



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MERU**  
**CRIMINAL CASE NO. 47 OF 2009**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**JAMES MURIUNGI .....ACCUSED**

**JUDGMENT**

1. The accused is charged with murder contrary to section 203 as read with section 204 of the penal code. The particulars of the offense are that on 24th day of March, 2009 in Maburwa sub-location Buuri Location Maburwa Village Tigania District within Eastern Province jointly with others not before court murdered Charles Mwenda Kinene.
2. The prosecution called a total of 8 witness. The evidence of PW1 Joseph, PW2 Paul, PW3 Samuel and PW6 Kamunde was similar. Their testimony was that on the 24th March 2009 between 1 and 2 pm they met the deceased person being pushed by the three people, James Muriungi, identified as the accused in the case. James Linus Muketha and Geoffery Manyara AKA Manyara Thagicu. Each of these witness testified that the accused and his group were armed with crude weapons which included sticks, slashes and pangas. By the time the saw the deceased in the company of the three men he had been thoroughly beaten and was bleeding profusely all over the body. It was their testimony that the 3 men were looking for the assistant Chief PW5 near Lii, at Maburwa shopping center which is near the Assistant Chief's office. PW1 and 3 saw the Assistant Chief escort the three together with the deceased towards his office.
3. PW4 was Teresina the mother of the deceased. She said that on that morning she sent her son the deceased to their shamba at Lukisi. That at 1 pm one Muriithi went to her home and reported to her that he has seen the deceased having been beaten. PW4 testified that she accompanied Trimurti to where her son the deceased was, near a canteen used as a hotel at Lii Market. She said that the deceased was in the company of three people who were armed with stones, slashes, pangas and sticks. She identified the three people as James Muriungi who she identified in the court as the accused. James Muketha and Manyara Thagichu. PW4 stated that she spoke with the 3 men and asked them not to beat the deceased any further but to take him to the police station to which they replied, threatening her that they could also kill her. She said that she left them and that on the following day she sent Trimurti to the police Station to check on the deceased only to be told he died the same day and his body was lying at the mortuary.
4. The Assistant Chief was PW5 James Kimathi Igweta. His evidence was that at about 2pm on the 24th March, 2009 he was inside his office when he heard noise outside. That he went to check and saw about 50 young men who were pushing and shoving a young man whose hands were tied with

ropes and on whose back was tied a sack and inside the sack was a shirt, tea leaves, rice, sugar and maize flour. He said that the group of youth accused the man of being a thief and they told him that the things tied on the back is what he had stolen after breaking into kiosks in the area. PW5 testified that he asked the group of youth who were armed with crude weapons to put down their weapons and to sit down but instead the youth scattered in different directions and only 3 were left. He said 3 who were left were the accused persons identified as Muriungi, one Thurania and one Manyara. PW5 testified that apart from the three were left behind he had also identified from the group of 50 one Mururu, Kairi, Mwitte Muthinja and Patrick Ikiio.

5. PW5 narrated the trip Tigania Police Station in which the three men including the accused accompanied him and the deceased and how the deceased died before they reached the police station. PW5 testified that when he talked to the deceased concerning his injuries, the deceased did not name any particular person who stuck him but said generally that it was the group which escorted him to the Assistant Chief who had injured him. PW5 confirmed that various kiosk owners in his area of jurisdiction had reported incidents of kiosk breaking and stealing before the material day. The Assistant Chief stated that among those who had kiosks in that area included the accused, one Thurania, one Manyara, one Mwitte Muthinja and one Munyi. He stated police at Tigania accompanied the body and him to Meru Hospital Mortuary where the deceased body was taken. P.C Tari was the police officer who accompanied the Assistant Chief to the hospital.
6. The examination of the body of the deceased by Mr. Og'ombe carried out on 31st March revealed that the body had multiple bruises and fracture of the occipital and parietal region of the head, with extradural hematoma. The cause of death was head injury. Dr. Catherine Mwendu PW8 produced the post Mortem report on behalf of Dr. Og'ombe.
7. The accused person gave a sworn statement. He accounted for his movements between 8 am and 12pm on the 24th March, 2009. he explained that he had attended a seminar for members of his Butoonwo Self Help Group at Maburo Village. He said that after the seminar at 12pm he proceeded towards Lii Village where he met a group of about 50 people among them he recognized James Mwitte, Kairo, Patrick Koronya, Munyi, Geoffrey Manyara, James Thurania and Richard Ikamati. He also saw the deceased who was his personal friend and who had been beaten and had his hands tied to the front and a sack tied to his back. The accused stated that James Mwitte informed him that they had apprehended the deceased for stealing from them the accused stated that he spoke with the deceased who pleaded with him not to leave him in the hands of the group because the group wanted an opportunity to kill him.
8. The accused stated that he persuaded the group to take the deceased to the Assistant Chief which they agreed and proceeded to his office. He said that when the Assistant Chief came out of his office and commanded the group sit down, lay down their weapons and to be quite, the group instead started running away. He said that they all ran away except him Geoffrey Manyara and Thurania. His statement of how they proceeded to the police station and how the deceased died on the way is similar to the evidence of the Assistance of the Assistant Chief, PW5.
9. The accused person is facing a charge of murder contrary to section 203 of the penal code which stipulates as follows.

