REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL CASE NO. 72 OF 2008

REPUBLIC ……..…….....…….....PROSECUTION

VERSUS

NICHOLAS MUEKE MWANIA…..…..…..……..1ST ACCUSED

JONES MUTANGILI MWANIA……..…...…….2ND ACCUSED

THOMAS MUUO MWANIA ….....….....3RD ACCUSED

JUDGMENT

1. **Nicholas Mueke Mwania , Jones Mutangili Mwania and Thomas Muuo Mwania** hereinafter;-

"Accused 1"

"Accused 2"

"Accused 3" respectively are charged with the offence of murder contrary to **Section 203** as read with Section **204** of the Penal Code.

Particulars thereof being that on the **21st** day of **June, 2007** at Kithumani Village, Kakutha Location in Makueni District within the Eastern Province, jointly with another not before court murdered **Richard Ndula Mwania.**

2. To prove the case the Prosecution called 7 witnesses.

PW1, **Dorcas Mueni Muia,** the wife to the deceased stated that on the **21st June, 2007**, she went to till land with her husband. They had been given the land by her late father-in-law. Her brother-in-laws were not happy about the arrangement. As a result they had a land dispute. On the fateful date as they cultivated the land her husband brought to her attention the presence of some people on the farm. It turned out to be Accused 1 and 2 who are her brother-in-laws, Accused 3 their nephew and accused 1's son, **Kimeu.** Accused 1, was sitting down, his son stood beside him. Accused 2 and 3 were also standing. When the deceased approached them, Accused 2 said they had to accomplish their mission. Accused 1 stood and cut him with a panga at the rear part of his head. The deceased fell down and was cut on the head and also at the back side of the head by Accused 2. She ran away encountered their worker, **Muthenya** whom she told what had happened. She also reported the matter to the chief, **Kithumani.** On cross-examination, she denied allegations that accused 1 and the deceased fought at the scene of the incident or that the deceased had grabbed that parcel of land but stated that there were many fights over the land since 1993.

3. PW2, **Joshua Muthenya Wambua** said he was harvesting beans with the deceased prior to him leaving to go and join his wife. He had a hoe. A while later, he heard screams. Ongoing to the scene he encountered PW1 who told him that the deceased had been killed by his brothers. He however, did not see them.

4. PW3, **Shadrack Leve Mulwa,** the area Chief received a report from PW1. He moved to the scene with three (3) of his Assistant Chiefs and found the body of the deceased. He notified the police. He went back to his office. At 1.30pm, the accused person and one **Mwasya** went to his office and reported that they had a quarrel with the deceased and M**utangili** had a panga which may have cut the deceased. They wanted to go and report the matter to the police but he advised them to wait for the OCS. The OCS arrived and interrogated them. Accused 3 led them to a bush some 1km away from the scene where a panga wrapped in a "Nation" newspaper was recovered.

5. PW4, **Godwin Nyamakio Mwania** a brother to the deceased as well as Accused 1 and 2 and an uncle to Accused 3 identified the body of the deceased to the Doctor who performed the postmortem. He was not present when the deceased died but stated that the deceased had taken possession of a portion of land that their late mother used to cultivate. The action made him call Accused 1 to preside over a meeting in an endeavor to resolve the problem.

6. PW5, **No. 38287 P.C. Michael Kilongonzi** went to the chief's office where he found the accused persons and re-arrested them. He visited the scene where he found the deceased body facing downward. It had a big cut wound on the back of the head. Accused 3 then confessed as to the whereabouts of the murder weapon. He led them to a thicket some 750 meters away from the scene where they recovered a blood stained panga. On cross-examination he said Accused 3 never said he knew who had used the weapon.

7. PW6, **No. 231069 C.I. Wilfred Mogere** was one of the officers who collected the body from the scene and re-arrested the accused persons who were at the chief's office. He investigated the case and charged the accused persons.

8. PW7, Dr. Sammy Masyuki a pathologist performed a postmortem on the body of the deceased. He formed an opinion that the cause of death was severe brain injuries and hemorrhage following a deep cut wound to the head. He was attacked from behind.

