



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL CASE NO. 56 OF 2009

REPUBLIC

versus

1. WAMBUA KITHUKA MUTHAMI.....ACCUSED

2. JACOB MATHEKA MALOMBE.....ACCUSED

RULING

1. **Wambua Kithuka Muthami** (Accused 1) and **Matheka Malombe** (Accused 2) are charged with the Offence of Murder contrary to **Section 203** as read with **Section 204** of the Penal Code. Particulars of the offence being that on the night of **11th** and **12th** **August, 2009** at unknown time, at Malili Village, Vote Sub-Location, Mutomo Location in Mutomo District of the Eastern Province, jointly with others not before court, murdered **Mwongela Muthami**.
2. To prove the case the Prosecution called 8 witnesses. PW1 **Laeli Mwikali Muthami** the wife of the deceased stated that the deceased was a witchdoctor (Medicineman). On **1st August, 2009** a stranger, a person she identified as Accused 1 went to their home and requested the deceased to go and treat him. She had seen Accused 1 at the home of Accused 2 who was their neighbour. On the **11th August, 2009** the deceased left home going to Malili to render services as requested. He had a bicycle, cellphone and a torch. Later on she got information regarding his death.
3. PW2, **Mutua Muthami** a son of the deceased stated that on the **1st August, 2009** he saw both accused persons crossing the River to Kyase. At about 7.30 p.m. he saw Accused 1 with the deceased. He heard Accused 1 tell the deceased that he was following up his bicycle that he had left with a repairer. They parted ways. Thereafter the deceased told him that Accused 1 wanted him to go and treat his brother but he was uncomfortable as he had come from the home of Accused 2 a son of a person who had a dispute with him (deceased). The three of them went to the house of Accused 1 where they slept but no treatment services were rendered. They left having agreed that the treatment would be done on **11th August, 2009**. They forgot a torch at the house. On **11th August, 2009** he escorted his father to the roadside as he left for Malili. He did not know how he died.
4. PW3 **John Mwongela**, a step son of the deceased identified his body to the Doctor who conducted the postmortem.
5. PW4 **Mutuku Mwongela** a brother of the deceased accompanied PW1 to the police station where they found the deceased's bicycle. He also identified his cellphone that the police had.
6. PW5 **No. 91701 P C Edwin Omwenga** visited the scene where they found a body half naked. The surroundings were not disturbed. They removed the body to Kitui District Hospital Mortuary. Later on they got information about a bicycle having been found some 100 meters away from the scene. In the course of investigations the area Chief recovered a mobile phone and torch.
7. PW6 **Jackson Kilango** the area Chief received information from the District Officer, Mutomo

- about an unknown person who had been killed. He disseminated the information. He played a role in the arrest of the suspects. One **Janet** allegedly gave him a torch and cellphone that were identified as belonging to the deceased which he handed over to the O.C.S. Mutomo.
8. PW7 **Dr. Cosmas Mutisya** conducted the autopsy on the body of the deceased and formed an opinion that the cause of death was massive intracranial haemorrhage secondary to depressed skull fracture and blunt trauma.
 9. PW8 **No. 231245 Supt. Yufnalis Barasa** investigated the case and found that the father of Accused 2 had a land dispute with the deceased. He recovered a torch and cellphone from one **Janet** alleged to have died that were identified as belonging to the deceased. Based on the tale given by **Janet** he formed an opinion that the accused persons committed the offence. He caused them to be charged.
 10. At the close of the Prosecution's case there was evidence that the deceased was found lying beside the road having sustained injuries that he succumbed to. Evidence of how the alleged **Janet** came to possess his torch and cellphone was not adduced. The accused persons were suspected to have been involved in committing the act that caused his death because the deceased left his home on the **11th August, 2009** claiming he was going to treat Accused 1.
 11. It has been held that:

“Suspicion however strong cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.” (See Sawe – Vs – Republic (2003) KLR 364.

Evidence adduced falls short of incriminating the accused persons as the ones who caused the death of the deceased. In the circumstances they are not guilty and I proceed to acquit them pursuant to the provisions of **Section 306 (1)** of the Criminal Procedure Code.

12. It is so ordered.

DATED, SIGNED and DELIVERED at MACHAKOS this 23rd day of JUNE, 2015.

L.N. MUTENDE

JUDGE