



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAJIADO**

**CRIMINAL CASE NO. 14 OF 2015**

**REPUBLIC.....PROSECUTION**

**-Versus-**

**DANIEL NGAYAI MUTALA.....ACCUSED**

**RULING**

1. The accused **Daniel Ngayai Mutala** faces a charge of murder contrary to **section 203** as read with **section 204** of the Penal Code.
2. The particulars of the charge are that the accused on the 22<sup>nd</sup> July 2008 at Kitengela Township in Kajiado District within Rift Valley Province murdered **Edward Kioko Mbolonzi**. The accused was arraigned in court on 16/10/2008 where he pleaded not guilty to the charge.
3. The prosecution opened its case and called 8 (eight) witnesses to prove the charge preferred against the accused.
4. The evidence that was led by the prosecution to establish the charge was that deceased worked as a teacher at Mavoko High School. The deceased had not been seen at his place of work. The wife of the deceased was telephoned and informed that his whereabouts was not known. In her testimony the telephone call came in on the 10/7/2008. She decided according to her evidence to travel to Kitengela to try and trace her husband, deceased herein. It was her evidence that on arrival at Kitengela on 11/7/2008 she sought the company of PW3 Joseph Muinde Ndua, a cousin to the deceased.
5. **PW1** and **PW3** then embarked to trace the deceased starting with the kiosk at Kitengela of a friend to the deceased. In their evidence before arriving at the kiosk they met with one Kazeo and owner of the kiosk. In their evidence Kazeo informed them that they had been beaten the previous night on 10/7/2008 by a senior officer at Namanga road.
6. It was further testimony of PW1, PW3 and in company of Kazeo they proceeded to the house of the deceased. In the house deceased was lying on the sofa set and on observation he was in pain though no physical injuries seen. PW1 and PW3 in their evidence decided to look for a vehicle to take deceased to Kenyatta National Hospital for treatment. The deceased was admitted at the hospital until the 22/7/2008 when he passed away.
7. **PW4 ALEX AMADIVA AMUGUNE** gave evidence and confirmed that he had employed the accused as a watchman guarding a building at Kitengela. In his testimony on the night of 10/7/2008 he heard noises outside the building. He went out of his house to confirm the nature of the noise only to find accused standing next to two men seated on the ground. It was at that stage according to his testimony that the watchman; accused herein informed him that the men were thieves. He further adduced evidence that they decided that the men be locked up. According to PW4 the men had injuries but did not know how and who inflicted them.
8. **PW5 ALFRED AMOL** testified that on 11/7/2008 he received a telephone call from PW4 that accused had fought with some people in the previous night. He recorded a statement with the police but was not at the scene where the alleged fight took place.

9. **PW7 CPL JACKSON BARU** adduced evidence as an investigating officer. He confirmed that he compiled the file, visited the scene and from the evidence gathered caused accused to be charged with murder.
10. According to **PW8 DR. JOSEPH NDUNGU** he conducted a postmortem on 25/7/2008 on the body of the deceased who had alleged to have died on 22/7/2008. In his opinion the deceased death was due to head injury secondary to blunt force injury.
11. At the close of the prosecution case Mr. Onchiri counsel for the accused submitted for a no case to answer against the accused.
12. In his submissions the prosecution failed to establish a prima facie case to prove the cause of death of the deceased. He argued before this court that prosecution did not call a star witness by the name Kaze mentioned in their case as one who was with the deceased on 10/7/2008. He also challenged the testimony of PW4 who allegedly saw deceased on the material day in company of accused and two other watchmen. The prosecution according to defence counsel Mr. Onchiri did not call the watchmen nor did PW4 offer evidence that accused was the one who assaulted the deceased.
13. Mr. Akula for the prosecution submitted that the accused killed the deceased. He relied on the evidence of PW4 and PW5 to place the accused at the scene of the crime.
14. The evidence relied upon to establish a charge of murder may be direct or circumstantial. Whether this evidence is direct or circumstantial, it must establish a prima facie case against the accused.

In a classical case of **BHALT VS. REPUBLIC 1957 EA 33z** it was held that;

***“Where a reasonable tribunal properly directing its mind to the evidence and the law would not proceed to convict, if accused decided to offer no evidence at the close of the prosecution case, then there is no case to answer.”***

15. From a line of decisions of this court it is settled beyond controversy that to establish a charge of murder the prosecution must prove;
  - a. ***That the deceased died.***
  - b. ***That the deceased died as a result of the act, conduct or omission of the accused.***
  - c. ***That there was malice aforethought that is the act or omission of the accused which caused the death of deceased was intentional, with knowledge, that death or of persons was probably consequence.***
16. From the record and evidence presented by the prosecution the deceased was allegedly assaulted on 10/7/2008. PW1 and PW3 took him to the Kenyatta National Hospital on 11/7/2008 where he underwent treatment. The deceased passed away on 22/7/2008. The deceased according to PW4 testimony was found on 10/7/2008 at Numeric Building Kitengela. There is no dispute that from PW1 and PW3 that his residence was not at Numeric Building. There is a gap in the prosecution case how deceased made his way to the building at night.
17. According to the prosecution evidence, it was not established where exactly deceased sustained the physical injuries. Secondly if this court was to accept the theory that Numerical Building was the scene of the crime, then the prosecution had a duty to prove that accused person and nobody else inflicted the injuries which caused the death of deceased. There is no direct evidence on that.
18. The prosecution relied on circumstantial evidence of PW3 and PW4. However it is trite law that for circumstantial evidence to sustain a conviction must point irresistibly to the accused. The burden of proving facts which justify the drawing of the inference to the exclusion of any other reasonable hypothesis than that of guilty of accused person is always on the prosecution and never shifts (See **REPUBLIC VS. KIPKERENG ARAP KOSKE 16 EACA 135**). In this case, it is possible that the deceased may have been attacked and suffered fatal injuries thereafter. I do not know. But I am satisfied that the circumstantial evidence against the accused as the attacker falls far short of the standard required by law.
19. According to the evidence deceased sustained injuries on 10/7/2008 and he passed away on 22/7/2008. The prosecution had a duty and must prove that he died thereafter as a direct result of the act, conduct or omission of the accused. In other words the harm or injury must be traced

directly to the act of the accused. The chain of causation must not be broken in order to hold the accused criminally liable for deceased death. The analysis of the evidence by PW1, PW3, and PW4 occasions a broken link on the chain of causation and thus affects *actus reus* of the offence.

20. Applying these principles to the current case, it is in my judgement that the sum total of the evidence raised a very strong suspicion regarding accused possible involvement in the deceased death. However in my finding, suspicion no matter how strong is insufficient to establish a prima facie case against the accused to warrant him to be placed on his defence. The accused is hereby acquitted under **section 306 (1)** of the CPC. He is at liberty unless otherwise lawfully held.

*Dated and delivered at Kajiado on 11/12/2015.*

**R. NYAKUNDI**

**JUDGE**

Representation

Mr. Onchiri for accused/Ms Mageto holding brief

Mr. Akula for the prosecution

Mateli Court Assistant