



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Criminal Case 92 of 2006

REPUBLIC.....Applicant

-VS-

DAUDI JOSPHAT MPEERE.....1st Respondent

ELIJAH SOLEWE MPEERE.....2nd Respondent

JUDGMENT

The accused had been charged for the offence of murder, contrary to Section 203 as read with Section 204 of the Penal code, Cap. 63, Laws of Kenya. The particulars of the offence as stated in the information are as follows:

“On the 4th February, 2006 at Milimani village,
Namanga in Kajiado District within Rift Valley
Province, jointly with others, not before Court,
murdered MUTUNKEI MPEERE.

In her evidence, PW1 Esther Naipanut, a farmer, informed the court that both the accused and deceased are her brothers. Besides the above, PW1 also testified that on 4th February, 2006 they had a family meeting to discuss land issues. During what she described as a peaceful meeting, the deceased demanded KShs.12,000/= so that he could go and get his title deed separately. Since the land buyer viz, Abdi had not completed paying the purchase price, the family was supposed to demand the said amount from him. According to PW1, the deceased assaulted the Accused 2 with a stone on the head. As the Accused 1 tried to intervene, the deceased tried to run away and fell on a stone. Thereafter, PW1 observed that the deceased was bleeding and never woke up again. After a few minutes, PW1 saw police officers arriving and they later took the deceased to Namanga Health Centre where he was referred to Kajiado District Hospital. Unfortunately, the deceased died on arrival at the hospital. The PW1 further explained that when the deceased fell down, the accused 1 hit him once with a stick on the hand. When the accused realized that he was not getting up, they ran away. On the other hand, PW2 Peninah Wakonyo Kahumbu Mpeere, the mother to the deceased and accused, confirmed that on 4th February, 2006 they had a family

meeting where the deceased wanted to be paid his money. Among the people who attended the meeting were: PW2, her five sons and Abdi who was the land buyer. After the meeting at around 5.00 p.m., PW2 started heading home. However, while still on the way, four children informed her that there was a fight in her home and that she should report the matter to the police. In response, PW2 reported the matter to Namanga Police Station where she was given a vehicle to take her to the scene. On arrival, PW2 found the deceased lying down next to a stone and they later took him to the hospital. By then, the deceased had a head injury and could not talk. PW2 was later informed that her son had died at around 10.00 p.m. In his medical evidence, PW3 – Dr. Titus Ndeti, a Senior Medical Officer of Health, Kajiado District Hospital, testified that on 10th February, 2006 he conducted a post-mortem on the body of Moses Mutunkei Mpeere who had blood stains on the face and compound fracture on the temporal region – apart from cerebral haemorrhage. Dr. Ndeti formed the opinion that the cause of death was intra-cerebral haemorrhage. At the conclusion of his evidence, Dr. Ndeti produced the post mortem – Ex.1. Besides the above, Dr. Titus Ndeti also produced the P3 Form – Ex.2 in respect to Daudi Josphat Mpeere (the Accused1) who had earlier been examined by Dr. Gitau. The Ex.2 showed that the mental status of the Accused 1 was normal and that his memory was also good. That apart, the P3 form also showed that the Accused 1 never had any external injuries. On the other hand, PW4, a businessman and brother to the deceased, largely confirmed and corroborated the stories of PW1 and PW2. The other additional details that PW4 gave was that the deceased was actually claiming KShs.12,295/00. He also explained that, the quarrel started after the meeting had recommended that KShs.1,500/= should be deducted from what the deceased was entitled to, to cater for their mother's transport costs. According to PW4, he left the scene when he sensed that a fight was about to break out. At around 7.00 p.m., PW4 met Gechia who informed him about the fight and the fact that the deceased had been rushed to the hospital. PW4 also testified that on 10th February, 2006 he witnessed the post-mortem of his deceased brother. In his evidence, PW5 – Cpl Joseph Mudibi who was attached to Namanga Police Station testified that on 4th February, 2006 he received a report from Penina Wakonyo Mpeere who was accompanied by her daughter viz, Esther that one of her sons was lying in a critical condition at home. Subsequently, PW2, Penina Wakonyo Mpeere identified the assailants as Daudi Josphat and Elijah Mpeere. Consequently, PW5 went to the scene while accompanied by Police Driver Simiyu, PC Kipkurui, the reportee and her daughter. On arrival, PW5 found the deceased who had a big wound on the head and a big swelling on the neck. By then, the deceased was breathing deeply and was unconscious. With the assistance of the other officers, PW5 took the deceased to Namanga Health Centre where he was admitted. However, in the evening the deceased's condition deteriorated and hence he was transferred to Kajiado District Hospital where he passed on while undergoing treatment. Thereafter, PW5 summoned witnesses and recorded their statements. On 10th February, 2006, PW5 accompanied two relatives to the deceased to Kajiado District Hospital where they identified the body of the deceased before a post-mortem was carried out by Dr. Ndeti. In addition to the above, PW5 also testified that on 22nd February, 2006 at around 10.00 p.m. he led a group of officers to a house at Namanga border where they arrested the Accused 1. Subsequently, on 18th May, 2006 PW5 together with other police officers laid an ambush at around 1.30 a.m and arrested the Accused 2. For reasons that have already been expressed explicitly, the accused 2 was "acquitted" after the court found that he had no case to answer.

