



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

**CRIMINAL CASE NO. 21 OF 2012**

**REPUBLIC .....PROSECUTION**

**VERSUS**

**TITUS MUNYAO MUKEI .....ACCUSED**

**JUDGMENT**

1. **Titus Munyao Mukei** , hereinafter “*the accused*” is charged with the offence of **murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code**. Particulars are that on the **6<sup>th</sup>** day of **June 2012** at **Kyumoni Village, Katulani Sub-location of Katulani District** within **Kitui County**, with others not before court murdered **Kweta Mukei**.

2. The case as presented by the prosecution is that on the night of **6<sup>th</sup> June, 2012**, the deceased was asleep in the house with her children and husband when they were attacked by people who stabbed her severally on the body. She was rushed to hospital but succumbed to injuries sustained while undergoing treatment.

3. To prove the case the prosecution called 5 witnesses. **PW1, Mukii Makau Rueben** the deceased’s 19 years old son stated that he was asleep inside a house adjacent to his parent’s house. He woke up to find a person inside his room. The person ordered him to go out. He found their workman **Mutunga Mangeli** and two (2) other people outside. They were taken to a nearby thicket and tied. He was however able to see three (3) persons, one of them was wearing a black coat and a black pair of trousers. He was hiding behind the house. They ascertained that his parents were in the house. They untied them and made him and his brother go back to their house. The persons made their workman call out his parents. Later on he heard his mother screaming and the people ran away. He identified the person in black clothes as his step-brother, the accused.

4. **PW2, Paul Mukei** aged 15 years stated that he woke up to find their workman being beaten. Three (3) men were inside their room. The three persons had torches. Their workman **Mutunga** was pulled out. Thereafter he was also taken to the valley. Further, he stated that he did not identify the three (3) persons who were inside the house but identified a person who wore a black coat as his stepbrother, the accused, by his voice intonation.

5. **PW3, Mukei Isika** the husband of the deceased heard **Mutunga** their workman calling out alleging that goats had strayed into the farm. The deceased went out leaving him in the bedroom. On hearing her call out the people not to stab her, he locked himself inside the bedroom. He heard a voice he believed to be for his son, the accused, urging the people to ensure the door was opened. When he eventually opened the door the deceased was already injured. Further, he stated that the accused and his siblings blamed the deceased for taking most of his property. He even wanted to construct a house at the homestead of the deceased.

6. **PW4, No. 230619 C.I. Samuel Khisa** visited the scene of crime and recorded statements of witnesses, the workman (herdsman) inclusive. He caused the accused to be arrested on the 16<sup>th</sup> June, 2012 after the burial of the deceased. Thereafter, he recorded a statement under inquiry from him whereby he denied having committed the offence in issue.

7. **PW5 No. 56445 P.C. Barnabbas Kilatya** investigated the case. He witnessed the postmortem of the deceased. He arrested the accused. Following his investigations he concluded that the accused was one of the thugs. With leave of the court he produced the postmortem report.

8. When put on his defence the accused denied having been at the scene of the incident. Putting up an alibi defence he stated that he was at his place of business at **Wamunyu** some approximately 90 kilometres away. He called a witness who was with him. **DW1, Kennedy Wambua Kingola** who worked as a security personnel at the club where the accused operated a butchery confirmed having been with him on the material night.

#### **Issues to be determined:-**

- i. Whether the fact of death was proved;
- ii. Whether the accused caused the death of the deceased;
- iii. Whether it was with malice aforethought.

9. The deceased sustained five (5) stab wounds around the neck and other stab wounds on the left breast into the chest cavity, on the left hypogastrium and on the left forearm. The left lung was punctured and had collapsed. The stomach was also punctured. **Dr. Mutuku** who performed postmortem on her body formed an opinion that the cause of death was severe hemorrhagic shock due to multiple stab wounds involving major vessels. This was proof of death.

10. It is stated by PW1, PW2 and PW3 that they saw the accused on the fateful night. Being their blood relative, it was a case of recognition.

