



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KAKAMEGA**  
**CRIMINAL CASE NO.50 OF 2003**

**REPUBLIC**

**V E R S U S**

- 1. **EUNICE KLAIN KHAVERE**
- 2. **JOHNSTONE ALULU**

.....

..... **ACCUSED**

- 3. **NICHOLUS MUSUNGU**
- 4. **JOHNSTON CHOGO**

**J U D G M E N T**

1. The accused persons herein, **EUNICE KLAIN KHAVERE, JOHNSTONE ALULU, NICHOLUS MUSUNGU and JOHNSTONE CHOGO** are all jointly charged with the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code. It is alleged that on 6<sup>th</sup> day of July 2003 at Busingo village, Jivovoli sub-location in Vihiga District they, jointly with others not before the court, murdered **JOSEPH MWALA MUKHOVI**.

2. They all denied the charge and the evidence tendered in support of it was as follows;

3. **PW1, Bonface Agesa Shibaya** stated that, on 16.7.2003, he went to visit the deceased who was his grandfather at 6.00 p.m. and when he entered the latter's house, the deceased could not respond when called out and when he touched him, there was no reaction whatsoever. As PW1 left, he allegedly met the 1<sup>st</sup> accused, popularly known as "*Mama Khavere*" outside the deceased's kitchen and according to him she shouted out and uttered the following words; "*catch that boy, where is he going?*" (said in Tiriki).

4. That when PW1 heard those words, he fled and according to him he was pursued by other persons whom he identified as Musungu (the 3<sup>rd</sup> accused), Alulu (2<sup>nd</sup> accused) and Chogo (4<sup>th</sup> accused). That he also noted that the 2<sup>nd</sup> accused had a panga as they all pursued him.

5. When he reached home, he allegedly informed one **Maureen Musimbi** and **Eugine Muranda** as well as **Douglas Vudambula** and **Dickson Mukhovi** that he had found his grandfather unable to talk and when they all returned to the scene, he again allegedly saw the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> accused persons leaving the deceased's house and entering a Nissan vehicle which drove away. Later, the same night a report was made to the police and he remained at the scene until the next day when police officers came and took the body away. He noted that the deceased had a cut on the right leg and blood was oozing from his mouth.

6. During cross-examination, PW1 said that he had known the accused persons before the incident as the 1<sup>st</sup> accused used to work for them while the 3<sup>rd</sup> accused was from their village. He added that he did not mention their names when he recorded his statement and that he in fact identified them only by voice. He added that he did not mention their names for fear of being beaten by the same persons.

7. **PW2, Dickson Mukhovi Likhanga** stated that on 23.6.2003 he was at home when the 1<sup>st</sup> accused allegedly came to a certain home and told the people at the funeral wake up for one Rose Kuyayi *“that the deceased had died.”*

8. Further, she allegedly stated that if the deceased did not leave his employer within a week, *“he would die or his employer would get an accident in a car.”* The deceased’s employer was one Margaret Isedi and the deceased was Margaret’s *“shambaboy/houseboy.”* PW2 did not take the statements seriously and on 6.7.2003 at 7.30 p.m. he was present when his grandmother, Difina Mwala, told PW1 to go and sleep where the deceased worked and PW1 did so but returned at 8 p.m. and said that the deceased was unable to respond when he called him and that he had been followed by Alulu, Musungu, Khavere and Chogo.

9. **PW2, Eugene Marache, Douglas Vundavula, Francis Shirona, Dickson Mukhovi and Maureen Musimbi** all went to the scene and as they approached, a Nissan vehicle reached Margaret Isedi’s home and PW2 saw one Alulu (who had a torch and panga) and one Chogo (who was empty handed) both entering the vehicle which was then driven away.

10. It was his further evidence that when he entered the house where the deceased was, he noticed that blood was oozing from the mouth and there was a wound on the deceased’s right leg. The next day, police officers came and took the body away.

