



NO. 268/2014

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL CASE NO.33 OF 2009

REPUBLIC PROSECUTOR

VERSUS

MUTINDA MWENDAKA NDAMBUKI 1ST ACCUSED

MUTUA MUSANGO WANGUGU 2ND ACCUSED

R U L I N G

1. **Mutinda Mwendaka Ndambuki** (Accused 1) and **Mutua Musango Wangugu** (Accused 2) are charged with the offence of Murder contrary to **Section 203** as read with **Section 204** of the Penal Code. Particulars of the offence thereof being that on the 28th day of April 2009 at **Itithini village, Katangi Division** in **Yatta District** of the **Eastern Province**, jointly murdered **Peter Mutunga** (deceased).
2. The facts of the case are that on the 28th day of April 2009, the deceased was at **Thumbwani** bar where he drank alcohol from about 6.30 p.m. to 7.00 p.m. One **Kyalo** joined him. They drank until 9.00 p.m. They went in search of a place to sleep. Thereafter they opted to go home. He was attacked that night and fatally injured. The matter was reported to the police. Investigations carried out culminated into the arrest of the accused persons. They were charged.
3. At the close of the prosecution's case they had called **seven (7)** witnesses. PW1, **Nancy Nduku Mulu**, an attendant at **Budalangi** club heard a person call the name **Mutua** asking him to say if it is money he needed. She heard sounds of something being dragged and metal objects being hit. She had seen the **two (2)** accused persons at the bar.
4. PW2, **Kyalo Wambua Nzeki** met the deceased at **Kiundwani** bar. He also saw the **two (2)** accused persons at the bar. On seeing them they left as the deceased said that Accused 1 had threatened to kill him. They parted ways with Peter as he had to check on his heads of cattle. Thereafter he heard screams. He went to check only to find Accused 1 lying on the deceased. He threatened to kill him if he confessed what he had seen.
5. PW3, **Christine Katungwa** escorted the deceased to where he would sleep that night. On the way while in the company of **Kyalo** they encountered accused 1. The deceased changed his mind and made a decision to go to **Katangi** instead of sleeping within the area. She left him going there. Later she heard the deceased calling out **Mutinda** asking why he was removing his clothes. She found the deceased's body near the **Budalangi** bar in the morning.
6. PW4, **Moffat Mutuku Kimeu** an assistant chief received a report of a lifeless body lying at **Itithini** market. He reported to the police.
7. PW5, **Paul Waweru Kangethe** a government chemist analyzed items submitted to the chemist by the police and came up with a report thereto. PW6, No. 81221 **P.C. James Ndegwa** investigated

- the case and formed an opinion to charge the accused persons. PW7, No. 51769 **Sgt. Chrispinus Mulama** received the report from the Assistant Chief and also participated in the investigations.
8. At the close of the prosecution's case, evidence on analysis carried out by the government analyst established that **item "D"** a pair of trouser indicated as belonging to **Mutinda Mwendaka Ndambuki** (Accused 1) was lightly stained with human blood of group B. The blood sample of the deceased was found to be of group B. The analyst opined that the blood stains could have come from the deceased after the injury.
 9. PW6, the investigating officer found the accused persons in custody. He noted that the deceased had been dragged from **Budalangi** bar to where the body lay. He took possession of the accused's clothings. On cross-examination he stated that he did not know under what circumstances the clothes were removed from the accused.
 10. PW7 explained that he got the accused persons relatives to get their clothes whereby he made them remove the ones they wore which he kept in his custody. The manner in which the clothes were recovered and the circumstances in which they were recovered had to be proved by some inventory being made of their status which was not the case herein. It can therefore not be said with certainty that they were in the state they were in at the time of being submitted to the government chemist for analysis.
 11. None of the witnesses who testified gave direct evidence as to the assailant of the deceased.
 12. At the close of the prosecution's case it was mandatory for the evidence proving death to be adduced. No such evidence was tendered. It could not be concluded that the deceased died as stated and from the alleged injuries. In the premises it cannot be concluded that the accused persons herein did cause the death of the deceased. Consequently they are not guilty. They are hereby acquitted under **Section 306(1)** of the Criminal Procedure Code.

DATED, SIGNED and DELIVERED at MACHAKOS this 19TH day of MAY, 2014.

L.N. MUTENDE

JUDGE