In his defence, Daudi Josphat Mpeere (hereinafter referred to as the Accused 1) introduced himself as a casual labourer. He recalled that on 3rd February, 2006 he went to the mosque at around 5.00 a.m. and thereafter attended a family meeting which was presided over by Abdi, a land buyer. Among the people who attended the family meeting were: Moses Mutunga, Kenyatta Nyemsi, Elijah Salewe, the mother – Penina Wakonyo and Esther. According to the Accused 1, the meeting ended peacefully and that the deceased had demanded to be paid his money so that he could pursue his title deed on his own. The Accused 1 further testified that at around 4.00 p.m., Abdi left for the mosque, while the family continued with the calculations. Similarly, the mother of the accused later left for town. Subsequently, when the Accused 2 suggested that KShs.1,500/= should be deducted from the share of the deceased, he became incensed and assaulted the former on the head using a stone. Seeing the above, Kenyatta and Daniel stood up and started running away. On the other hand, the Accused 1 raised an alarm and was later joined by Esther. The Accused 1 also testified that after assaulting the Accused 2, the deceased also grabbed him by the neck. In addition to the above, the Accused 1 also testified that when the deceased was running away, he slid and fell down on a big stone. Though the Accused 1 tapped the deceased using a

stick, he never woke up. From there, the Accused 1 went home.

After the court delivered its summing-up both assessors returned a verdict of : “guilty” against the accused 1. The first assessor viz, Kennedy Alubi explained that the Accused 1 had run away and hid himself after the incident. He also questioned the use of the stick by the Accused 1 instead of using his hand. A review of the evidence on record clearly show that there was a family meeting on 4th February, 2006. Apparently, the main agenda was for the family to share the proceeds from the purchase price that was paid by the land buyer viz, Abdi. Whereas the meeting went on fairly well, the same ended on a sour note when they were discussing about how much the deceased was entitled to. According to PW1 it was the deceased who assaulted the Accused 2 with a stone on the head. It was also the evidence of PW1 that when the Accused 1 tried to intervene, the deceased tried to escape and fell on a stone. Thereafter, the deceased bled and never woke up again. Unfortunately, the evidence of PW4 was evasive since he reckoned that he left before the fight started. The medical evidence by Dr. Ndeti clearly show that the deceased was found with blood stains on the face and compound fracture on the temporal region. Dr. Ndeti formed the opinion that the cause of death was intracerebral haemorrhage. From the above evidence it is crystal clear that none of the witnesses saw the Accused 1 assaulting the deceased on the head. The explanation by PW1 that the deceased fell on a big stone when escaping is consonant with the medical findings by Dr. Ndeti. Though PW1 referred to an assault on the hand of the deceased by the Accused 1 the doctor never referred to any injury on the hand. That means that there was no injury on the hand that was significant and contributed to the death of the deceased.

Given the above sketchy evidence, I hereby find that the defence by the accused is reasonable and plausible under the circumstances. Due to the above reasons, I hereby wish to differ with the findings of the two assessors. In view of the above, I hereby find that the prosecution have failed to prove their case beyond any reasonable doubt. The accused is found “not guilty” and is acquitted under Section 306 of the Criminal Procedure Code, Cap 75, Laws of Kenya. Accused should be released forthwith unless held lawfully. Those are the orders of this court.

MUGA APONDI,

JUDGE.

14TH FEBRUARY, 2008.

Judgment read signed and delivered in open court in the presence of the accused: Mr. Nyongesa Defence Counsel: and Mrs. Murungi State Counsel.

ORDER: Assessors to be paid allowances.

MUGA APONDI,

JUDGE.

14TH FEBRUARY, 2008.