



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL CASE NO. 79 OF 2008

REPUBLIC

VERSUS

NZIOKA NDIKU..... ACCUSED

J U D G M E N T

1. The accused, **Philip Ndiku** was charged with the offence of murder contrary to section 203 and 204 of the Penal Code.
2. The particulars of the offence were that on the 3rd day of August 2008 at **Kithiwani village** in **Matungulu Location** in **Kangundo District** of the Eastern Province jointly with others not before court murdered **Stanley Mutuku Muli**.
3. The trial commenced before the **Hon. Lenaola J**, then proceeded further before **Hon. G. Dulu J**. I took over the case at the stage of the defence case.
4. The prosecution case was that on the evening of the 3/8/2008 the deceased, **Stanley Mutuku Muli** was found at the gate of the home of **Mwende** where he had been drinking chang'aa. The deceased was drunk and had sustained bodily injuries. The deceased was escorted home by his neighbours, PW1 **Peter Mulwa Kimeu**, and PW4 **Samuel Mwangela** to his wife PW2 **Rose Mbeneka Muli**. The following day on 4/8/2008, the deceased died while being taken to hospital.
5. On 4/8/2008, the accused and his co-accused who passed on in the course of the trial herein, reported to the village elder, PW5 **Daniel Mulwa** that they had been injured by the deceased the previous evening while taking liquor at **Mwende's** home. The accused and his co-accused then proceeded to **Kangundo Police Station** to make a report. Later during the day the village elder heard of the death of the deceased. PW7 Joseph who was also drinking at **Mwende's** home on 3/8/2008 explained how a quarrel ensued between the deceased and late **Nzioka** (co-accused who passed away) over drinks and the two started fighting. That during the fight the accused stabbed the late **Nzioka** in the eye. That when the accused found the deceased and the late **Nzioka** fighting with the late **Nzioka** bleeding the accused picked a piece of firewood and hit the deceased with the same on the head. The other people fled from the scene. The following day they learnt of the death of the deceased.
6. Investigations commenced. A postmortem carried out on the body of the deceased revealed that the cause of death was cardiopulmonary arrest due to severe head injury due to blunt trauma. The accused was subsequently charged with the present offence.
7. In his defence, the accused stated that he was on his way home with the late **Nzioka** when at about 6.00 p.m. they stopped at **Mwende's home** for some drinks. **Mwende** sold "Chang'aa" at her home. The deceased together with others were also at the same home taking drinks. The accused left shortly to buy tobacco. When the accused returned to the drinking den he found the deceased therein and the late **Nzioka** fighting. He started separating them. The late **Nzioka** then said that he had been stabbed in the eye by the deceased. The late **Nzioka** then picked a piece of wood and hit the deceased with the same on the head. The deceased fell down and did not get up although

he was still alive. The accused then reported the matter to the area chief then to **Kangundo Police Station**. The accused found the late **Nzioka** also at the police station and they went home together. The following day the late **Nzioka** made a report that he had been injured on the eye then went to hospital at **Kangundo District Hospital**. While at the hospital they received news that the deceased had passed away. The accused denied having struck the deceased with a piece of wood.

8. The evidence that links the accused to having hit the deceased with a piece of wood is that of PW7, **Joseph Ngima Ndolo**. According to the evidence of PW7, the offence occurred between 5.00 p.m and 6.00 p.m. inside **Mwende's house**. It was PW7's evidence that after the late **Nzioka** was stabbed on the eye by the deceased during a fight, the accused hit the deceased on the head with a piece of firewood. It is evident that the people imbibing in liquor taking were from the same neighbourhood and referred to each other by name. PW7 knew the accused by the name **Mutuku**. PW7 was quite categorical in his evidence that he saw the accused strike the deceased on the head with the piece of wood before he left. The evidence of PW1 is that of recognition during day time and is therefore free of error.
9. The evidence of the two neighbours (PW 1 & 4) who escorted the deceased home and the evidence of the wife to the deceased (PW3) show that the deceased was injured, could not even walk out of the home where he had taken drinks and passed on the following day while being escorted to hospital.
10. The doctor, PW6 **Dr James Mwoki** confirmed that the deceased died as a result of the head injury due to blunt trauma. The doctor's evidence corroborated that of PW7 on the cause of death.
11. The evidence of the village elder, PW5 **Daniel Mulwa** confirms that a report of the incident was made and he referred the matter to the police. The Investigating Officer did not however testify.
12. The accused however denied the offence and stated that it was the late **Nzioka** who fought with the deceased and also hit the deceased on the head with a piece of firewood. Well, dead people tell no tales. It would therefore be easy to blame everything on the late **Nzioka**. However, there is no reason why PW7 who was also at the scene would frame up the accused. It is noteworthy that the accused went to make a report to the area assistant chief on the material day then to the villager elder the next day and also went to **Kangundo Police Station** where he says the late **Nzioka** made a report then accompanied the late **Nzioka** to the hospital. If the accused was innocent and he was not injured, one wonders what he had gone to report to the village elder and to the area chief.
13. After considering the evidence from both the prosecution and the defence, I am satisfied that the prosecution case was proved beyond reasonable doubt for the lesser offence of manslaughter contrary to **section 202** of the **Penal Code**. There was no intention to kill. Consequently, I find the accused guilty for the offence of manslaughter and convict him accordingly.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 17th day of February 2014.

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JUDGE