9. When put on their defence the accused persons opted to give evidence on oath. Accused 1 stated that he was the eldest of the five (5) siblings. Prior to their father's demise he showed each one of them a place to construct a homestead. They were also to use the land for purposes of farming. On the **21st June, 2007** he was at **Kithumani** Market with his son **Marvin Mueke** and **Accused 2** when he was arrested by the police from **Sultan Hamud**. They were held in custody for 40 days prior to being arraigned in court on the **1st August, 2007.** It was in court that he was told he had caused the death of his younger brother. At the time of his arrest the Assistant Chief told them that his sister-in-law had reported that the deceased had been killed by his brothers. He denied having been on the farm as alleged. He denied an allegation that there was a land dispute between them as brothers. He said his relationship with his sister-in-law was good.

10. Accused 2 said on the fateful date he was at Kithumani Market where he had gone to have lunch and also needed to see his brother (*Accused 1*) who had arrived the previous night. They were arrested. It was alleged he was a suspect in his brother's murder. Accused 3 was arrested thereafter. They were charged in **HCCRC No. 331 of 2007** which was later terminated. He saw the murder weapon in court. He denied having had any dispute with the deceased.

11. Accused 3 said he was a student in form three (3) at the time of his arrest. He was arrested after the police had arrested his co-accuseds. He stated that the police officer who arrested him sought to know if he was **Mwasia.** He told him he was **Kivuva** but he argued that he was **Mwasia** and ordered him to enter the motor-vehicle. He found his maternal uncles and co-accuseds already in the motor-vehicle. He denied being connected to his uncle's death. He denied having seen the deceased on the day he died. He

denied having seen the murder weapon prior to it being produced in court. He denied having led the police to where it was recovered.

Issues to be determined are;-

i. Whether the accused persons caused the death of the deceased.
ii. Whether they had malice aforethought.

12. Evidence adduced proving the fact that the deceased was found dead on his late father's land was not in dispute. A postmortem was carried out on his body. The doctor who conducted it formed an opinion that the cause of death was severe brain injuries and hemorrhage following a deep cut wound to the head, having been attacked from behind. The head in particular had a deep scalp cut wound that measured about 14cm; fractured skull and exposed brain to the right parieto- temporal area and a fractured right mandible.

13. The evidence as to who caused the injuries the deceased sustained was adduced by PW1. She was the sole witness present at the time. Her evidence to that fact was therefore of a single witness. The law is clear; no particular number of witnesses is required to prove a fact. This means that a conviction can be founded on evidence of a single witness. (see ***section 143 of the Evidence Act, Cap 80, Laws of Kenya).*** However, there is always need to test such evidence with greatest care especially when the offence occurred in circumstances that may be difficult to tell who actually did what. (see ***Mburu and Another versus Republic [2008] 1 KLR 1229, Ogeto versus Republic 2004 KLR 14).***

14. This is a case where I have to uphold the cautionary rule because the deceased was a brother to the 1st and 2nd accused persons. There existed a dispute over land they were to inherit from their demised father. It would be possible for PW1, a wife to the deceased to state anything that may be favourable to the prosecution's case. With this in mind I do proceed to analyze the evidence adduced.

15. PW1 stated that while in company of the deceased they found the accused persons with **Kimeu** the son to the 1st accused on a parcel of land where the deceased had harvested beans. Accused 1 sat down while the rest stood. She stated further thus:-

"***When my husband approached them, the 2nd accused said that they should accomplish their mission. The 1st accused stood up and cut him with a panga behind his head. After being cut, the deceased fell down, and the 2nd accused cut him on the head (at the back) and brain matter came out … the 3rd accused did not say anything or do anything to my husband. Same with Kimeu, the 1st accused's son… the group all had pangas including Kimeu and the 3rd accused"***

16. In their defence the accused persons denied having been at the scene of the crime. Accused 1 said he was arrested at 4.00pm while at **Kithumani** market with his son, **Marvin Mueke.** On cross examination he stated that his brother's death was brought to his attention by the chief. It was his evidence that he arrived on the material date in the morning. He denied having heard any noise although they live on the same farm. By the time he was leaving for the market, he denied having heard anything. Accused 2 stated that he learnt of his brother's death from the chief after his arrest while at the market.

17. Although the accused persons denied having been at the scene, following instructions received from them, their advocate duly cross-examined the witnesses. In particular it was suggested to PW1 that the 1st accused fought her husband and she replied thus:-

"***The 1st accused and my husband never fought at the scene… I do not know if the accused persons voluntarily submitted themselves to the Chief… I was present when my husband was killed."***

18. PW1 must therefore be believed when she states that the accused persons were at the scene of crime and acted accordingly per her testimony. Looking at the nature of injuries sustained by the deceased, the injuries were definitely occasioned by other people who used sharp objects. Evidence adduced proves

beyond reasonable doubt that the 1st and 2nd accused persons committed the act using the panga they had which caused the death of the deceased.

