



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 29 OF 2010**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**JONAS KEA MUTUI.....1<sup>ST</sup> ACCUSED**

**DANIEL MUIMI LOISE .....2<sup>ND</sup> ACCUSED**

**RULING**

1. **Jonas Kea Mutui** and **Daniel Muimi Loise** hereinafter “*the 1<sup>st</sup> and 2<sup>nd</sup> accused persons*” respectively are charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence being that on the 22<sup>nd</sup> day of April 2010 at unknown time at the **B2 Ranch Forest, Kwa Vonza** Location in **Lower Yatta** District within the **Eastern** Province jointly with another not before court, murdered **Nzomo Kea Mutui** (deceased).
2. The facts of the case are that the deceased went missing. A report was made to the police. Thereafter his body was recovered at **B2 Forest** interred in a shallow grave. It was exhumed and taken to **Kitui Hospital Mortuary**. Investigations carried out resulted into the arrest of the accused persons who were jointly charged with the offence of causing his death.
3. At the close of the prosecution’s case nine (9) Witnesses testified. **PW1, Dr. Patrick Mutuku** produced in evidence the postmortem report on behalf of Doctor **Opoko** who conducted the autopsy on the body of the deceased. The body was partially decomposed with bones visible. It had a fracture of the left tibia and fibula. There was another fracture on the right side. Internally the body had a dislocation of the joint connecting the skull to the spine. The doctor formed an opinion that the cause of death was cardiopulmonary arrest secondary to dislocated atlanto-occipital joint on the neck. On cross-examination he stated that the injuries sustained could be attributed to manual strangulation.
4. **PW2, Douglas Muinde Kituku** the then Chief of Katutu Location received a telephone call from **Kasyoka Kea** who reported that her father, **Jonas Kea** (Accused 1) fought his brother **Nzomo** who had gone missing. He reported the matter to the police. The Police arrested **Peter Kea, Luna Kea** and **Julius Kea** stepbrothers of the deceased and their mother **Jemimah Mwatha**. When the body of the deceased was found he was at the scene.
5. **PW3, Frigustus Kafuna Musyoka** arrested the 2<sup>nd</sup> accused and handed him over to the police.
6. **PW4, Alexander Ngayu Mutui** also went in search of the 2<sup>nd</sup> accused and notified the police of his whereabouts.
7. **PW5, Justus Mukala Musembi** participated in the search of the body of the deceased. They moved towards the river where he stumbled on the body of the deceased that had been covered by grass.
8. **PW6, Agnes Syombua Nzomo** the wife of the deceased saw him last on the 19<sup>th</sup> April, 2010 when he left for their rural home. They communicated on the 23<sup>rd</sup> April, 2010. Later on she got

- information that the body of the deceased had been found in the forest.
9. PW7, **Corporal Joseph Kariuki Mwangi** received a report of a missing person from a sister to the deceased. His father (1<sup>st</sup> accused) also went to the police station on the 29<sup>th</sup> April, 2010. He interrogated him and placed him in cells. On the 30<sup>th</sup> April, 2010 he got information about members of public who wanted to lynch the wife of the 1<sup>st</sup> accused and his three (3) sons. He went and re-arrested them. He also re-arrested the 2<sup>nd</sup> accused.
  10. PW8, **No. 61475 Corporal David Ongweny** of scenes of crime photographed the mortal remains of the deceased.
  11. PW9, **No. 49090 Corporal Bainito Ingosi**, the investigation Officer participated in exhumation of the body of the deceased. He stated that Accused 1 and the deceased had a land dispute. He recovered a hoe from the home of the 1<sup>st</sup> accused which he believed was used to dig up the shallow grave.
  12. In order for a person to be guilty of murder the prosecution has a duty of proving that the accused person caused the death of the deceased by an unlawful act or omission with malice aforethought (see **Section 203 of the Penal Code**).
  13. Malice aforethought is defined by **Section 206 of the Criminal Procedure Code** as follows;-  
*“a) An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not*  
  
*b) Knowledge that the act or omission causing death will probably cause the death or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.*  
  
*c) An intent to commit a felony.”*
  14. The fact of death of the deceased was proved by the report of the Doctor who performed autopsy on the body of the deceased. The medical autopsy done revealed that the cause of death was not natural. The Doctor attributed the injuries sustained to manual strangulation. The severity of the fractures seen would suggest that something caused the legs to break. This means that some force was exerted on the legs which was traumatic that resulted into breakage.
  15. None of the witnesses who testified saw the accused persons cause the serious injuries that were occasioned on the body of the deceased that he succumbed to. PW6 stated that there was a land dispute between the deceased and his father, the 1<sup>st</sup> accused. When she parted ways with the deceased he said he was going home but none of the witnesses who testified told the court whether indeed he went home.
  16. The body of the deceased was found in a shallow grave at B2 Forest. PW9 estimated the place to be some approximately ten (10) metres away from the seasonal river. PW9 produced in evidence a hoe suspected to have been used in digging up the grave and also injure the deceased. He said he was with the 1<sup>st</sup> accused person when he recovered the hoe. Although he alleged that the hoe was the murder weapon no evidence was adduced to support his allegation.
  17. The police in this matter arrested about five (5) suspects. Two (2) of them, the accused persons’ family members who recorded statements were to be treated as prosecution witnesses but the state opted not to call them. PW9 in charging the accused persons relied on the information given by PW6, who was not present when the incident occurred. He also stated that the incident was witnessed by only family members.
  18. Without evidence that the accused persons are the ones who did the act or omission that caused the deceased’s death, there is no basis for inferring guilt on their part.
  19. From the foregoing it is apparent that at the close of the prosecution’s case no evidence has been adduced warranting the accused persons being called upon to defend themselves. Consequently, I find them not guilty of the offence of murder and proceed to acquit them under **Section 306(1) of the Criminal Procedure Code**.
  20. They should be released forthwith unless otherwise lawfully held.

**DATED, SIGNED and DELIVERED at MACHAKOS this 21<sup>ST</sup> day of APRIL, 2015.**

**L.N. MUTENDE**

**JUDGE**