

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL CASE NO. 19 OF 2010

REPUBLIC..... PROSECUTOR

VERSUS

CLEOPHAS KILONZI NDAVUTAACCUSED

RULING

1. The Accused **Cleophas Kilonzi Ndavuta** was charged with the offence of **Murder** contrary to section 203 and 2004 of the Penal code.

The particulars of the offence were that on 1st day of October 2004 at **Nzatani village, Mwingi District** within Eastern province murdered **Kimwele Musili**.

2. The prosecution called seven (7) witnesses in total. In summary, the evidence adduced by the prosecution witnesses is that they heard that the deceased had been assaulted while being questioned on allegations of theft and was at the home of the accused who was his employer. Relatives of the deceased among them Pw1 **Musili Kitema Ndenge** the father, Pw2 **Mbila Musila** and pw5 **Simon Kimanzi Musili** the brothers to the deceased and one **Titus Mulyungi Ngiti** proceeded to the scene. They found the deceased had sustained injuries. The deceased who was very weak told them that he had been beaten by the accused and two administration officers who he named as **Kitela** and **Rotich**. The deceased shortly thereafter passed away while arrangements were being made to take him to the hospital.
3. A report was made to the police and investigations carried out. Pw7 **Alex Kitonga Mathuva** was one of the police officers who visited the scene and carried out investigations. A post mortem carried out by Pw6 Dr. **Moses Njue Gachoki** concluded that the cause of death was due to head injuries and subcutaneous hemorrhage. The accused was arrested and subsequently charged.
4. The only evidence that links the accused to the offence is the dying declaration made to his family members just before the deceased died.
5. *“The general principle on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at a point of death and the mind is induced by the most powerful considerations to tell the truth. In Kenya, however the admissibility of dying declaration need not depend upon the declarant being, at the time of making it, in a hopeless expectation of eminent death. There need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in reception into evidence of such declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person”.* See *Choge –vs- Republic (1985) KLR 1*.
6. Pw4 **Eunice Ngalyuka**, a sister in law to the accused testified that it was the police officers who had handcuffed the deceased and had beaten him asking him about some iron sheets and maize and beans that had been stolen from the house of the accused. This witness who was declared a hostile witness gave evidence that failed to link the accused to the beating.
7. Without any other evidence implicating the accused. I find the prosecution has failed to establish a *prima facie* case to warrant the accused being placed on his defence. Consequently. I acquit the accused under section 306 (1) CPC.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 30th day of April 2015.

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JUDGE