



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL CASE NO. 23 OF 2009

REPUBLIC.....PROSECUTOR

VERSUS

MUTAMBO MUTHAMI.....1ST ACCUSED

MUSYOKA MULANDI.....2ND ACCUSED

ANTHONY MUTUA MANTHI.....3RD ACCUSED

JUDGMENT

1. The 1st Accused Mutambo Muthami, 2nd accused Musyoka Mulandi and Anthony Mutua Manthi the 3rd Accused were charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code (*Cap. 63*) Laws of Kenya. The particulars of offence were that on the 28th day of February, 2009 at Nguluani Village, Ngandani Sub-Location, Kikumbulyu location in Kibwezi District within Makueni County jointly murdered Sammy Kituku Kiawa.
2. Each of the accused persons pleaded not guilty. The case proceeded to a full trial.
3. The prosecution called six witnesses in support of their case. The prosecution case was that at the material time, the deceased was taking some local brew at the home of PW1, Yona Mwathe. That four people descended on the deceased with pangas and rungas. The deceased took to his heels but the four people three of whom were identified as the accused persons herein caught up with him and attacked him using pangas and rungas.
4. The deceased sustained severe injuries and died while being taken to hospital. Prior to his passing on, the deceased named the accused persons as his assailants. The accused persons were arrested and subsequently charged.
5. When the accused persons were placed on their defence, each of them gave sworn evidence. No witnesses were called.
6. The 1st accused denied the offence. He stated that he did not know the deceased and nor did he see him on the material day.
7. The 2nd accused stated that on the material day he was at his father's farm where he worked the whole day. He denied being at the scene at the material time. He further stated that he did not know the deceased and did not kill him or collude with anybody to kill the deceased.

8. The 3rd accused stated that he was buying vegetables for his business when he heard about the death. He then proceeded to the scene with other members of public. Thereafter the 3rd accused went back to buy vegetables for his business, then proceeded to his business premises in Mombasa. The third accused further stated that he was later arrested for the offence that he knew nothing about.

9. PW1 Yona Mwathe, PW3 Daniel Masive and PW4 Naomi Kasiva Mwangangi gave an eye witness account on how she saw the deceased being chased and assaulted by the accused persons. PW2 Peter Ndivo Kiema gave evidence on the dying declaration made by the deceased before his death naming the accused persons as the people who had assaulted him. However, the prosecution case was closed prematurely before calling evidence on the cause of death. No medical officer was called to testify and no postmortem report was produced. There is therefore no evidence to confirm the cause of death.

10. I took over this case at the stage of the hearing of the defence case. The accused persons denied having committed the offence. A conviction is based on the strength of the prosecution case, not the weakness of the defence case. The prosecution failed to call crucial witnesses, thereby leaving gaps in their case. Consequently, I give the accused the benefit of doubt and acquit them. Each accused is at liberty unless otherwise lawfully held.

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B. THURANIRA JADEN

Dated and delivered at Machakos this 18th day of June, 2015

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B. THURANIRA JADEN

JUDGE