



REPUBLIC..... PROSECUTOR

VERSUS

JACKSON MUSYOKI 1ST ACCUSED

DANIEL NGOVI NZUKI 2ND ACCUSED

JOSEPH NZUKI MATULU 3RD ACCUSED

JUDGMENT

On information dated 16th August, 2007 and filed in court on the same date, the accused were charged with murder contrary to section 203 as read with section 204 of the Penal Code. It was alleged that on 6th August, 2007 at Kivingoni Village, Muthingau Sub-location in Yatta District within the Eastern Province, the accused murdered **Dominic Kilonzo Nzioka**, hereinafter "**the deceased**". The accused entered a plea of not guilty and they were tried. They were initially tried by **Lenaola J.**

PW.1. **Shadrack Mbithi Nduku** testified that on 4th August, 2007 at about 7 a.m. he left home for his grandmother's home, to assist her harvest maize. On 6th August, 2007 the deceased came visiting at about 5 p.m. Soon thereafter he picked a quarrel with the grandfather, the 3rd accused. The grandfather asked the deceased whether he had come to kill him. PW.1 then decided to escort the deceased from the home. Having walked for about 50 metres they were stopped by Villagers among them the 1st and 2nd accused. The 1st accused attacked them suddenly with rungu. They tied their hands with ropes and were led to the police post. Before reaching the Police Post, the deceased lost consciousness as a result of the assault. The witness however did not see the 3rd accused when they were being attacked. At about 11 a.m. he boarded a police vehicle to Matuu Police Station. In the vehicle there was a dead body which turned out to be deceased's.

Cross-examined by **Mr. Konya**, learned counsel for the accused, he stated that the 3rd accused was his grandfather. There had been a land problem in the family as the 3rd accused and his sons intended to sell a parcel of land without his grandmother's knowledge or approval. He opposed the transaction. The deceased was his friend. He had come on 6th August, 2007 at about 5 p.m. He was not a member of the family. They had not planned to harass the 3rd accused. Otherwise the 3rd accused had raised an alarm which led to them being attacked. He knew that the deceased had a love affair with his mother. Many

people attacked them including the accused. They were armed with pangas and rungas.

PW.2 **Dorcias Nduku Nzuki** testified that she was a daughter to the 3rd accused. The 1st accused was her cousin whereas the 2nd accused was her brother. On 6th August, 2007 the 3rd accused quarreled and abused her, asking her why she had come back to his home when she was a married woman. The deceased was her husband. Previously she had been married to one, **Alex Nthiwa**. Following the confrontation, she ran away. She later called her sister, **Ndinda** who informed her that her mother and herself were being assaulted by **Ndunda**, the 1st and 2nd accused. She did not go home but remained at **Kekesa** market where she was putting up with the deceased. She later called the deceased who informed her that he was at her parent's home. But he was being assaulted. He did not however tell her who was assaulting him. She never saw the deceased again until the next day at about 3 p.m. when his body was being taken to Matuu Police Station.

Cross-examined, she stated that she had been married twice. The deceased had promised to marry her. She was not around when the deceased was assaulted. Otherwise PW.1 was her son.

PW.3 **Veronica Mwikali Kilonzo**, testified that the deceased was her husband. On 6th August, 2007 he left home but never came back. The following day, she was told by **Lazarus Muthengi** that the deceased had been injured and was lying by the roadside tied with ropes. She went to the scene and on seeing the condition of the deceased, she collapsed and lost consciousness. The deceased had an injury to the head and brains were oozing out, the ribs were pierced and the shirt had blood stains. It appeared as though the deceased had been dragged as his shirt had soil and drag marks. The deceased's body was taken to Matuu Police Station and later to Matuu Nursing Home. On 28th August, 2007, she identified the body of the deceased to a doctor who conducted the post mortem.

Cross-examined, she stated that she had been married to the deceased since 1992. She was aware that the deceased was having an affair with PW.2. She was not happy with the affair and reported the same to the Assistant Chief. The Assistant Chief warned them to stop the affair. She did not know how the deceased met his death and who had caused it.

PW.4 **P.C. Benson Maluki** testified that on 7th August, 2007 he was instructed to proceed to the scene where someone had been injured and tied up with ropes. He found the deceased lying on the roadside. He had been injured on the back and on the front of the head. He could not talk. At the scene, an officer, **APC Mathenge** (PW.6) informed him that PW.1 had been locked up as a suspect. He had been with the deceased. Following investigations, he arrested the 3rd accused. His sons, 1st and 2nd accused were mentioned as having been party to the deceased's assault. He caused their arrest after they had gone into hiding. PW.1 confirmed to him that the 3rd accused was the one who raised the alarm and started beating them alleging that they were thieves.

