



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU**

Cr. Case 4 of 2004

REPUBLIC.....PROSECUTOR

VERSUS

JAMES NTONGAI MUTHINE.....ACCUSED

JUDGMENT OF THE COURT

1. The enactment and operationalisation of the Statute Law (Miscellaneous Amendments) Act 2007 abolished the role of assessors in murder trials with effect from 15.10.2007.
2. As a result thereof, I have decided that there will be no summing up in this case hence this judgment. I believe that no prejudice shall be suffered by the accused as a result of this decision. The assessors who have sat with me during the trial are forthwith discharged. They are however entitled to payment of attendance allowances incurred to date.
3. The accused herein James Ntongai Muthine is charged with murder contrary to section 203 as read with section 204 of the Penal Code. It is alleged that he murdered one Jackson Maroo on the 2nd day of October 2003 at Kangeta Location in Meru North District.
4. The facts of this case will emerge from the evidence of the seven witnesses called by the prosecution. PW1 was John Mungeria (John) who testified that on 2.10.2003, at about 7.30 pm, he saw the accused herein beating the deceased near the gate of one Fredrick Mutabari who was John's employer. John said that the accused was beating the deceased using a slasher and was also kicking the deceased. John stated further that he was only 8 metres away from the pair and that with the help of his torch he was able to see them clearly. It was John's further testimony that as the accused beat and kicked the deceased, he was also telling him (deceased) that he (accused) would kill the deceased. John said that before that day, he had known both the accused and the deceased for about one year and that he used to interact with both of them on a regular basis.
5. John testified further that he quickly reported the matter to Fredrick Mutabari (Mutabari) – PW4. That John and Mutabari thereafter assisted the deceased's death. During his further testimony, John stated that he did not talk to the accused or the deceased when he found the accused assaulting the deceased though he was categorical that the accused kicked the deceased in the stomach. John denied a suggestion by defence counsel that he (John) had a grudge with the accused.
6. PW2 was Rose Kanja (Kanja). She stated that on 2.10.2003 at about 8.00 pm, she saw the accused beating someone near Mutabari's home but that she could not identify the person who was being beaten. Kanja said that she shone her torch upon the accused and saw him clearly. She said she then went home and later she assisted to carry the deceased to his home before the later was taken to hospital.

7. During further testimony Kanja said that she saw the accused from a distance of about 8 metres and that using her torch which had new and powerful batteries she shone the torch upon the accused and saw him well. She however state that she did stay long at the scene because of fear. Kanja said that the accused used a piece of timber to assault the deceased, but that when she got home she did not tell anybody that she had seen the accused assaulting the deceased. Kanja denied that she had framed the accused.

8. PW3 was Susan Kajuju Wamaroo (Kajuju), wife to the deceased. She stated that on 2.10.2003 at about 8.00 pm, John went to her home and informed her that the deceased was being beaten by the accused herein near Mutabari's home. She said she proceeded to the scene in the company of other family members but that before they got to Mutabari's, they met other members of the public carrying the deceased. She then took the deceased to hospital.

9. During cross-examination, Kajuju denied that her husband was a drunkard. She also said that when she saw her husband in the company of members of the public, his head was swollen.

10. PW4 was Fredrick Mutabari (Mutabari) a primary school teacher. He stated that on 2.10.2003 at about 7.30 pm, he received information from his two children Evans Kirimi and Anastasia Gatwiri (not called as witnesses) that a drunkard was lying outside their gate. He also said that John, who had accompanied the two children to the canteen just outside the home also informed him that he (John) had left the deceased lying on the road a few meters from his (Mutabari's) gate. Mutabari also stated that John informed him that the deceased had been beaten by the accused.

11. Mutabari also said that together with John he went to the scene and saw the deceased lying a few metres away from the gate and unable to speak. Mutabari not there though he (Mutabari) knew the accused well. Mutabari also said that though John mentioned the accused's name he (John) also told Mutabari that they had fixed Maroo. In what appeared to be a contradictory statement, Mutabari stated that John did not say that he (John) had seen anyone assaulting the deceased. As regards the state of the night on that day, Mutabari stated that though there was moonlight, the night was somewhat dark and that one could recognize another from a distance of about only two metres and no more.