11. In the case of *Republic versus Turnbull and Others [1976] 3All E.R. 549, Lord Widgery C. J.* had this to say:

***“Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made. All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused’s case, the danger of mistaken identification is lessened, but the poorer the quality, the greater the danger”.***

12. In this case the incident is said to have occurred at about 2.00am. PW1 stated that there was moonlight that enabled him to see. He claimed to have recognized the man dressed in black who hid behind the house. On cross-examination he said that the man was short the size of the accused. However he did not tell anyone that he had seen the person until after his mother’s burial. The accused was home for two (2) days prior to the burial on the 16/4/2012. Even as he recorded his statement on the 23<sup>rd</sup> June, 2012 he stated that he saw a person who looked like the accused.

13. PW2 on the other hand stated that the person who wore black clothes also wore a black hat popularly known as a “godfather”. On cross-examination it turned out that the statement was silent on the manner in which the person was dressed. He also stated that he identified his voice. PW3 also stated that he identified the person by his voice.

14. Although these witnesses seemed to believe that one of the attackers was the accused, none of them told the police who were investigating the case at the outset. Members of the first family of PW3 were arrested as suspects. PW3 was a suspect too. They were later released. The investigating officer stated that it was in a further statement that PW2 said that he saw a person who looked like the accused. PW2

was clear in his testimony – he denied having recorded a further statement arguing that if any was written it was done by his father, PW3. What can be deduced from the evidence of PW1 PW2 & Pw3 is that circumstances that prevailed did not favour correct identification. The purported visual identified by recognition could have been mistaken by virtue of the bad relationship that existed between the 1<sup>st</sup> and 2<sup>nd</sup> families of PW3.

15. It was alleged that the accused was identified by voice. In the case of *Kavani -versus - Republic [1985] KLR 290; 293* the Court of Appeal held:-

***“Identification by voice nearly always amounts to identification by recognition. Yet here as in any other cases care has to be taken to ensure that the voice was that of the appellant; that the complainant was familiar with the voice and that he recognized it; and that there were conditions inexistence favouring safe identification.”***

16. PW1 and PW2 have known the accused since their childhood. PW3 has known the accused since birth. They were so familiar with his voice that they could not be mistaken about it. The question begging is if indeed they heard his voice; why they never told the police at the outset or soon thereafter.

17. The accused raised an alibi defence. He stated that he could not have been at the scene of the incident as alleged because he was at his place of business. In the case of *Kiarie -versus- Republic [1984] KLR 739 at Page 745* the Court of Appeal stated thus:-

***“An alibi raises a specific defence and an accused person who puts forward an alibi defence as an answer to a charge preferred against him does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable”***

18. The accused recorded a statement under inquiry whereby he named persons who were with him at **Wamunyu** at a night club where he operates a butchery on the fateful night. In his defence the accused stated that he was at his place of business. He recorded a statement under inquiry whereby he named persons who were with him on the material night. He also called one of the persons he mentioned to the police as witnesses. The Investigating Officer said he only interrogated **Kennedy Wambua Kingola** but did not interrogate the landlord, the bar attendant and the security man. **DW1, Kennedy Wambua Kingola**, in his testimony confirmed that on the fateful night he was at Wamunyu at the club with the accused.

19. The duty was upon the prosecution to disapprove the alibi defence the accused put up. On cross-examination the Investigating Officer said that when the report was made by PW3 he suspected his first family to have been behind the attack. It was for that reason that he arrested the accused’s siblings but later released them. The workman/herds-boy recorded a statement. It was alleged without proof that he had died. The Investigation Officer stated that according to his statement the maid and the deceased’s daughter went out with her. He did not record the statement of the two persons following an allegation that they were traumatized. The two (2) witnesses would have been instrumental in proving who the attackers were. Weighing the evidence adduced in totality the prosecution failed to disapprove the alibi defence put up by the accused.

20. From foregoing it is apparent that the prosecution has failed to prove the case against the accused beyond any reasonable doubt. I therefore enter a finding of not guilty and accordingly acquit the accused of murder pursuant to the provisions of the law.

**DATED, SIGNED and DELIVERED at MACHAKOS this 27<sup>TH</sup> day of JANUARY, 2015.**

**L.N. MUTENDE**

**JUDGE**