11. **PW3, Francis Shironya** stated that on 23.6.2003 while at Rose Kuyayi’s funeral meeting, the 1<sup>st</sup> accused came and stated that the deceased was troubling her by falsely accusing her grandchildren of theft and had them arrested. She then stated that the deceased would die within one year and on 6.7.2003, he was with PW1 and PW2 at the deceased’s house when PW1 told him and others that the deceased was not responding to his call.

12. According to PW3, he saw the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> accused persons as they entered a Nissan vehicle and he added as follows;

***“All of them were picked by the vehicle whose headlights had helped me to identify them.”***

13. It was PW3 who then reported the incident to the village elder after seeing that the deceased was dead. Together with the village elder, he made another report to the Chief and later police officers came and took the deceased’s body away.

14. In cross-examination, he denied seeing any of the accused persons carrying a weapon and further stated that when the Nissan vehicle picked the accused persons, he was 50 meters from it.

15. **PW4, Eugene Muracha** was with PW1, PW2 when they went to the deceased’s house on the material night and was also present earlier on 23.6.2003 when the 1<sup>st</sup> accused came to Rose Kuyayi’s funeral meeting and stated that the deceased would die.

16. According to him when they reached the deceased’s house, they saw three accused persons coming out of the compound and he recognized them as the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> accused persons. That the 2<sup>nd</sup> accused was holding a torch while the 3<sup>rd</sup> accused person had a panga. That they then stopped a vehicle which sped off. He added that the lights from the vehicle enabled him to recognize the three persons aforesaid.

17. PW5, gave evidence similar to PW4 and like PW4 stated that although the accused persons were neighbours of the deceased, they did not respond to the screams for help from PW1 – PW5 when they

reached the deceased's house.

18. **PW6, Maureen Musimbi** gave evidence similar to that of PW4 and PW5 about the events of 23.6.2003 and also on the events of 6.7.2003 and I see no need to repeat that evidence.

19. **PW7, Difina Mwala** also gave similar evidence as above on the incident on 23.6.2003 and she also went to the scene and on seeing the deceased's body, she screamed and it was her evidence that some people in the neighbourhood responded to the screams except the accused persons who were also the deceased's neighbours.

20. **PW8, Everlyne Ajisa Herman** was allegedly present on 23.6.2003 when the 1<sup>st</sup> accused uttered certain incriminating words and on 6.7.2003, was one of those who went to the deceased's house where she found many people and saw the injuries on the deceased's body.

21. **PW9, Herman Lihayo Mukhovi** received a report of the deceased's death on the material night, proceeded to the scene, saw the injuries on the deceased's body and waited for the police to take action.

22. **PW10, Gerishom Mwanganyu**, a village elder, received the report of the deceased's death on the material night, went to the scene, and the next day the body was taken by police officers.

23. **PW11, Shem Mulera Isiji**, received a call at 10 p.m. on the material night and like the other witnesses, he went to the scene, saw the deceased's injuries and advised the deceased's sons to report the incident to the police.

24. **PW11**, (there are two PW11's on the record), **Hudson Kivulaga Isendi** received the report of the deceased's death on the material night, went to the scene the next day, noted his injuries and arranged for the police to remove his body to the mortuary. That on 9.7.2003, he identified the deceased's body at Mbale District Hospital where the post-mortem was conducted.

25. **PW12, Margaret Mumalisi Esemi** recalled that on 23.6.2003, she found faeces in a paper bag within her home. She asked the deceased, who was her caretaker, who had thrown it there and he said that he suspected that the 1<sup>st</sup> Accused's grandson had done so. When the 1<sup>st</sup> accused was asked about the matter, she became defensive and the matter was reported to the local AP Camp. The 1<sup>st</sup> accused was then ordered to remove the mess and she cursed the deceased and said that he should not have been working in that home.

26. Further, that on 6.7.2003, she received a report that the deceased had died. She went to the scene, noted the injuries on his body and the body was taken away.

27. When the accused persons were put on their respective defenses, the 1<sup>st</sup> accused stated that she was arrested and charged with an offence she never committed.

