

REPUBLIC OF KENYA

High Court at Kakamega

Criminal Case 21 of 2010

REPUBLIC PROSECUTOR

VERSUS

KELVIN MOI LIPWONI ACCUSED

J U D G M E N T

The accused is charged with the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code**. The particulars of the offence are that the accused *on the 7th day of July 2010 at Ikholi village, Shitoli sub-location, Shirumba location, Kakamega East district in Western Province, murdered MUSA ABDALLA LUYUNDI.*

The prosecution called eight witnesses. **PW1, PETRONILA KHADI** was the wife of the deceased. On the 7th of July 2010 at about 9.00 p.m. she in her house when the deceased arrived home. She opened the door and the deceased fell on a table. On inquiry she saw the deceased was bleeding on the head and jaw. The deceased said “*sikio*” “*Moi*” “*Moi*” – “*ear*” “*Moi*” “*Moi*”. PW1 went to call the deceased’s parents and the deceased was taken to Kakamega Provincial General Hospital. PW1 visited the deceased on 8th of July 2010 at the hospital but the deceased could not talk. The deceased died that day at about 7.00 p.m. According to PW1 when the deceased mentioned “*Moi*” “*Moi*” he could only have meant the accused who goes by that name and lives in the neighbourhood. PW1 further testified that on 8th of July 2010 she passed by the scene where her husband had been beaten and recovered a mosquito net and a Marvin cap. It is PW1’s evidence that the Marvin cap belonged to the accused who had been wearing it on daily basis. The scene was located 70 meters away from her home. There was no grudge between the deceased’s family and that of the accused.

PW2, ABDALLA LUYUNDI is the deceased’s father. He got information that the deceased had been injured on 7th July 2010 at about 9.00 p.m. while at his home. He went to the deceased’s home and saw him bleeding from the head, nose and mouth. The deceased could not talk. They took the deceased to hospital but he died the following day at about 7.00 p.m. On the 13th of July 2010 PW2’s other son by the name **JUMA (PW7)** was cutting grass when he recovered a cap that belongs to the accused. By then the accused had been arrested. **PW3, JOSEPH ASHIONO** went with PW2 to Kakamega General Hospital on 7th of July 2010 when they took the deceased for treatment. The next day PW3 found the accused with other people drinking chang’aa and informed them about the status of the deceased. According to PW3 it appeared that the accused was aware of the deceased’s injuries. PW3 informed the area vigilante members and the accused was arrested at his home.

PW4, FREDRICK SHIKOKOTI was the Shitoli sub-location assistant chief. He was informed by PW3 that the deceased had been attacked and was hospitalized at Kakamega General Hospital. He was informed that the accused and one **GEOFFREY KHAMUNYU** had been heard talking about how they had injured the deceased. He arrested the two people and took them to Isulu Police patrol base. **PW5, KABAKA GEOFFREY**, testified that the deceased was his workmate. On the 7th of July 2010 he was at his home when the deceased went there. They stayed together and watched football upto about 7.00 p.m. when the deceased left. The following day PW5 heard that the deceased had been assaulted. He went to see the deceased at Kakamega Hospital and he informed the Headmaster of the school where the deceased used to teach. According to PW5 the deceased was carrying a paper bag which he said had a mosquito net. While in his house they had taken chang’aa.

PW6, DR. DICKSON MCHANA, produced the post mortem report on behalf of Dr. Nyikuli who had performed the post mortem on 15th July 2010. According to the post mortem report the deceased had a cut wound on the right scalp 12 cm. long, bruise on the left hand and linear fracture on the left parietal bone of the skull. The cause of death was severe head injury. **PW7, JUMA KHAMOI LUYUNDI**, testified that on the 13th of July 2010 at about 11.00 a.m. he was clearing the road at their home in preparation of the burial when he recovered a hood hidden. He picked it and a boy by the name **ABDALLA** told him that it belonged to **KELVIN MOI**, the accused. The deceased's wife also claimed that the hood/cap belonged to the accused.

PW8, SGT. ANTONY GITAVI, was based at the Isulu patrol base as the officer in-charge. On the 9th of July 2010 he was informed about the death of the deceased. He went to the deceased's home and visited the scene where the deceased had been attacked. He recovered a paper bag. He went to the deceased's house and met PW1 who showed him the clothes the deceased had put on that night. PW1 told him that the deceased had mentioned the name of "MOI". On the 13th of July 2010 he got a call from the deceased's father (PW2) that they had recovered a Marvin/cap and it had been identified as belonging to the accused. The accused was arrested and charged with the offence.

The accused was put on his defence and denied committing the offence. In his sworn evidence he testified that he knew the deceased. On the 7th of July 2010 he was at his home when he was arrested at about midnight. He was taken to Kakamega police station where he was later charged with the offence. The deceased was his neighbor.

According to the prosecution evidence the deceased mentioned the name "MOI" to his wife (PW1). The evidence connecting the accused to the offence is the mentioning of his name and the recovery of the Marvin cap. The main issue to be determined is whether the deceased made a dying declaration and gave the accused's name as the one who had assaulted him. No one saw the accused assaulting the deceased. It is the evidence of PW3 that when he saw the accused and other people drinking and informed him about the status of the deceased, the accused appeared to have been aware. According to PW3 this was on 8th July 2010. The deceased was assaulted on the 7th of July 2010 and it is possible that the information about the attack could have already spread in the village. By the time PW3 was talking about the injuries it was 7.00 p.m. and it is possible that the accused had heard about the incident. Although PW1 testified that by mentioning the name "MOI" the deceased meant the accused, I am not satisfied that that was the case. It is not clear that the accused is the only person who goes by the name "MOI" in the entire sub-location.

According to PW1 she passed by the scene where her husband was attacked and recovered a mosquito net and a marvin cap. This was on the 8th of July 2010. It is the evidence of PW7, JUMA KHAMOI that on the 13th of July 2010 he recovered the hood which is the same marvin cap while cutting grass. Other than the allegation that the marvin belonged to the accused there is no direct evidence connecting the accused to the marvin cap. It is also not clear when the same was recovered. There was no sketch plan of the scene of crime and the court cannot conclude that the same was recovered at the scene. It is the prosecution evidence that the deceased was drunk. According to PW5 the deceased left for his home at 7.00 p.m. While according to PW1 the deceased reached home at about 9.00 p.m. It is possible that the deceased took more alcohol elsewhere after having taken chang'aa at PW5's home.

I do find that the prosecution has not proved its case beyond reasonable doubt against the accused. The deceased did not give the name of the accused as the person who had assaulted him. The mentioning of the name "MOI" is not a conclusive to warrant a finding that indeed it is the accused who had assaulted the deceased. In the end the accused is hereby acquitted of the offence of murder contrary to **section 203** as read with section 204 of the **Penal Code**. The accused shall be at liberty unless otherwise lawfully held.

Delivered, dated and signed at Kakamega this 31st day of January, 2013

SAID J. CHITEMBWE
J U D G E