



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL CASE NO. 95 OF 2009

REPUBLIC.....PROSECUTOR

VERSUS

CHRISTOPHER KATHEKA KAVESA ALIAS KATHEKANI ALIAS

CHOTA.....1ST ACCUSED

KAMAU KITILI MUTHUA.....2ND ACCUSED

JUDGMENT

The accused herein, *Christopher Katheka Kavesa* alias *Kathekani* alias *Chota* [hereinafter referred to as the *first accused (A1)*] and *Kamau Katili Muthua* [hereinafter referred to as the *second accused (A2)*] are jointly charged with the offence of murder contrary to *Section 203* as read together with *Section 204* of the *Penal Code*.

The particulars of the charge are that on the 11th day of October, 2009 at around 9.00 pm at Mathare Estate in Nairobi Area jointly with others not before the court, murdered Moses Mulwa [hereinafter referred to as the *deceased*.]

The prosecution called (7) witnesses in support of the state case.

Mwendwa Mulwa, (PW1), was at Bondeni Mathare in the company of Mulwa (deceased) sitting on a bench outside a kiosk at about 7.00 pm. Kamau (A2) summoned his brother, *Mulwa*, aside. They went two (2) meters away. Kamau then called Katheka (A1) who removed a knife and stabbed Mulwa (deceased). He went to the scene. Someone stabbed him on the head and the shoulder. He ran to Joy Nursing Home where

he was admitted. He had known Kamau six (6) months before the episode and Katheku two (2) years before the episode. Hence it was a case of recognition.

Julius Mulwa Mwendwa, (PW2), met his two (2) sons Moses Mulwa (deceased) and Mwendwa Mulwa [PW1] seated on a bench near a kiosk at Bondeni on 11th October, 2009 at about 4.45 pm. In the process of talking to his sons, a boy, whose name he did not know, summoned the deceased. Mwendwa (PW1) was left seated on the bench. He saw the deceased and Kamau the [2nd accused] walk away about 1 meter. He saw the first accused (A1) stab his son. The scene was illuminated by electricity lamp post near the kiosk. His son Mulwa (PW1) ran to assist the deceased. He followed Mulwa [PW1] from behind. When PW1 arrived at the scene he was also stabbed on the head and shoulder. Mulwa then ran

away while bleeding. He took the deceased to hospital where he was pronounced dead on arrival. He reported the incident at Pangani Police Station. The police took the body to City Mortuary. Later on, he found out that Mulwa [PW1] was admitted at Joy Nursing Home where he was discharged the following day. He identified the body for purposes of postmortem. Thereafter the body was released to him for burial on 24th October, 2009.

Julius Muthengi Musau, (PW3), Identified the body of the deceased in the company of PW2 at the City Mortuary on 21st October, 2009 for purposes of postmortem.

No. 70541 P.C Joseph Kirunga, (PW4), attached to Huruma Police Station was on duty at 8.00 am. In the company of Papalsara and Corporal Kaberia they were on patrol duties within Huruma Estate. A young man in the company of an old man approached them for assistance regarding on occurrence entered in O.B NO. 80 of 11th October 2009. It involved a murder report. The two reportees said they knew where the suspects were hidden up. They directed them to Mathare Bondeni Area to a house made of iron-

sheets. On knocking the occupants refused to open. They broke in and arrested four (4) men. The reportees identified two of them as the assailants who stabbed the deceased and PW1. He identified the two accused persons in the dock as the ones they arrested.

No. 32169 Inspector Joseph Mwinzi, (PW5), received a report of murder on 11th October, 2009 from Mwendwa Mulwa (PW1). He accompanied the reportee to the scene and recovered the body of the deceased. He observed that the body had a deep knife wound on the chest. He took the body to the City Mortuary to await postmortem. Subsequently, he recorded the statements of the reportee. After two weeks the reportees assisted the investigating team in identifying the assailants who were then arrested. He identified the accused persons in the dock.

Dr. Njau Mungai, (PW6), performed postmortem on the body of the deceased. The body was identified by Julius Mulwa [PW1] and Julius Muthengi [PW2].