28. The 2<sup>nd</sup> accused on his part stated that on 6.7.2003, he was asleep when he heard screams from his neighbour's house and when he went there, he found that the deceased had been killed and a huge crowd had formed. He walked with the village elder to make a report to the police at Shamakhokho and when they were asked to report at Serem Police Station, he decided to go back home and he was arrested on 11.7.2003 for an offence he denied committing.

29. The 3<sup>rd</sup> accused on his part said that he woke up in the morning of 6.7.2003, saw a large crowd at the deceased's house, went there, saw his body and returned home. He was arrested on 11.7.2003 and he denied committing the offence.

30. The 4<sup>th</sup> accused stated that on the material night, he heard screams at 8 p.m. from his neighbour's house and he went there then returned home. He was arrested on 11.7.2003 and later charged with an offence he never committed and which he denied.

31. From the above evidence, one can summarize the theory advanced by the State as being that on 23.6.2003, PW12 found faeces in a paper bag in her compound. The deceased who was taking care of her home, suspected that the 1<sup>st</sup> accused's grandson had done so and when she was ordered to remove the mess, she became angry with the deceased. Further evidence was tendered that on the same night, while villagers were mourning one Rose Kuyayi, she stated that the deceased had troubled her and that he would die within one year and "true to her word", he died of injuries inflicted to him on 11.7.2003. It was the further theory of the State that on the material night, it was the accused persons who inflicted fatal injuries to the deceased hence the murder charge against them jointly.

32. Is the above evidence sustainable and can it pass the threshold that a criminal charge must be proved beyond reasonable doubt? No witness actually gave evidence as to what caused the deceased's death because no doctor was called to testify on that aspect of the case. PW1 and other witnesses who were at the scene however, stated that the deceased had an injury to the leg and blood was oozing from his mouth. It is the presumption of this court that from the evidence on record, the deceased indeed died and while the cause of death may not be determinable, the only thing that I can do is determine whether the accused persons from the evidence on record were responsible for that death.

33. The evidence was wholly circumstantial and in my understanding, circumstantial evidence is often the best evidence and it has been held time and time again that for circumstantial evidence to be the basis for a conviction, the inculpatory facts must be incompatible with innocence – see Lawrence Nkonge Mniandi vs R [2010] e KLR where the decision in R vs Taylor [1928] 2 Cr. App. 20 was approved. In this case, the statements by the 1<sup>st</sup> accused whether made on 26.3.2003 or not, could only have had meaning if there was another piece of evidence to support it. I say so because save for the evidence of PW1 that the 1<sup>st</sup> accused asked what he was doing on the material night, there is no other evidence that the 1<sup>st</sup> accused did anything towards the deceased that would connect her to his death. It is admitted that the 1<sup>st</sup> accused's home shared a fence with PW12 who was the deceased's employer. I see nothing inculpatory when she asked PW1 what he was doing in the area. It is not unlawful for an old lady such as the 1<sup>st</sup> accused to pose such a question at night.

34. Regarding the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Appellants the only circumstantial evidence at the scene is that they were seen at the scene on the material night. Again, even if they were properly identified and I submit that the circumstances were not favourable at all, their being in the area and jumping into a Nissan vehicle was not incriminating. They were neighbours of the deceased and the argument that they did not come to the deceased's aid is neither here nor there.

35. In the end, I am certain that the accused persons were brought to court on suspicion only. The evidence tendered was repetitive and added no value at all and without the doctor to confirm the cause of death, the arresting officer to give the basis for the arrests and the Investigating officer to tie up the case and create a nexus between the alleged incriminating circumstances, the evidence ended up being weak and unsupportive of the charge.

36. That being the case, the charge has not been proved beyond reasonable doubt and the accused persons are acquitted of the charge of murder. They shall be ordered to be released unless they are otherwise lawfully held.

37. Orders accordingly.

***Delivered, dated and signed at Kakamega this 14<sup>th</sup> day of March, 2011***

**ISAAC LENAOLA  
J U D G E**