12. PW5 was number 58583 Police Constable Bernard Kagure. He stated that on 4.10.2003 at about 4.30 pm, while he was at Maua Police Station, he received a report that the deceased who was admitted at the Tigania General Hospital and found that the deceased was in a coma with a serous injury on the forehead. He stated further that on 5.10.2003, he got a further report from the deceased's brothers that the deceased had died on 4.10.2003. Further PW5 stated that on 7.10.2003 the accused was escorted to the police station by the chief of Muringene Location after the accused had surrendered to the chief. On the 14.10.2003 PW5 said he accompanied Dr. Gichere (PW6) during post mortem examination. He said he thereafter took the accused to the hospital for medical examination and thereafter charged the accused with the offence of murder on the basis of the statements he took from PW1 (John) and PW2 (Kanja).

13. PW6 was Dr. Raphael Nderitu Gichere who performed the post mortem examination on the body of the deceased. He stated that the deceased had a linear bruises on the forehead, and on the left side of the face with a swollen forehead and scalp. That there was massive frontal bleeding under the scalp with multiple fractures on the scalp and more particularly on the frontal aspect. The doctor also testified that there was bleeding inside the skull and that the brain was compressed leading to increased intra-cranial depression. In Dr. Gichere's opinion, the cause of the deceased's death was severe head injury secondary to blunt trauma on the head with skull fractures and extended haematoma. Dr. Gichere produced the post-mortem report as P exhibit 1. Dr. Gichere stated further that though it was possible through blood sampling to tell whether the deceased was drunk before the injuries could have been caused either from a fall or from a blunt object.

14. PW7 was Francis Mithika Mucheke (Francis) chief of Antobanga Location. He stated that on 7.10.2003 the accused herein surrendered himself and asked to be escorted to Maua police station. That the accused was fearing for his life on allegations that he had killed somebody. Francis further said that though the accused hailed from another location he (Francis) arrested the accused and escorted him to

Maua police station and handed him over to PW5 for further investigations.

15. The accused person gave an unsworn testimony and stated that he was not near the scene of crime when he is alleged to have killed the deceased. He said that for the whole day on 2.10.2003, he was either at his hotel or at Daniel's shamba harvesting miraa. He stated that he heard about the deceased's death on 3.10.2003 while he was at work at his hotel. He also said that on 7.10.2003 while he was harvesting miraa in his father's shamba at Muringene he was threatened with imminent death and decided to report the matter to the chief (PW7) who later took him to the police station at Maua.

16. It was contended on behalf of the accused person that the prosecution had not proved its case beyond any reasonable doubt against him. Mr. Gikunda Anampiu for the accused submitted that the eye witness accounts given by PW1 and PW2 were contradictory especially as to whether the deceased was beaten using slasher or plank of wood. He also submitted that the conditions prevailing on the night of the alleged attack were not conducive for positive identification/recognition of the accused as the deceased's assailant. In this regard, Mr. Gikunda submitted that the length of time both PW1 and PW2 spent with the accused, i.e two minutes and one minute respectively was too short for any meaningful observation on a dark night. That the evidence given on the intensity of light available for observation was lacking and that it was not clear whether the observation was directed at the accused's face or clothing. Mr. Gikunda further submitted that these gaps in the evidence created many doubts as to whether indeed John and Kanja clearly recognized the accused whom they alleged they knew before. It was also contended on behalf of the accused that since both John and Kanja never told anyone that they had seen the accused assaulting the deceased, then their evidence as weighed against Mutabari's evidence should not be believed.

17. Mr. Muteti, Principal State Counsel submitted that the prosecution's case against the accused person was proved beyond any reasonable doubt. Mr. Muteti urged the court to discard the accused person's defence of alibi which defence he submitted was quickly crafted by the accused but which defence miserably crumbled in the face of the evidence given by both John and Kanja. It was contended further for the state that the defence of alibi put forward by the accused is too weak to raise any reasonable doubt in the mind of this court. It was also argued that both John and Kanja gave a reasonable explanation as to why they neither straight away helped the deceased or told anyone about what they had observed on the road near Mutabari's gate.

18. On the accused's surrender to the chief of a different location, Mr. Muteti submitted that this was a clear attempt by the accused to conceal his involvement in the deceased's murder after realizing that he was being sought by the police in connection with the murder.

19 Mr. Gikunda replied by saying the burden of proof in this case rested squarely at the feet of the prosecution that burden could not be shifted to the defence. He also urged the court to find that the totality of the evidence did not irresistibly point to the accused as the perpetrator of the heinous crime against the deceased person.

