



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL CASE NO. 54 OF 2009

REPUBLIC.....RESPONDENT

VERSUS

MWANTHI KITAMANGE.....ACCUSED

JUDGMENT

The accused **MWANTHI KITAMANGE** faces a charge of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE**. The particulars of the charge were given as follows:

**“On the 20<sup>th</sup> day of December, 2009 at Mabandari village, Dzombo Location, Msambweni District within Coast Province, murdered NDETEI MULWA.”**

The accused pleaded Not Guilty to the charge and his trial commenced before the High Court in Mombasa on 16<sup>th</sup> November, 2011. The trial commenced before Hon. Justice Tuiyott who heard one witness. Upon his transfer out of Mombasa, Hon. Justice Nzioka took over the matter and heard the remaining six (6) witnesses. When Justice Nzioka became unavailable to conclude the matter I did take over the case and finalized the defence. This chronology of events has been responsible for the delay in concluding this matter. The prosecution led by **MR. GIOCHE** the learned state counsel called a total of seven (7) witnesses in support of their case. **MS. OKUMU** advocate acted for the accused.

The brief facts of the case were that on 20<sup>th</sup> December, 2009 at about 4.00 p.m. the deceased ‘*Ndetei*’, **PW4 ADEMUS MUIINDE MAINGI** and the accused were together drinking mnazi in a pub owned by **PW6 SIMON MWANZIA MUSYOKA**. The accused and the deceased got into a quarrel and began to hurl abuses at each other. Their quarrel degenerated into a struggle but **PW6** stepped in and separated them. **PW6** told the court that he evicted the accused from his club and the accused left. A few minutes later the deceased also left the club in the company of **PW4**. **PW4** told the court that as they were proceeding home the deceased fell to the ground due to his drunken state. **PW4** and his companions proceeded on their way home leaving the deceased lying on the road. The following day **PW3 MUTINDA MUSYOKA** was on his way to fetch water at 6.30 a.m. when he came across the deceased lying on the road critically injured with a swollen head and blood oozing out of his mouth and nose. **PW3** alerted the family of the deceased who came and rushed him to a nearby clinic for treatment. He was later transferred to Msambweni District Hospital where unfortunately he lost the fight for his life. The matter was reported to police and the accused was arrested. Upon the completion of police

investigations the accused was arraigned in court and charged with the offence of murder.

At the close of the prosecution case the accused was found to have a case to answer and was placed on his defence. He elected to make a sworn defence in which he denied any and all involvement in the death of the deceased. It now behoves this court to determine whether based on the evidence adduced before it the charge of murder has been proved beyond a reasonable doubt.

Section 203 of the Penal Code defines the offence of murder as follows:

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

Arising from this definition are the three key ingredients of the offence of murder all of which must be proved beyond a reasonable doubt in order to sustain the charge. These three ingredients are:

1. Proof of the fact and the cause of death of the deceased.
2. Proof that the deceased met his death as a direct consequence of an unlawful act or omission perpetrated by the accused.
3. Proof that said unlawful act or omission was committed with malice aforethought.

The fact and cause of death of the deceased have readily been proved. **PW1 DICK MUTUKU** and **PW3** have both testified as to how they came across the deceased critically injured and groaning in pain lying on the road on the morning of 21<sup>st</sup> December, 2009. They alerted the family of the deceased. **PW2 MUSAU MULWA** a brother to the deceased told the court that upon receiving the news he rushed to the scene and confirmed that indeed it was his brother lying injured on the road. He rushed the deceased to Kikomeni clinic and later to Msambweni District Hospital where the deceased died whilst undergoing treatment. All these witnesses knew the deceased well and all identify him as ‘*NDETEI MULWA*’. Evidence on the cause of death is tendered by **PW6 DR. SOPHIA MOHAMED** a medical doctor attached to Msambweni District Hospital. She confirms that she conducted the autopsy on the body of the deceased. **PW6** told the court that she noted severe bruises on the face, forehead and head of the deceased. Upon an internal examination she noted a fracture to the left side of the head with brain matter oozing out. Her conclusion was that the cause of death was “*severe intracranial hemorrhage causing shock due to severe head injury as a result of direct trauma to the head*”. The witness completed and signed the post-mortem report which she produced in court as an exhibit **Pexb1**. It is therefore manifestly clear that the deceased met his untimely death as the result of being battered about the head with a blunt object.

