



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL CASE NO. 54 OF 2009

REPUBLIC.....PROSECUTOR

VERSUS

DAVID MUNYAO MUTETO.....ACCUSED

RULING

1. **David Munyao Muteto**, the accused is charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. Per the allegations in the particulars of the offence, on the **26th day of August 2009** at about 3.30 p.m. at **Matinga village, Kituti sub-location** in **Mutomo District** within the **Eastern Province** he murdered **Margaret Mbenya Muteto** (deceased).
2. To establish the case, the state called four (4) witnesses. **PWI, Kavuu Kyalia** was fetching firewood at about 3.00 p.m. on the **26th August, 2009** when she heard screams. She ran to the deceased's home where the screams emanated from. On the way she encountered the accused, a son of the deceased running away going through the thicket. On arrival at the homestead, she found the deceased lying down facing upwards already dead. She had sustained an injury that seemed to have been inflicted by an arrow. She also saw **Kyema Mutinda** leave the homestead. Soon thereafter **Mutie**, a grandson of the deceased arrived with the police.
3. **PW2, Kyema Mutinda** was asked by the deceased to do for her some work. While leaving the homestead he saw the accused entering the house. While on his way home he encountered people running. He went back to find the deceased lying down.
4. **PW4, Mutia Titus** left going to untie the animals. He left **PW2** talking to the deceased. On his way back he saw the accused entering the homestead. He had been away for one and half weeks. On his return, **PW3** was assigned duties of keeping a bicycle at a safe place due to lack of trust of the accused. As he rode the bicycle towards the gate he heard the deceased screaming. He returned to find the deceased having fallen down outside the kitchen. He saw an arrow without its head. He also saw the accused running away. He went to call the police.
5. **PW4, No. 69408 P.C. Benjamin Maundu** accompanied Chief Inspector **Yufnalis Barasa** to the scene of the incident. He found the body of the deceased lying at the kitchen. On observation, he noted blood stains on the clothes at the chest. The AP Sergeant who was present notified him that he had custody of the accused. He re-arrested the accused and took possession of the arrows.
6. This is a case where the accused was arraigned in court on the **16th September 2009**. Up to the year 2013 the investigation officer expressed the difficult he was encountering in getting witnesses. In the year 2014, February the 11th, they were able to avail the two witnesses. Thereafter the case was adjourned. On **1st July, 2014** two (2) other witnesses were availed. Thereafter the case was adjourned thrice. The prosecution was granted a last adjournment. Having

- failed to avail the witness the state was compelled to close the case on the **19th January, 2015.**
7. The prosecution had a duty of proving beyond any reasonable doubt that the accused caused the death of the deceased by malice aforethought (**See Section 203 of the Penal Code.**) None of the witnesses who testified saw the accused person committing an act that caused the death of the accused. PW1 saw the accused running into the thicket. PW2 saw the accused entering the deceased's house but he did not see him shooting her with an arrow. PW3 left the deceased with PW2 going to untie animals. He encountered the accused entering the gate. Thereafter he found the accused locked up in the house that belonged to his brother.
 8. PW3 was riding the bicycle going towards the gate when he heard his grandmother screaming. He turned back to find her having fallen down. Inside the kitchen was an arrow without its head which he picked and put in a drum prior to going to notify the police. On his return he found the sub-chief holding an arrow and a bow. The sub-chief having not been called as a witness there was no evidence to establish where the bow and arrow emanated from.
 9. Having not been seen by anybody shooting the arrow that inflicted the injury on the person of the deceased, the evidence that could be considered could be circumstantial in nature. In the case of **Teper versus R 91952) AC 489 Lord Normand** said:

“Circumstantial evidence must always be narrowly examined. If only because evidence of this kind may be fabricated to cast suspicion on another...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. PW3 saw PW1 leaving prior to the incident. When he returned from the Administration Police Camp he found PW 1 at the scene. In her testimony PW1 gave an impression of having not been at the homestead of the deceased prior to hearing screams and eventually finding the deceased already fatally injured. PW2 was also at the homestead prior to the incident. None of the witnesses could tell how far he had gone prior to the incident.
11. PW3 believed that the arrows that were recovered belonged to his grandfather. However, the prosecution did not adduce evidence to establish that the arrows did not belong to any other person. And, he did not see the accused with any bow and arrows.
12. In believing that the person who perpetrated the offence was the accused, PW3 stated that he had a disagreement with his father for disposing off land. He had demanded for part of the proceeds. On cross examination, however, he could not tell the parcel number of the alleged land. He could also not tell if there was any sale agreement.
13. From the foregoing it is apparent that circumstances that prevailed did not irresistibly point at the accused to the exclusion of any other person as the person who could have done an act that caused injuries that may have been on the person of the deceased.
14. At the close of the prosecution's case there was also no evidence to prove the cause of death of the deceased. Therefore, it is doubtful if the accused committed the offence as alleged. He is, therefore, not guilty. Accordingly, he is acquitted pursuant to the provisions of **Section 306(1)** of the **Criminal Procedure Code.**

DATED, SIGNED and DELIVERED at MACHAKOS this 28TH day of APRIL, 2015.

L.N. MUTENDE

JUDGE