



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL CASE NO. 3 OF 2012**

**LESIT, J**

**REPUBLIC.....PROSECUTOR**

**-VERSUS -**

**RAPHAEL MULI MUTUA.....1<sup>ST</sup> ACCUSED**

**THOMAS KAMAU MWAURA.....2<sup>ND</sup> ACCUSED**

**JUDGMENT**

1. The accused **RAPHAEL MULI MUTUA**, hereinafter the 1<sup>st</sup> accused, and his co-accused **THOMAS KAMAU MWAURA** hereinafter referred to as the 2<sup>nd</sup> accused were jointly charged with murder contrary to **section 203** as read with **section 204** of the **Penal Code**. The particulars of the offence were:

**“On the 26<sup>th</sup> day of November 2011 at KM Estate, in Kasarani District within the County of Nairobi, the accused persons jointly with others not before court murdered FELIX OBWANGI OBETO.”**

2. The prosecution called a total of 11 witnesses. Hon. Muchemi, J heard the first six witnesses. I took over from her honour and heard the remainder of the case.
3. The prosecution case was that the deceased was a Third Year student at Kenyatta University. He had rented a place to live together with his friends PW9 and others within Kiwanja area. The premises belonged to PW4. On the 26<sup>th</sup> November 2011 the deceased bought lunch for PW9 which he delivered to him in his room. PW9 did not see the deceased again that afternoon.
4. PW1, a girlfriend of the deceased testified that the deceased went to see her in her room at about 8.30 p.m. He had blood on the face and mouth and complained of having been mugged and robbed of his phone. He left PW1 with a phone no of one Stanley who deceased told her would call her the following day. PW1 never met Stanley and neither did he call as deceased had informed her.
5. After leaving PW1’s room the deceased proceeded to the room of PW9. PW9 saw him enter, heard him complain he had been injured on his face by “*maboy Fulani*” “*certain boys*”. The deceased then stormed out. He looked angry and agitated. PW9 testified that he followed the accused who told him no one could do such a thing to him. PW9 testified that the deceased was so angry that he was not coherent.

6. PW9 testified that after walking a distance of about 250 meters, the deceased spotted two men, one of whom PW9 came to know later as Stanley. The two of them told deceased that they knew where the two who stole deceased phone could be found. They were led by Stanley and the other to an open field where they met six youths.
7. PW9 heard deceased say that he had recognized one of them as the one who stole his phone. The deceased then grabbed one by the shirt and they started exchanging words to a point they almost fought. PW9 stated that he intervened by saying a fight was not necessary. The deceased who was still angry said that his landlord was a policeman.
8. PW9 testified that the six youth who had all sorts of crude weapons like sticks and bars started beating the deceased and even him. The deceased then fell down and PW9 heard one of the youth saying “ua” “kill”. PW9 said that he lifted the deceased and told him they must run away. PW9 ran alone because the deceased decided to grab someone instead.
9. PW9 said he ran back for the deceased and told him they had to run as they were outnumbered. This time the deceased heeded and ran as did PW9. PW9 jumped over the fence and got people to escort him to his room. PW9 woke up his landlord PW4. They went back to the scene of attack, accompanied by other people. They could not find the deceased. PW9 called PW1 who told him that she had not seen the deceased since 8.30 p.m.
10. It is only until the next morning that the deceased body was found not far from where the attack took place.
11. PW9 told the court that at the scene of attack he was able to identify the 1<sup>st</sup> accused as one of the six youths. PW9 stated that the 1<sup>st</sup> accused was armed with a knife. He saw him by moonlight as he, PW9 had walked quite close to where the 1<sup>st</sup> accused stood.
12. According to the pathologist who performed post mortem on the body of the deceased, the deceased died as a result of internal haemorrhage due to chest injuries due to blunt and sharp trauma.
13. The accused gave a statement under inquiry to PW11, CIP Gikunda who was not involved in the investigations. It was a self-serving statement because he admitted being at the scene of the incident but denies he knew anything. The accused retracted the statement saying he made no statement to the police.
14. The 1<sup>st</sup> accused was placed on his defence after the close of the prosecution case. The 2<sup>nd</sup> accused was however acquitted under section 306 of the Criminal Procedure Code. The reason for the acquittal of the 2<sup>nd</sup> accused is that none identified him in court as one of the six youth who attacked the deceased and PW9 on the material night. There was no iota of evidence creating a nexus between the 2<sup>nd</sup> accused and the deceased death.
15. The accused gave an unsworn statement. He told the court that on 21<sup>st</sup> November 2011 after spending the day working at a construction site he attended a party he was invited to. He said that he left the party at 9 p.m. with his cousin Benson. They both proceeded to visit a friend whose brother had been circumcised and he spent the night there.
16. On the following day, the accused stated that he proceeded to his paternal grandfather’s place in Kangundo where he remained until the 31<sup>st</sup> when he was arrested. The accused stated that he was not involved in the murder.
17. I have carefully considered the evidence adduced in this case together with submissions by Mr. Muoki for the accused persons and Ms. Maari Prosecution Counsel for the State.

18.The accused is charged with murder contrary to **section 203** as read with **section 204** of the **Penal Code**. **Section 203** creates the offence of murder and defines that offence in the following terms:

**203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.**

19.The prosecution must prove:

- a. That it is the accused, whether alone or in concert with another(s) stabbed the deceased.
- b. That the deceased died as a result of the stab wound(s).
- c. That at the time the deceased was stabbed, the accused or those other(s) with him had formed a common intention to either cause death or grievous harm to the deceased.