Having sufficiently proved both the fact and cause of death of the deceased the prosecution must go further and prove that it was the accused who caused this death by unlawfully battering the deceased about the head. At the outset it must be noted that there was no eyewitness to the assault which led to the death of the deceased. **PW4** told the court that it was he and one ‘*Kiptoo*’ who left the pub in the company of the deceased. The deceased had already left about ten minutes earlier. Since they had all been partaking of mnazi they were in various stages of intoxication. **PW4** told the court that as they walked home “*the deceased fell on the way because he was drunk*”. The two men did not bother to pick up the deceased nor did they wait for him to get up. They just left him lying there and proceeded on their way home. At no time did **PW4** mention having seen the accused in the vicinity. **PW4** categorically states that:

**“I did not see Mwanthi [the accused] on the road at that time.”**

The other man named as ‘*Kiptoo*’ did not testify in this case. In short therefore no evidence is adduced of the accused having been seen anywhere near the deceased at the time he met his death much less evidence that it was the accused who attacked and injured the deceased. All the witnesses who were present in the bar are unanimous that although the accused and deceased did engage in the struggle, the two were separated and the accused left the bar earlier on his own, leaving the deceased with **PW4** and others drinking there. The evidence is that when the deceased walked out of the bar he was alive and well his

only impairment appears to have been some level of intoxication.

It appears that the only reason why the accused was fingered as a suspect in the murder of the deceased is the fact that he had been seen arguing and struggling with the deceased in a mnazi pub earlier in the evening. **PW3** who found the deceased lying critically injured the following morning told the court that:

**“The crowd gathered and decided to go and look for the suspect. He was one Mwanthi Kitamange [the accused herein]. He was held as a suspect because he was drinking alcohol the day before with the deceased .....**”

The mere fact that the accused was seen drinking with the deceased the day prior to his death does not in any way make him a suspect. Nor does the mere fact that the accused was involved in a bar brawl with the deceased amount to proof that he murdered the deceased.

**PW7 PC PAUL WARUMBWA** the investigating officer attempts to link the accused to the murder of the deceased through a blood-stained T-shirt belonging to the accused which was recovered in the accused’s house. However, although the said T-shirt, together with the deceased blood-stained clothes as well as a blood sample from the deceased were forwarded to the Government Chemist for analysis, no report on the result of such analysis was ever produced in court. **PW7** told the court that he took all the exhibits to the Government Chemist on 29<sup>th</sup> December, 2009. He confirms that he never received any report back from the Government Chemist. **PW7** states:

**“I have been going to the Government Chemist severally and there are no results to date .....**”

The state did not bother to call the government analyst as a witness to confirm firstly whether he received the exhibits in question, secondly whether he conducted the analysis and lastly whether there were any results from the analysis and if so what happened to the report. It is clear that the investigation into this aspect was half-hearted. For an investigating officer to come to court only to announce that he has not obtained the analysis report for exhibits submitted to the Government Chemist is tantamount to conceding that the case was not ripe for prosecution.

The court cannot assume that the presence of blood-stains on the accused’s T-shirt is proof of his guilt. No nexus is shown between the blood stains found on the accused’s T-shirt and the deceased’s blood. There is credible evidence to suggest that the blood on the accused’s T-shirt may well have been his own blood. **PW6** who was the owner of the mnazi pub told the court that the accused did sustain injuries and was bleeding as a result of his brawl with the deceased. **PW3** on his part stated that when they went to the accused’s house they found him dressing his wounds using his T-shirt. This then would provide a reasonable and a logical explanation for the blood on the accused’s T-shirt. **PW3** attempted to imply that the T-shirt had blood-stains from another source. However, under cross-examination by defence counsel **PW3** admits that:

**“I did not write in my statement that I found Mwanthi [accused] bleeding. I have testified about the blood today because I have remembered.”**

It is very unlikely that the witness would have forgotten to include this crucial piece of evidence in his statement to police only to remember it several months later when he is testifying in court. It is clear that this witness was merely trying to slant his evidence so as to implicate the accused. The deceased was found lying injured on a public road which is used by all walks of people. The very real possibility that some other members of public had attacked and critically injured the deceased has not been excluded by the prosecution.

Taken in its totality, there is no tangible evidence to link the accused to the attack on the accused. The prosecution case is based on mere suspicion. It is settled law that suspicion alone no matter how strong cannot form the basis for a conviction in law. I find that the element of *actus reus* has not been proved beyond a reasonable doubt. If the accused elected to keep silent in his defence no conviction could arise

from the evidence on record. I therefore enter a verdict of '*Not Guilty*' and I acquit the accused of the charge of murder under section 306(2) of the Criminal Procedure Code. The accused is to be set at liberty forthwith unless he is otherwise lawfully held.

**Dated and delivered in Mombasa this 18<sup>th</sup> day of December, 2013.**

**M. ODERO**

**JUDGE**