Cross-examined, he stated that they were beaten by a mob of more than 10 people.

PW.5 **Dr. Simon Kioko** conducted a post mortem on the body of the deceased. He noted cut wounds on the skull and open fracture on the occipital region. In his opinion the cause of death was cardiopulmonary arrest due to intra cranial haemorrhage as a result of blunt trauma.

PW.6 **APC James Mathenge** testified that on 6th August, 2007 he was then attached to Maiyuni A.P. Post. At about 9 a.m., he received a report of a man being beaten by the members of public. That person was brought to the post by 1st accused and one **Mwongela**. He had injuries on his hands and legs. That person who turned out to be PW.1 stated that they had been attacked with the deceased but could not say who attacked them. When he spoke to the 1st accused, he told him that he had rescued the suspect from mob justice. He kept the suspect in his custody until the following day when he took him for treatment and then went to the scene. He found the deceased lying by the roadside. He was a live but unable to talk. Later he was asked to get the 1st and 2nd accused to record statements.

Cross-examined, he responded that he did not ask PW.1 why he was in the home where the deceased was attacked by the suspects. What he knew was that the deceased went to the home of the 2nd accused and started beating his wife and children.

With that, the prosecution closed its case. **Lenaola J.** having considered the evidence so far led was of the opinion that the accused had a case to answer. He therefore put them on their defence. However, he could not hear the defence as he was soon thereafter transferred from the station. He was replaced by **Waweru J.** who on 1st March, 2010 ordered that the proceedings be typed. By the time the proceedings were so typed, **Waweru J.** too had left the station on transfer and replaced by **Kihara Kariuki J.** Having been explained to at length the provisions of section 200 of the Criminal Procedure Code by **Kihara Kariuki J.**, the accused elected to proceed with the case from where **Lenaola J.** had left. The accused opted to make unsworn statements and called no witnesses.

The 1st accused testified that on 6th August, 2007, he woke up and went to his place of work where he remained until 1 p.m. and thereafter left for Matuu Market. He met one **Mwongela** thereat, at about 7.30 p.m. they left together for home. At Maiyoni, they met with PW.1 who told them that he had come to harvest Maize at his grandmother's home. He had come with other people. On arrival at his grandmother's house, one of the people went to the home of 2nd accused and beat up the wife and his children. The wife of the 2nd accused screamed and neighbours came and started assaulting them. He managed to escape and that is when he met this accused on the road. The 1st accused took PW.1 to Maiyoni market and thereafter to a police post. At the Police Post they found PW.6 and when asked what had happened, he told PW.6 that he had been assaulted by people he did not know. He thereafter left for home. On 8th August, 2007 he was contacted by PW.6 to go and record a statement at Kithimani Police Station. On 9th August, 2007 he did so whereupon he was arrested and charged with the murder of a person he did not know.

On his part, the 2nd accused testified that on 6th August, 2007 he was not at home. Instead he was at G.K. Prison Thika in remand. He was released on bond on the same day at about 3 p.m. He then proceeded to Kyasioni to see a witch doctor. According to Kamba tradition, handcuffs must be removed through traditional cleansing ceremony. He was treated there overnight. The following day, he proceeded home arriving at 8 a.m. Upon arrival he was informed by his wife that the previous day some people had come home and disagreed with her and his father. The father had gone to Matuu. He found PW.1 and PW.2 at the Police Station. PW.1 informed him that the deceased had gone to his home and a quarrel ensued between the deceased, his wife and father. On running away, PW.1 and the deceased were accosted by neighbours. On 8th August, 2007 police from Kithimani came home and interrogated him with his father over the death of the deceased. They then left with 3rd accused. He followed them to Kithimani, and found that the 3rd accused had already been placed in custody. On 10th August, 2007, he went to see the 3rd accused in cells. On seeing him the OCS ordered for his arrest. Otherwise he knew nothing about the case.

The case was then adjourned to 19th October, 2011 for further hearing. Come that day and **Kihara Kariuki J.** had left the station on transfer. The case came before me on 14th November, 2011 for directions. Having explained the purport of section 200 as read with section 201 of the Criminal Procedure Code, the accused again elected to proceed with the case from where **Kihara Kariuki J.** had left.

