



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
CRIMINAL CASE 34 OF 2007**

REPUBLIC

VERSUS

MUSYOKA MUASAACCUSED

JUDGMENT

1. Musyoka Muasa is charged with the offence of murder contrary to section 203 and section 204 of the Penal Code. It was alleged that on 1.7.2007 at Itulu Village, Waia Location in Makueni District within Eastern Province, he murdered Kavuu Kisangi. He denied the charge and in support of its case, the Republic tendered the following evidence;
2. PW1, Felista Kasavi Mulinge stated that on 2.7.2007 at 8.00 a.m she went to check on her uncle, the deceased, and he found him with a deep cut at the top of his head. When she asked what had happened to him, he replied that Musyoka Muasa, the accused person had cut him. She knew that the deceased and accused stayed in the same house and so she went to inform one Ngeze Kisangi who proceeded to the deceased's house. The said Kisangi, PW2, stated that the deceased was his younger brother while the accused person is his nephew, son of his older brother. That when he received the news of his injury from PW1, he proceeded to the deceased's house and saw that he had a deep cut on the top and back of the head but he was still alive. He made a report to the sub-chief and Police who took him away but he died on the way to hospital.
3. It was his evidence that the deceased was unable to talk when he reached him and that PW1 reported to him that the deceased had told him that the accused person had injured him.
4. PW3, Dr. Catherine Kilonzo produced a report by Dr. Mutiso who performed a post-mortem on the deceased's body on 13.7.2007. The deceased had a deep cut on the head which extended into the brain as well as a deep cut in the left leg and a fracture of the left tibia. The cause of death was the head injury which led to bleeding in the brain.
5. PW4, Jeremiah Muli Makau, the sub-chief, Nduluku sub-location knew both the deceased and accused person and he stated that on 2.7.2007, the accused person came to him and told him that he had injured someone and wanted a note to take him to hospital. He noticed that the accused person had his right ear cut off at the tip, as if it had been bitten off. He went to see the victim in his house and he spoke to him in a whisper and told him that the accused had injured him. The house looked like there had been a struggle in it. He arrested the accused and had the deceased taken to hospital but later, he died.
6. When cross-examined, the witness said that the accused actually told him that he had "*fought*" with someone and that is what he recorded in his statement to the Police.
7. When the accused was put on his defence, he said that on the material night, the deceased got hold of him and cut off part of his right ear. He did not say what weapon or object was used but as he struggled with a panga, the deceased got cut. The next day he reported to the Assistant Chief and he was arrested. He admitted causing the fatal injuries. But he added that he had no

intention of doing so.

8. From the above facts, it is obvious that the deceased and the accused, his nephew, lived together and it is wholly unclear what triggered the incident that led to the death of the deceased and loss of part of the accused's ear. The advocate for the accused prays that since the charge of murder has not been proved, the accused person should be acquitted but I take the view that the act of causing death has not been denied but I also agree that there is no evidence of malice aforethought. The accused person's conduct in reporting the incident supports that proposition. That being the case, the accused is not guilty of murder but of the lesser offence of manslaughter and I so order. He is convicted of that offence under section 202 as read with section 205 of the Penal Code.
9. Orders accordingly.

Dated and delivered at **Machakos** this **11th** day of **February 2010**.

Isaac Lenaola

Judge

In the presence of; Mr. Omirera for Republic

Accused present

Isaac Lenaola

Judge