He formed the opinion that the deceased died of haemorrhage's from stab wounds. He produced the postmortem report as **exhibit No. 1**.

Dr. Zephania Kamau, (PW7), was requested to assess age, mental status and bodily injuries (if any) in respect of Kamau Kitili. He assessed his age at 20 years. He had no physical injuries and was mentally fit to stand trial. He produced a copy of the P3 dated 22nd October, 2009 as **exhibit No. 2**.

On the same day he was also requested to assess age, mental status and bodily injuries (if any) in respect of Christopher Katheka [A1]. He assessed his age at 22 years, he had no physical injuries and was mentally fit to stand trial. He tendered the P3 as **exhibit No. 3**.

At the close of the prosecution's case, after carefully analyzing the evidence on record, I placed both accused on their respective defence after explaining to them the provisions of **Section 306 (2)** of the **Criminal Procedure Code**.

Accused No. 1 [Christopher Katheka] chose to give sworn statement but elected not call any witness. (A1), in his defence testified that on 17th October, 2009 he visited his cousin, Kyalo Kaviti. He met there at the second accused herein who was staying with the said Kyalo Kaviti. Since it was late he decided to seep at Kyalo's. While sleeping heard somebody knocking the door of Kyalo. When he opened he was confronted by three (3) policemen who introduced themselves as officers from Huruma Police Post. The said officers were in the company of two civilians.

The policemen told them that they were under arrest in connection with an incident that took place at Bondeni, Mathare on 11th October, 2009. He denied having been at Mathare on 11th October, 2009. He claimed to have been at Huruma Madoya at his place of abode. He denied the charge.

Kamau Kitili, (A2) gave unsworn statement. In his defence he testified that from June 2009, he was staying at Huruma Estate. On 17th October, 2009 he visited Kyalo Kaviti. He heard somebody knocking the door of the premises of his said friend. When the door was opened found three policemen at the door. The said policemen entered and searched the premises. In the process they were allegation that they had something to do with the murder of the herein. The four of them were then taken to Huruma Police Post and thereafter charged with the offence of murder. He denied the charge.

Against that backdrop of evidence, it is clear to me that PW1 and the deceased were seated outside a kiosk at Mathare Bondeni at about 7.00 pm on the material day when he was called by Kamau (A2). His brother PW1 remained behind. They went with Kamau about 2 meters away. Kamau then removed a knife under his sleeve and stabbed the deceased severally. PW1 on impulse ran towards the scene but somebody also attacked and stabbed him on the shoulder and on the head. The father of the deceased, who was nearby rushed to the scene and assisted in taking the deceased to the nearby hospital where the deceased was pronounced dead on arrival.

PW1 knew both the assailants – A1 and A2. On the one hand he had known Christopher Katheka (A1) for a period of 6 months before this incident. On the other hand, he had known Kamau (A2) for a period of two (2) years before the incident. Hence it was of recognition.

Both PW1 and PW3 testimony is that the area was illuminated by electricity light mounted on a lamp post. The area was so well lit that even if a coin dropped at the scene it would be seen.

On the basis of the fact that PW1 knew the assailants before the attack, I find that his evidence is credible given the lighting system at the scene. In accepting the evidence of identification by PW1, I have taken into account that the conditions favouring positive identification was favourable. In this regard I call in and the authority of *ABDALLAH BIN WENDO AND SHEHE BIN MARAMBERE -VS- REGINA* In doing so I have warned myself of the dangers of relying on the evidence of a single witness. But in this case the lighting system was favourable.

In the premises, I accordingly find and hold as a matter of law and fact that the first [A1] and [A2] with ***malice-aforethought*** jointly caused the death of the deceased herein on the 11th day of October, 2009 at Bondeni Village within Mathare. This finding is based on direct evidence. I convict both of them 1st and 2nd accused of the offence of murder.

Having taken into full consideration all the mitigating circumstance of this case as presented by their counsel, I sentence the accused persons to suffer death as prescribed by the appropriate law. Right of Appeal 14 days.

Dated and delivered at Nairobi this 24th day of November 2015

N. R. O. OMBIJA

JUDGE