



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

**CRIMINAL CASE NO. 50 OF 2008**

**REPUBLIC ..... RESPONDENT**

**VERSUS**

**MORRIS MUTISYA MAKAU**

**JOSEPH MUTUKU MUSYIMI ..... ACCUSED**

**J U D G M E N T**

1. The 1<sup>st</sup> Accused, **Morris Mutisya Makau** and the 2<sup>nd</sup> Accused, **Joseph Mutuku Musyimi** are charged with the offence of murder contrary to **section 203** and **204** of the **Penal Code**.

The particulars of the offence were that on the 7<sup>th</sup> day of April 2007 at Kola Market in **Makueni District** within the **Eastern Province** jointly murdered **No.31892 PC Michael Mutuku Muli**.

2. The prosecution called a total of nine (9) witnesses in support of their case. The prosecution case is that on the material day, the deceased, **PC Michael Mutuku Muli** was a police officer attached to **Kola Police Station**. On the material day, the deceased was seen at various bars in Kola market. Among the people who saw him were PW2 **Jackson Mwangangi** and PW8 **Samson Kieti**. The deceased was last seen by PW3 **Geoffrey Njue** leaving "Picnic Bar" with the 1<sup>st</sup> Accused. Later the same night at about 9.15 p.m. the 2<sup>nd</sup> Accused sought help from a nurse, PW4 Magdalene Mwikali Kingola to attend to the deceased who was said to have fallen on the road side. The 2<sup>nd</sup> Accused lead the nurse to the scene where they found the body of the deceased. The deceased had a crushed head and a block of stone was found next to the body. The 1<sup>st</sup> Accused appeared at the scene and disappeared shortly thereafter. Another medic, PW5 Evans Komboi Mutiso also arrived at the scene but it was too late to attend the deceased who was already dead.

3. The death of the deceased was reported at the police station and investigations commenced. The 1<sup>st</sup> Accused was arrested. The 1<sup>st</sup> Accused mentioned the 2<sup>nd</sup> Accused who was also arrested. Photographs of the scene were taken by PW6, PC Joseph Mutie a scene of crime officer. A postmortem was carried out on the body of the deceased after the body had been identified to the doctor by PW1 Joseph Muteti Mwonga, a brother in-law to the deceased. The doctor's opinion was that the cause of death was cardio pulmonary arrest secondary to massive intracranial bleeding secondary to high impact force.

4. The 1<sup>st</sup> and 2<sup>nd</sup> Accused were subsequently arrested and charged with the offence herein.

5. When called upon to defend themselves, each accused elected to give unsworn evidence. No witnesses were called.

6. The 1<sup>st</sup> Accused denied the charge and stated that he was arrested and asked if he knew the deceased. The 1<sup>st</sup> Accused stated that he answered in the affirmative and explained that he had seen the deceased the previous day at about 10.00 in the morning. The 1<sup>st</sup> Accused was then escorted to Makueni Police Station and charged with the offence herein.

7. The 2<sup>nd</sup> Accused stated that he was arrested from home and beaten up then escorted to Makueni Police Station and charged with the offence herein. He further stated that he found the deceased having fallen down on the road and he called a medic who telephoned some police officers. The 2<sup>nd</sup> Accused denied the offence.

8. At the close of the defence case, written submissions were filed by the counsels from both sides. I have duly considered the said submissions.

9. This case has been through the hands of four judges before I finally took it over at the judgment writing stage.

10. I have combed through the evidence of the nine (9) prosecution witnesses but failed to find any evidence that links the 1<sup>st</sup> and 2<sup>nd</sup> Accused to the offence herein. The circumstantial evidence adduced against Accused 1 and 2 is that the 1<sup>st</sup> Accused was seen with the deceased. The 1<sup>st</sup> and 2<sup>nd</sup> Accused were then seen at the scene where the body of the deceased was found. The circumstantial evidence is weak and is capable of other innocent explanation. The investigating officer (PW9) alluded to a confession made by the 1<sup>st</sup> Accused. However, no confession was recorded and produced in court as an exhibit. It seems the accused persons were arrested and charged on basis of suspicion. However, suspicion only cannot form a basis for the conviction of an accused person.

11. My view of the prosecution case is that it was too weak to have even warranted placing the accused persons on their defence. A conviction is based on the strength of the prosecution case and not the weakness of the defence case. It matters not that the accused persons merely denied the offence and only talked about their arrest.

12. With the foregoing, I find the prosecution has failed to prove their case beyond reasonable doubts and acquit both Accused 1 and 2.

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**B. THURANIRA JADEN**

**JUDGE**

**Dated and delivered at Machakos this 31<sup>st</sup> day of July 2014.**

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**B. THURANIRA JADEN**

**JUDGE**