20. The question that arises for determination is who killed the deceased? It is not in dispute that the deceased died as a result of injuries sustained on the fateful evening of 2.10.2003 between 7.30 and 8.00 pm or thereabouts just outside Mutabari's gate. A brief review of the evidence will assist the court in determining the issue before it. John stated that he saw the accused beating the deceased using a slasher and that the accused also kicked the deceased in the stomach. That he (John) observed the accused from a distance of about 8 metres and that he flashed his torch at the accused and deceased though he did not clarify on which part of the accused's body the torchlight fell. John also said he stayed at the scene for about two minutes and then ran off to Mutabari's home to make a report. Mutabari said that both John and the children who had accompanied John to the canteen talked of having seen a drunkard lying on the road. Mutabari said John never gave him the name of the aggressor.

21. As for Kanja, she said that she flashed her torchlight at both accused and deceased for about a minute but that she could not identify the deceased. The time was 8.00 pm she said and that she was afraid so she hurried to the canteen to buy sugar as she had intended. After witnessing the incident, Kanja

said she went home and slept. She told no one, not even her son about the incident.

22. Dr. Gichere's evidence was to the effect that the injuries upon the deceased's body were mainly on the head, and especially the forehead. The doctor's report did not show that the deceased suffered any injuries in the stomach as alleged by John and further that the injuries found on the deceased's body were caused by a blunt object. Can a slasher be said to be a blunt object?

23. After carefully considering above evidence, the submissions by counsel on both sides the law and the accused person's defence, I find and hold view that the prosecution's case falls short of the standard of proof required in criminal cases, namely that the case against any accused person should be proved beyond any reasonable doubt. I find that the testimonies given by John and Kanja which form the backbone of the prosecutor's case, have to be treated with caution. I have wondered why if John witnessed the incident and clearly recognized the accused, he did not give Mutabari the details of the deceased's assailant(s) at the very first opportunity. John testified that he had known both deceased and accused for a year and that he had interacted with them regularly. What prevented him from telling Mutabari what he had seen?

24. Further, why did John tell Mutabari that they had fixed the deceased? It is my considered view that if the deceased was beaten, he must have been so beaten by a mob, and it is not clear that the accused was part of that mob. I find and hold that even the circumstances prevailing at the hour in question were not good for proper identification and recognition of the accused person. Even though both John and Kanja alleged that they saw the accused assaulting the deceased their testimonies are not fool proof due to lack of sufficient light. Though Kanja said that her torch light was bright and new, she could not say when the batteries were put into the torch. Further, she said that because she was afraid she hurried off only after a minute of observing the accused. I find and hold that such length of time was not sufficient for proper identification of the accused by Kanja.

25. I also find that the evidence of Mutabari contrasts sharply with the evidence given by the two eye witnesses, namely John and Kanja. Whereas John and Kanja alleged that they saw the accused beating the deceased, the information that John passed on to Mutabari was that he had seen a drunkard lying on the road. John did not even mention that the "drunkard" was Maroo. I am therefore doubtful whether both John and Kanja saw the incident as they wanted this court to believe. It is also interesting to note that when John went to report the matter to Mutabari, he said that they had fixed the drunkard. What did John mean? Was he part of a bigger group that may have beaten the deceased, and could the accused have been one of the group? Maybe the accused was, but the evidence so far adduced does not prove beyond doubt that he was.

26. I also find that the evidence by Dr. Gichere does not also fully agree with what John told the court that he saw the accused kicking the deceased in the stomach. The post-mortem report – P exhibit 1 does not have any evidence of injury of the deceased's stomach. Further, the doctor told the court that the deceased's injuries were most likely caused by a blunt object yet John said that the accused was beating the deceased using a slasher. At the same time, Kanja said that the accused was beating the deceased using a plank of wood. Which was which? Did these two witnesses really witness the incident? The discrepancy in these two key testimonies is so bit that has created such doubt in my mind that the accused must be given the benefit of the same.

27. I have considered with care the accused's defence of alibi, but in my view, if the prosecution evidence had been strong, I would not have attached any weigh to that defence. However, since it is the duty of the prosecution to prove the guilt of the accused beyond any reasonable doubt and not for the accused to prove his innocence, all I can say is that the alibi is probably true.

28. In the result, I don find and hold that the prosecution has not proved its case against the accuse person beyond any reasonable doubt. Accordingly, I find him not guilty of the charge of murder and acquit him of the same. Unless he is otherwise lawfully held, the accused is to be released from the prison custody forthwith.

29. It is so ordered.

30. Dated and delivered at Meru this 18th day of January 2008

RUTH N. SITATI

JUDGE