The 3rd accused testified that on 4th August, 2007, PW.1 came to his home. On 5th August, 2007 he sold his cow for KShs.15,000/- in the presence of PW.1. PW.1 asked him to give him KShs.3000/- from the proceeds of sale but he declined. On 6th August, 2007 he went looking for somebody to stand surety for the 2nd accused who had been charged at Kithimani with assaulting his mother. He got home at about 5.30 p.m. At about 6 p.m. he heard the wife of 2nd accused screaming from his house. He rushed there and encountered a man, who held him and pushed him to the ground. He demanded money from him being the proceeds of the sale of the cow. He screamed and the person ran away. When he stood up he

saw PW.1 in the company of his mother with another person whom he did not know. They were running away. The person who had held him and pushed him to the ground joined them. The village headman on hearing the screams came to the scene and he explained to him what had happened. The village headman advised him to report the incident to the police. He did so. On 8th August, 2007 police from Kithimani came to his home, and requested him to accompany them to the Police Station. He complied but was surprised when he was locked up at the Police Station and later charged with the offence he knew nothing about.

That then brought to a closure the defence case. Both **Mr. Konya** and **Mrs. Gakobo**, learned Senior State Counsel opted to file and exchange final written submissions. I have carefully read and considered them.

Murder is a serious offence which has to be dealt with caution before a conviction can be entered due to the gravity of the sentence attached to it. Section 203 of the Penal Code defines murder as the causing, by a person or persons with malice aforethought, the death of another person by an unlawful act or omission. It reads:-

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

It is clear from this definition that for an accused person to be convicted of murder, it must be proved that he caused the death of the deceased with malice aforethought by an unlawful act or omission. There are therefore three ingredients of murder which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are (a) the death of the deceased and the cause of that death, (b) that the accused committed the unlawful act which caused the death of the deceased and (c) that the accused had the malice aforethought.

With regard to the first element, there must be evidence proving that the death of a human being ***the deceased*** actually occurred. In the present case, all the evidence adduced corroborate this fact. It is clear that one **Dominic Kilonzo Nzioka** lost his life.

However, it is being alleged that his death was caused by the accused. This is only an unsubstantiated allegation. From the evidence tendered it is only PW.1 that the prosecution had hoped to build its case around. This witness is a son of PW.2 whereas the 3rd accused is his grandfather. He testified that on the material day, he was with the deceased at the home of his grandmother, the wife of 3rd accused. They had gone to help her harvest her maize. The deceased who was his friend but turned out to be his mother's lover came over at about 5 p.m. on the fateful day. On his arrival he picked a quarrel with 3rd accused who intimated that he had come to kill him. Thereafter, PW.1 decided to escort the deceased away from the home of 3rd accused. As they were going, he heard someone whistling from behind. They had hardly gone for about 50 metres from the homestead, when the villagers including allegedly 1st and 2nd accused stopped them and assaulted them. Apparently the 3rd accused was not among them. This evidence would appear to completely exonerate the 3rd accused for the offence charged. Even if he whistled, there is nothing to show that the whistling had anything to do with the killing of the deceased. The witness did not say that the whistling was aimed at calling the neighbours or whoever cared to hear to join in assaulting them. As a matter of fact, this witness ended up being locked up in police custody as a suspect in the murder of his friend cum lover of his mother, PW.2. His evidence therefore has to be considered and evaluated with a lot of care and circumspection. In my view his evidence is unreliable and lacks credibility. It was shaky, inconsistent and unworthy believing. It is obvious from the evidence, that he knew more than he was willing to disclose to court with regard to the death of the deceased.

This evidence considered alongside the defences advanced by the accused, the defences appears to be credible. There is no reason why the accused would have descended on the deceased with rungus and PW.1 and battered them. They were all related to each other. It appears to me that, the deceased may have been a victim of mob justice or is it injustice after the 3rd accused and wife of 2nd accused had screamed following the attack on them by the deceased who was acting in cahoots with PW.1 and his mother PW.2.

Although motive by which a person is induced to do or omit to do a criminal act or to form an intention is immaterial so far as regards criminal responsibility, it is interesting to note the motive attributed in the alleged attack on the deceased and PW.1 according to the various witnesses who testified. To PW.1, the deceased came to the 3rd accused's house and soon thereafter picked a quarrel with the 3rd accused who accused him of coming to kill him. He decided to escort the deceased away from the home of 3rd accused. As they were going, he heard someone whistling from behind him but does not say who whistled. About 50 villagers who included 1st and 2nd accused whilst armed with runguns then descended on them and assaulted them.

