



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**CRIMINAL CASE NO. 76 OF 2008**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**SILA MUNGUTI.....1<sup>ST</sup> ACCUSED**

**NYAMASIO SILA .....2<sup>ND</sup> ACCUSED**

**RULING**

1. **Sila Munguti** and **Nyamasio Sila** 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 13<sup>th</sup> day of June 2008 at **Ukia** Location, **Ivaanu** sub-location in **Makueni** District within the **Eastern** Province, murdered **Ngumbi Kimeu** (deceased).
2. Facts of the case are that on the 13<sup>th</sup> June, 2008 the deceased in company of other village elders went to the home of the accused persons to caution them against selling ‘Karubu’ a traditional liquor and Narcotic drugs. There were many patrons partaking the illegal substance. The deceased and others were attacked. The elders managed to escape. The following day the deceased was found injured. He was taken to hospital. Thereafter he died.
3. The prosecution called a total of seven (7) witnesses in an endeavor to prove the case. **PW1, John Munguti** told the court that he was one of the elders who were sent by the Chief to deliver a message to the accused persons. As they conveyed the message to them, the 1<sup>st</sup> accused entered the house of the 2<sup>nd</sup> accused. Both of them came out, each armed with a panga (broad-bladed African knife) and a club, they accused them of being thieves. Their action forced the elders to flee. The following morning he got information that one of the elders was in pain. He went to the home of the accused in company of **Kiilu Makosi** and found the deceased within the homestead of the accused persons. The 1<sup>st</sup> accused emerged with a walking stick and threatened to assault them. However, they managed to take the deceased to **Mikuyuni** Police Post and reported the incident. Thereafter they took him to hospital. He was admitted. Later on he died. On cross-examination he stated that at the time they were fleeing, the deceased was not injured, however, they found him injured the following day.
4. **PW2, Mutua Kilonzo** stated that he was one of the clan elders who were sent to the home of the accused persons where they found revellers partaking the traditional brew. When they called the 1<sup>st</sup> accused aside, the 2<sup>nd</sup> accused and revellers left the premises. Shortly thereafter they (2<sup>nd</sup> accused and revellers) returned and declared that they (elders) were thieves. They were armed with clubs, pangas and stones but he was not able to tell what the 2<sup>nd</sup> accused in particular was armed with. They attacked them and he fled.
5. **PW3, Simon Kalulu Kivindyo**, one of the elders who went to the home of the accused persons

- stated that the 2<sup>nd</sup> accused left with the revellers as they conveyed the message to the 1<sup>st</sup> accused. The 1<sup>st</sup> accused then screamed and shouted calling them thugs. The 2<sup>nd</sup> accused returned with a group of people who demanded to know why they were at the homestead. The 1<sup>st</sup> accused then hit him (PW3) and he saw a stool being thrown at the deceased by the 2<sup>nd</sup> accused. It hit him on the right leg. He (PW3) ran and hid in the maize plantation.
6. **PW4, Kiilu Makusi** on the other hand stated that when he saw revellers assaulting the deceased he ran into the maize plantation and hid. The following day he found the deceased at the banks of the river. They took him to the Police Post then the Police Station.
  7. **PW5, Benard Nzuki Kimeu**, a brother to the deceased identified his body to the Doctor who performed the postmortem.
  8. **PW6 Justus Ngumbao Ngila** a former Chief of Kithungu location testified that **John Munguti** and **Benjamin Isika** sought permission to hold a clan meeting to discuss family matters. He issued them with a permit. Thereafter he learnt that there were chaos at the meeting and a person had been injured. He later heard from **John Munguti** that the person had died.
  9. **PW7, No. 50004 P.C. Jackson Ndwiga Maina** arrested both accused persons and took possession of a stool from the 1<sup>st</sup> accused's house that was purportedly used.
  10. The accused persons herein were arraigned in court on the 27<sup>th</sup> August, 2008. As at 2<sup>nd</sup> December, 2014, the State had not availed evidence of the Doctor who performed a postmortem on the body of the deceased. It was given a last opportunity of calling the witness. On the 21/1/2015, having failed to discharge the duty the State was compelled to close the case.
  11. At the close of the case, the prosecution ought to have proved that the accused persons caused the death of the deceased by an unlawful act or omission (See **Section 203** of the **Penal Code; Nyambura & Others -versus -Republic (2001) KLR 355**).
  12. Witnesses PW1, PW2, PW3 and PW4 alleged that they were sent to the home of the accused persons by the Chief to caution them following their notoriety in dealing in illicit brew and other substances. However, the Chief, PW6 issued permit for a meeting that was to be held at the home of **John Munguti** a polygamous man and chairman of the clan. They were to discuss family matters. He summoned **John Munguti** the following day (14/6/2008) following an allegation that there had been chaos at the meeting and he advised him to report the matter to the police.
  13. The evidence adduced by PW6 contradicted the allegation that he sent PW1, PW2, PW3 and PW4 to go and caution the accused persons to desist from dealing in illicit substances.
  14. PW1, PW2, PW3, and PW4 blamed the accused persons for the chaos that resulted. All of them seem to have fled without seeing what actually happened to the deceased. PW4 stated that he saw the 2<sup>nd</sup> accused throw a stool that hit the deceased's right leg. Then revellers descended on him and beat him up but he managed to escape. There is contradictory evidence as to where exactly the deceased was found the following day, whether it was at the river banks or the homestead of the accused persons.
  15. Witnesses alleged that the deceased was taken to hospital. However no medical evidence was adduced to establish the fact that indeed the deceased was taken to hospital and had sustained injuries that necessitated him to seek treatment at a medical facility on the 14/6/2008.
  16. In the case of **Ndungu -versus -Republic (1985) KLR 481** the Court of Appeal stated that :-

***“In some cases death can be established without medical evidence. Of-course there are cases, for example where the deceased person was stabbed through the heart or where the head crashed, where the cause of death would be so obvious that the absence of a postmortem report would not be fatal. But even in such cases, medical evidence of the effect of such obvious and grave injuries should be adduced.”***

17. The prosecution having not adduced evidence of the deceased having been taken to hospital following an assault upon his person, they should have proved the cause of death by providing the postmortem report. The cause of death of an individual can only be determined by the Doctor/Pathologist who performed the autopsy that would give a definite cause of the death and how the same occurred. Such evidence would also help the court estimate the time of death. I have in mind the allegation that the clan elders fled but the deceased was found the following day either at the homestead of the accused persons or the river banks and purportedly taken to hospital

whereafter he died.

18. In the celebrated case of *Bhatt -versus -Republic (1957) E.A. 332* it was held:-

***“... a prima facie case is a case where a reasonable tribunal properly directing its mind on the law and evidence could convict if no reasonable explanation is offered by the defence”.***

19. In this case placing the accused persons on their defence would be a waste of judicial time as no credible evidence on the cause of death of the deceased has been adduced. If this is done and they opt to remain silent the court would not know what to do next.

20. From the foregoing, I find the prosecution having not established the fact that the death of the deceased was caused by the accused persons. Accordingly, I find them not guilty of the offence of **Murder** and acquit them pursuant to the provisions of **Section 306 (1)** of the **Criminal Procedure Code**. They will be released forthwith unless otherwise lawfully held.

21. It is so ordered.

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

**L.N. MUTENDE**

**JUDGE**