19. With regard to the second issue, in the case of **David Mburu versus Republic [2014] eKLR** the Court of Appeal held thus:-

"For a person to be convicted of the offence of murder, it must be proved beyond any reasonable doubt that he caused the death of the deceased with malice aforethought which is deemed to be established by evidence providing any one or more circumstances set out in section 206 (a) to (d) of the Penal Code".

20. Section 206 of the Penal Code provides thus;-

"Malice aforethought shall be deemed to be established by evidence proving any one of 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 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 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. The injuries sustained by the deceased were serious. He was hacked to death. Persons who caused the resultant *actus reus* definitely had an intention to cause grievous harm to the person. PW1 alluded to some dispute that existed between the deceased and his siblings over the land. PW4 also confirmed existence of a disagreement. He alluded to an incident that occurred on **1st June, 2007** which resulted into convening of a meeting on the **26th June, 2007.** The deceased had taken possession of land that their late mother had been cultivating. Accused 1 being the eldest presided over the dispute as he (PW4) claimed a share of that parcel. The accused persons motive could be predicated upon the facts that the deceased had already taken over possession of a parcel of land that belonged to their parents previously on pretext that it had been allocated to him.

22. The accused persons were on a portion of land that the deceased had planted beans and had harvested. Accused 1 had travelled from far (*Kitale*). Accused 2 is quoted as having stated;-

"… They should accomplish their mission…"

This was a suggestion that they had a common intention to atleast accomplish something. The deceased went to where they were. PW1 says they acted swiftly such that he (deceased) had no opportunity to utter even a word. The accused persons having denied being at the scene, it cannot be imagined that they acted by defending themselves from any action. Whatsoever prompted them, it is obvious that they acted with the intention to at least cause some grievous harm. In the premises, I find that malice aforethought was established.

23. Evidence adduced by PW1 absolves the 3rd accused from having either acted or uttered anything in respect to what transpired. Evidence was however led that he is the one who led to the recovery of the panga believed to be the murder weapon. He voluntarily showed PW3 and PW5 where it was hidden, an allegation he denied vehemently. PW3, said the weapon was found wrapped in a "*Nation*" newspaper, a kilometer away from the scene. PW5 said the panga was not bloodstained. It was however not sent to the Government Chemist for analysis. On recovery the accused did not divulge who had used it. With this kind of evidence it cannot be stated with certainty that it was indeed the murder weapon. In the

premises, there is no proof beyond reasonable doubt that the 3rd Accused had a common intention with his co-accuseds in committing the offence. Consequently, he is acquitted of the offence of murder as provided by **Section 203** of the **Penal Code.**

24. It was submitted by the defence counsel that the accused persons were held in custody for **forty (40)** days prior to being arraigned in court. He prayed for their acquittal on that ground, stating that it was an unlawful detention that was not explained. In the case of ***Moses Kinoti Nkoroi & Others versus Republic HCCR. Appeal No. 128, 129 and 130** of **2008.*** It was stated thus:

"…***a delay in arraigning a suspect in court does not necessarily entitle the suspect to an acquittal. (See Dominic Mutie Mwalimu versus Republic Criminal Appeal No. 217 of 2005; and Evanson K. Chege versus Criminal Appeal No. 722 of 2007).***

If any Constitutional right of an accused person is violated, the remedy lies not in an acquittal but an action in a Civil Suit for damages. In Julius Kamau Mbugua versus Republic Criminal Appeal No. 50 of 2008, this court stated that-

The breach of a right to personal liberty of a suspect by police perse is merely a breach of a Civil right, and Section 72(b) expressly provides that such a breach is compensable by damages")

25. In the premises the accused persons cannot be acquitted on the stated ground.

26. With regard to Accused 1 and 2, I find the prosecution having proved beyond any reasonable doubt that they caused the death of deceased with malice aforethought. They are therefore guilty.

27. Accordingly, they are convicted of the offence of murder as provided by the law.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **20TH** day of **MAY, 2014.**

L.N. MUTENDE

JUDGE