As for PW.2, it was her testimony that on the material day, she returned home and found her father, the 3rd accused and her nephew, **Mutuku Ndinda**. Her mother was not at home and her nephew told her that she was hiding in the bushes as the 3rd accused had chased her away. She entered the house and when she came out she saw **Kavindu**, her aunt and Sammy. There were also neighbours holding sticks. She then ran away. The 3rd accused had abused her by asking her why she had come back to his home after being married. Later she called her sister **Ndinda**, who told her that the deceased had been assaulted by the accused. The deceased was living with her at **Sophia** as a husband but previously she had been married to one, **Alex Nthiwa**. Apparently **Kavindu** and **Sammy** were objecting to payment of dowry by **Alex Nthiwa**. Subsequently, she called the deceased who promptly informed him that he was at her home but was being assaulted. He was however unable to tell her who was assaulting him.

Yet according to **PW.4 PC Benson Maluki**, it is the 3rd accused who raised the alarm and started beating PW.1 and the deceased because they were alleged to be thieves.

According to **PW.3 Veronica Mwikali Kilonzo** however, the deceased was having an affair with PW.2. As a wife, she had reported the affair to the assistant chief as she was not happy with the affair. The Assistant chief warned him to stop the affair and PW.2 to keep away from her home. However, she was not sure whether he stopped the affair.

On the other hand what did the accused say in their defence and in particular the 3rd accused?

On 5th August, 2007 he sold his cow for KShs.15,000 in the presence of PW.1. PW.1 asked him for KShs.3000/- but he declined. On 6th August, 2007 at about 6 p.m. he heard the wife of 2nd accused scream. He ran there only to see a man emerge from the house and run towards him. He held him and pushed him to the ground. He demanded money from him being the proceeds of the sale of cow. In the process he heard his house being closed whereupon the person who was suffocating him ran away and joined PW.1 and PW.2. They all then escaped.

From all the foregoing, was the deceased and PW.1 attacked because they were suspected to be thieves or because there was an objection to payment of dowry by **Alex Nthiwa** or because he had come to kill the 3rd accused or because of a love affair with PW.2 or as a result of their opposition to the sale of family land by the accused and his sons. Any of the above motives are plausible. It is however, instructive that the deceased and PW.1 were all related to the accused. The deceased was related to them by virtue of his love affair with PW.2 who was the daughter to the 3rd accused, a sister to the 2nd accused and a cousin to the 1st accused. PW.1 was however, a grandson to the 3rd accused and a nephew to the 2nd and 3rd accused.

By virtue of that relationship, I am sure that there must have been a reason for the attack on them. The reason which meets with my approval is the one which relates to the attack on 3rd accused by a person who demanded money from the proceeds of the sale of the cow by the 3rd accused. That person was in the company of PW.1 and his mother PW.2. PW.1 was aware that his grandfather had the money since he was a witness to the sale. He had even asked from him KShs.3000/- but the grandfather declined. Following the attack on the 3rd accused, he screamed. By then the wife of 2nd accused too had joined in screaming. The neighbours responded to the screams and descended on PW/1 and the deceased with runguns. In the process, they fatally injured the deceased. These ties in very well with the evidence of

PW.1 who conceded that they had been attacked by a crowd of people numbering 50 consisting of the accused's neighbours. If indeed they had been attacked by the accused, the deceased would have told PW.2 when he talked to her twice. According to the evidence of PW.2 she talked to the deceased on phone twice. On both occasions he complained that he was being assaulted and when she asked him by who, he did not tell her. It is even doubtful that he could have talked to PW.2 on phone as he was being assaulted. How is that possible? Surely, if he was being attacked by the accused, the people he knew very well, being relatives why was he not able to name them. Under cross-examination, PW.1 stated:

“When the crowd came to attack us, I was with the deceased alone. I was in shock....”

Again when PW.1 was brought to PW.6, A.P.C. James Mathenge and was being interrogated he conceded that they had been attacked by people he did not know.

From the foregoing that it is clear that the deceased was a victim of mob justice after being suspected of robbing or attempting to rob the 3rd accused of his money. Motive being irrelevant, it is instructive however, that there were various possibilities for the attack and the people who could have mounted the same. In those circumstances, where then does one find malice aforethought?

All in all, no credible evidence has been led to support the information. PW.1's evidence was shaky, inconsistent and unworthy believing. There was no independent evidence corroborating the evidence of PW.1 and PW.2 who are a mother and son.

Given various reasons advanced, for the attack on the deceased, doubts thereby created must be resolved in favour of the accused as usual.

Accordingly the accused and each one of them is acquitted of the information. They should be set free forthwith.

Ruling dated, signed and delivered in Machakos this 29th day of February, 2012.

ASIKE-MAKHANDIA

JUDGE