police. PW10, **No. 61475 Corporal David Ongwanyi** took photographs of the scene. The body was moved to **Kitui District Hospital Morgue** where an autopsy was conducted by PW1 who opined that the cause of death was cardiac arrest due to shock and internal haemorrhage due to a bruised liver. However, the Doctor could not establish what caused the bruise as the body had no external injuries.

3. In his defence the Accused stated that on the material date they were to plant maize and he had bought seed. He left home at **6.00 a.m.** going to look for oxen. He returned home to find his wife squatting. She was not responding. He went to inform his late mother, **Nzoki Muthyotuku**. Later he found one **Kyalo Issa** who was in company of **Kameta** and **Kivilu Musyimi** having taken her to the kitchen. The police arrived soon thereafter and arrested him. They picked a hammer and alleged it was a murder weapon. He denied having caused the death of the Deceased.

4. Issues to be determined are whether:

- Death occurred.
- It was caused as a result of an act or omission occasioned by the Accused.

- He possessed a guilty mind.

5. The fact of death was proved by the Prosecution through evidence adduced by the Doctor who performed the postmortem (PW2). The body was identified to him by **Nyamai Muthyotuku** (PW3), the Deceased's brother-in-law and her brother **Robert Nguthu**. He confirmed the occurrence of death and the cause. Per his opinion, the Deceased suffered cardiac arrest due to shock with internal haemorrhage due to a bruised liver.

6. PW9 the Investigation Officer found the Deceased having passed on. He found people at the scene of the incident who included witnesses who testified. Per the information he got the Deceased was hit by the Accused. The murder weapon was alleged to have been a hammer.

7. The only person who was present when events unfolded was PW5. Although the Accused denied having quarreled with the Deceased, their son PW5 heard them quarreling prior to the Deceased coming out of the house. He saw the Accused following her holding a hammer. However, he did not witness what transpired prior to finding the Deceased having fallen on the ground. Evidence against the Accused as to whether or not he hit the Deceased was circumstantial. For circumstantial evidence to be admissible it must be considered cumulatively. In the case of **Abanga alias Onyango CRA No. 32 of 1990(UR)** the Court of Appeal set out the principles to apply in order to determine whether the circumstantial evidence adduced in court is sufficient to sustain a conviction. It stated 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.”***

8. In deed the Accused was placed at the scene of the incident. He is the one who was seen following the Deceased. The Deceased was found having fallen on the ground and having not controlled her own urination. However, the Accused was not seen hitting the Deceased. The Doctor on examining the body did not find any obvious injuries on the external part of the body. Internally, both lungs appeared fibrotic. The right side of the heart was flabby. The liver had a small bruise on the right lobe. The cardiac arrest suffered by the Deceased was secondary to shock. The haemorrhage that was noted internally was due to the bruised liver. On cross examination the Doctor could not tell what caused the bruise. With regard to the lungs he stated that there were signs of old lung disease.

9. Without evidence of any external injury, and the cause of the bruise that resulted into bleeding being unknown, a presumption cannot be drawn that the Accused committed an act that caused the Deceased a muscle damage that made her have the cardiac arrest.

10. In the case of **Uganda vs. Dic Ojok (HCT-00-CR-SC-0109 of 2012)** it was stated that in all criminal cases, the duty of proving the guilt of the Accused always lies on the Prosecution and the duty does not shift to the Accused except in a few statutory cases and the standard by which the Prosecution must prove the guilt of the Accused is beyond reasonable doubt.

11. The evidence presented by the Prosecution falls short of proving that the Accused used the hammer to hit the Deceased.

12. In the result the case against him is not proved to the required standard. I find him not guilty and

acquit him of the charge of murder. He shall be released forthwith unless otherwise lawfully held.

13. It is so ordered.

**Dated, Signed and Delivered at Kitui this 22<sup>nd</sup> day of November, 2016.**

**L. N. MUTENDE**

**JUDGE**