20.The circumstances which constitute malice aforethought, an essential ingredient for the offence of murder, are set out under **section 206** of the **penal code** as follows:

**Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—**

**(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 of 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;**

**(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.**

21.Having considered the evidence before me and the submissions by counsels, this case revolves around two critical issues which are that of identification and that of the nexus between deceased death and accused.

22.Mr. Muoki for the State urged that there was no proper evidence of identification in this case. Mr. Muoki urged that a key witness who said he knew who stabbed the deceased by the name Stanley was not called as a witness. Counsel relied on **Rep. vs. Kariuki & Others Nakuru CA No.20 of 2003** for the proposition that where the prosecution does not call a key witness the court is entitled to draw the inference that had such witness been called his evidence would have tended to be adverse to the prosecution.

23.Mr. Muoki submitted that PW9 was the sole identification witness and that as there were two groups of people, one of students and the other of six members of public, the identification by PW9 was questionable. Counsel relied on **Mbaabu Kinyua vs. Republic Meru CA No. 163 of 2011** for the proposition that the evidence of visual identification should be approached with caution.

24.Ms. Maari submitted that the 1<sup>st</sup> accused was placed at the scene of murder by PW7 who testified that he went with the deceased to the scene. Counsel urged that PW7 said that he saw the 1<sup>st</sup> accused at the scene and also noted that he was armed with a knife. Counsel urged that from the evidence of PW7, it was clear that the accused had an intention of killing.

25.Ms. Maari urged that PW7 had said that he recognized the 1<sup>st</sup> accused at the scene as the one he had met before within KM area and also at the pitch. Counsel urged that PW7 had said he saw the 1<sup>st</sup> accused at close quarters and his identification was reliable.

26. It was not PW7 but PW9.
27. Ms Maari submitted that the evidence of PW7 (9) was corroborated by the 1<sup>st</sup> accused statement under inquiry as he admitted being at the scene of the incident. Counsel urged further that after the murder the accused ran to stay with his grandparents in Kangundo for a whole month and urged that this was the conduct of a person with a guilty mind.
28. The evidence against the accused is twofold. The first is the evidence of PW9 and the second the 1<sup>st</sup> accused statement under inquiry given to CIP Gikunda, PW11. There are great similarities and corroborated facts between the evidence of PW9 and the 1<sup>st</sup> accused statement under inquiry.
29. In both statements it is clear that PW9 and the 1<sup>st</sup> accused acknowledge that they knew each other before the incident because they used to meet in the pitch during games. Secondly it is acknowledged in both statements that both PW9 and the 1<sup>st</sup> accused were at the scene of incident on the material day.
30. Thirdly, it is acknowledged that when the deceased reached the scene he grabbed one of the youths and declared that he was the one who stole from him. In both the evidence of PW9 and 1<sup>st</sup> accused statement it is clear that the accused was not the person the deceased grabbed or accused of stealing from him.
31. From these undisputed facts therefore identification of the 1<sup>st</sup> accused and his presence at the scene of incident is not an issue. PW9 correctly saw the 1<sup>st</sup> accused at the scene and recognized him having known him before.
32. Regarding whether there was a nexus between the 1<sup>st</sup> accused and the deceased death, PW9 stated clearly that the deceased grabbed one of the six youths they found at the scene. Instead of running away as PW9 suggested to him, PW9 returned to the scene and told the deceased to abandon the fight and run as they were way out numbered. That second time the deceased obliged and took off in a different direction as PW9 also ran a different direction.
33. At the point PW9 and deceased both ran from the scene, PW9 had not seen any attack on the deceased of the nature which caused his death. The doctor's finding at post mortem was deep laceration between the 6<sup>th</sup> and 7<sup>th</sup> rib which cut through the chest muscles with the inner chest wall and which caused internal bleeding. There were three (3) liters of blood in the chest cavity. The injury was by both blunt and sharp object.
34. PW9 saw the deceased run away from the scene just like him. PW9 did not see the deceased being wounded. The wound inflicted on the deceased and which led to his death was deep. It is doubtful he could have run with such an injury for a long distance.
35. It is PW9's evidence that he returned back to the scene with their landlord PW4 and others. Despite searching that whole area, they were unable to find the deceased. Also notable was the fact that they saw no blood at the scene. That is suggestive that it is likely the deceased was not injured at the time of the fight which PW9 witnessed at the scene.
36. The prosecution burden of proof is on the standard of beyond any reasonable doubt. The evidence adduced in this case, even though establishing beyond a doubt that the 1<sup>st</sup> accused was at the scene of fighting between the deceased and another, fell short of establishing that the deceased received the fatal injuries at the scene and at the time PW9 and 1<sup>st</sup> accused were present.
37. The deceased body was found the next morning. From PW9's evidence, the body was found at the same area where PW9, PW4 and others searched the night before without success.
38. There is a doubt created as to whether the deceased may have been stabbed after returning to the scene after PW9 and PW4 had searched the area. If he was stabbed at the time he took off with PW9 his body should have been found by PW4 and 9.
39. Since it is not clear at what point the deceased was stabbed, there is a doubt whether he was stabbed by one in the group where the 1<sup>st</sup> accused was.
40. I find the prosecution has failed to adduce evidence to create a nexus between the injury which led to deceased death and the 1<sup>st</sup> accused and his accomplices. The accused should be given the benefit of doubt in the circumstances.
41. I have come to the conclusion that the prosecution has failed to prove the charge against the accused to the required standard of proof. In the result the accused receives the benefit of doubt and accordingly I acquit him of this offence under **Section 322** of the **Criminal Procedure Code**.

**DATED AT NAIROBI THIS 12<sup>TH</sup> DAY OF NOVEMBER, 2015.**

**LESIIT, J.**

**JUDGE**