**“any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.”**

The burden and evidential burden lies with the prosecution to prove their case against the accused person beyond any reasonable doubt. The prosecution must prove that it was the accused who hit the fatal blow to the deceased causing his death. The prosecution must prove that at the time the accused hit the deceased formed an intention to either caused death or do grievous harm the deceased. The prosecution must prove accused had malice aforethought. Section 206 of the penal code gives the circumstances which constitute malice aforethought as follows:

**“malice aforethought shall be deemed to be established by evidence proving any one or 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 of 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 a wish that it may not be caused”**

10. Mr Rimita who represented the accused in this case urged the court to observe that the witness who alleged that they was the accused person striking the deceased in company of two others were all family members. He also urged the court to note that the evidence of these family members contradicted the evidence of the Assistant Chief, PW5 who clearly stated that the deceased was in the company of 50 youths, and not three people as those witnesses had alleged. He also urged the court to note that the fact of taking the deceased to the authorities to face the law together with the things alleged to have stolen by him was proof that the intention was not to kill the deceased. He also urged the court to consider whether the evidence adducted by the prosecution was able to show who struck the fatal blow, and secondly whether common intention was established.

11. Mr. Moses Mungai for the state urged that the prosecution had proved that the accused person and others, stabbed the deceased and that he died as a result of the physical assault. Mr. Mungai urged that even though the prosecution does not deny that the deceased may have stolen or was a thief. He submitted that nevertheless the conduct of the accused and the others with him clearly demonstrated that they had a common intention and that it was out of that common intention that the deceased died. With due respect to the learned state counsel the deceased did not die of stab wounds.

12. The prosecution did not adduce any evidence to show how the accused came to be involved in the group in which the deceased was seen before he died. The only evidence adduced was to the effect that the accused was seen with two others escorting the deceased as they struck him on the shoulders. The evidence of what the accused and each of the two others with him were carrying as weapons was not consistent. PW1 and 3 said they could not remember what weapons each carried. PW2 testified that the accused had a slasher and a stick, while Manyara had a stick and panga and Linus a Rungu. PW4 said that the three men had stones, slasher, pangas and sticks. PW6 testified that each of the three men had a slasher and club.

Apart from the inconsistency in the evidence of the weapons carried by the alleged assailants, there was also inconsistency in the evidence in regard to where the Assistant Chief (PW5) was. PW1 and 3 testified that PW5 was in a hotel at Maburwa shopping center. PW6 said that the office of the Assistant Chief was five minutes from the hotel where he saw the accused with the deceased and others.

13. The prosecutor needed to adduce evidence to establish the actual role played by the accused in the death of the deceased and also show that he had formed a common intention with his two colleagues to cause either grievous harm or death to the deceased. The prosecutor must prove that the action causing death was executed by either the accused person or his companions, and that at the time of execution all of them had formed a common intention to do so. Section 21 of the penal code defines what common purpose is in the following words.

**“when two or more persons from a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offense is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offense.”**

14. The prosecution failed to adduce any evidence, first of all showing at which stage the accused person joined the group in which the deceased was seen in company of. It was important for the prosecution to show how the accused came to be in the group given his statement in defense in which he says that by the time he joined that group the deceased had already been seriously injured. Furthermore the accused defense that he joined the group on the deceased request with a hope of saving his life needed to be controverted by the prosecution case. The prosecution failed to controvert the accused defense, and his allegation that he had nothing to do with the injuries inflicted on the deceased was not rebutted by the prosecution case.
15. I noted that the evidence against the accused was by first cousin to the deceased i.e. PW1, 2, 3 and PW6 were all first cousins to the deceased. The mother of the deceased PW4. These witnesses contradicted the evidence of the Assistant Chief who was PW5. PW5's evidence was that the deceased was taken to his office by group of fifty youths some armed with crude weapons and that they disappeared leaving behind only three people who included the accused. All other eye witnesses PW1-4 and 6 all claimed that the accused was only with two others who beat up the deceased causing his death. PW5 was an independent witness and he was a reliable and credible witness.
15. I noted from the statement made by PW6 to the police that PW6 had told that he was in the company of the accused, one Joseph Trimurti Munyi and one Kimeru and the deceased at the time of the incident. One of the names of PW6 is Thuraira and PW7 the investigating Officer, together with the Assistant Chief, PW5 all mentioned him as one of those who accompanied the deceased, the accused and the Assistant Chief of the Police Station. The point is that more people than the accused and his alleged two companions were involved in escorting the deceased To the Assistant Chief. PW1-4 and 6 were not telling the truth regarding the entire incident. They cannot be believed and are not credible witnesses. Whatever evidence they adduced against the accused person needed to be corroborated by some other evidence implicating the accused in material particulars. The only other evidence was that of the Assistant Chief which was to the effect that the accused was in the company of fifty youths who took the deceased to his office.
16. After carefully considering the evidence adduced by the prosecution and the defense in this case. I find that the prosecution had failed to adduce evidence to show that the accused person, whether acting alone or with others, caused the death of the deceased. The prosecution's evidence only established that the accused was in the group that escorted the deceased to the Assistant Chief. Mere association is not sufficient evidence to establish either an action or mens rea or intention to commit the offense. The prosecution needed to adduce cogent reliable and plausible evidence to prove that the accused inflicted injury on the deceased, that he was acting with on common purpose with those alleged to be in his group and that the injuries were the result of the death of the deceased. The evidence adduced did not establish where the deceased was found, who found him, who inflicted injuries on him and motive for the attack. The accused defense that his association in the group was innocent and was meant to ensure that the deceased was taken to the authorities, remains unchallenged, was reasonable and acceptable defense. I will give the accused the benefit of doubt and acquit him for the offense of murder contrary to section 203 of the Penal Code under section 322(1) of the Criminal Procedure. Code and acquit him accordingly.

**DATED SIGNED AND DELIVERED AT MERU THIS 11TH DAY JULY 2013**

**LESIIT J**

**JUDGE**