



**REPUBLIC OF KENYA**

**High Court at Machakos**

**Criminal Case 39 of 2009**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**1. CHARLES STEPHEN**

**2. NASHON SAFARI**

**3. JOCOB MUSEE**

**4. PATRICK MWANGI.....ACCUSED**

**RULING**

The accused are charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code, the particulars being that on the 13<sup>th</sup> April, 2009 at Kyanika area in Mwingi District within Eastern Province they jointly murdered **Mutiso Katee**. The accused denied the information and were soon thereafter put on trial. In his opening address to court, **Mr. Mwenda**, learned State Counsel stated that on 13<sup>th</sup> April, 2009 the deceased was pushing a wheelbarrow and passed through a parcel of land owned by the family of the accused. It was about 8.30 p.m and the accused upon seeing him dashed towards him whilst armed. The 1<sup>st</sup> accused had a short axe while the rest had rungu. They pursued the deceased, caught up with him and beat him to death and left at the scene. The body was discovered four (4) days later by children herding cattle. It was later removed to Mwingi District Hospital Mortuary where post mortem was conducted and cause of death established to be cardio respiratory arrest due to severe head injury.

The prosecution was intend on calling an eye witness who observed the attack and other witness who would attest as to how the deceased went missing that night. The learned prosecutor further stated that there would also be testimony by those who recovered the body. The intent to kill was demonstrated in the manner in which the attack was carried out. The deceased was unnamed at the time and was a known butchery attendant in the area. The way he was attacked and left to die showed the intention on the part of the accused to cause grievous harm.

Unfortunately, the prosecutor never met the threshold he had set for himself as aforesaid. In a bid to establish a case against the accused the prosecution called a total of nine witnesses. However, all these witnesses called did not even remotely come close to confirming the facts as set out by the prosecution above. None of the witnesses testified as to the accused being the perpetrators of the offence nor being armed with an axe and rungu. None saw them accost and beat the deceased to death as alleged in the facts. No motive and or intention was established against the accused persons as to why they wanted the deceased dead. As correctly observed by counsel for the accused, this is one of the cases where the police

for reasons known to themselves have victimized people who appear innocent. There is no doubt at all that the prosecution has failed to establish a *prima facie* case against the accused.

As already stated none of the witnesses called saw the accused persons assault the deceased to death. The alleged eye witness, one **Jane Wanja** was never called as a witness. Instead the prosecution called someone else as PW9 and ended up denying who being **Jane Wanja**. At that junctureshe was stood down. The existence of such **Jane Wanja** is therefore suspicious and goes to show that her evidence could as well have been fabricated.

Though the prosecution alleges to have recovered items like the metal sheet, jacket, sandals, an axe and wheelbarrow at the scene of crime and homes of some of the accused they were not produced before the court. Were these things really recovered? What were the reasons for non-production? The only presumption would be either they were never related to accused/deceased or their production would have been prejudicial to the prosecution's case.

The civilian witnesses called had a golden thread that ran through their evidence; coercion and assault so that they could record statements implicating the accused in the death of the deceased. PW1 and PW3 were categorical that the police assaulted them and gave them already made statements to sign. Indeed PW1 narrated how he was even given a shirt and Kshs. 200/= so as to record a statement implicating the accused in the distally act. PW1 and PW3 ended up denying their alleged statements.

The prosecution did not call any witness to connect the accused persons with the murder of the deceased directly or circumstantially.

The prosecution failed to establish any intention on the part of the accused to commit the offence. This is a crucial element in the offence of murder. Other than PW1 and PW3 all other witnesses were material identification witnesses in respect of the recovery and identification of the body.

No doubt the evidence on record leaves a lot to be desired. Indeed it raises serious doubts as to the accused's culpability. The prosecution has appreciated these difficulties for in its submissions, it has stated thus:-

***“The evidence adduced by the civilian witnesses was however in stark contrast to the statements they had recorded with the police, which formed the basis of charging the accused persons. The primary reasons being that the key eye-witnesses are related to the accused persons. These family ties and the time that had passed prior to the commencement of trial may have tipped the scales in the accused person's favour. I urge the court to look at the evidence of the objective and non-civilian witnesses and consider the weight of their testimony within the stated context”.***

However, to my mind, these are mere theories that do not advance the prosecution case. The evidence so far adduced fails far too short in establishing the accused's hand in the death of the deceased. If the evidence was left as it is and the accused opted to keep quiet in their defence, no conviction will be forthcoming. The accused are accordingly acquitted of the information and set free unless otherwise lawfully held under Section 306(1) of the Criminal Procedure Code.

**DATED at MACHAKOS this 22<sup>ND</sup> day of NOVEMBER, 2012.**

**ASIKE-MAKHANDIA  
JUDGE**

**DATED, SIGNED and DELIVERED at MACHAKOS this 30<sup>TH</sup> day of NOVEMBER, 2012.**

**GEORGE DULU  
JUDGE**