



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MACHAKOS**  
**CRIMINAL CASE 38 OF 2003**

**REPUBLIC.....PROSECUTOR**

**Versus**

- 1. MBAI MULI**
- 2. FRANCIS MULUNGA IKOTHO**
- 3. ALEXANDER KAMEME MULUNGA...ACCUSED**

**JUDGMENT**

Mbai Muli, Francis Mulunga Ikotho and Alexander Kameme Mulunga (hereinafter referred to as accused 2, & 3) were jointly charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. They were alleged to have jointly murdered Nicholas Mbeni Nzavya on 23/12/02 at Kiliniki village, Nzawa sub-location, Ngutani Location of Mwingi District.

All the accused denied the offence. The prosecution called a total of 14 witnesses. At the close of the prosecution case, Accused 2 was acquitted for lack of evidence linking him to the offence. Accused 1 and 3 were called upon to defend themselves and they gave sworn evidence but did not call any witnesses.

During the hearing of this case the presence of assessors was then a requirement but the same was done away with before the summing up was done. The Court has therefore proceeded to write the judgment without summing up the case for the assessors.

Briefly the evidence adduced by the prosecution witnesses is as follows; P.W. 1 Mbithe Mbwika recalled that on 23/12/03, at about 5.00 p.m. she was at her home, when the deceased, Mbeni, came to her home, then Mbai, Mulunga and Kameme (Accused 1, 2 and 3) followed and they informed her that they had come to see her since she had been ill and had just been discharged from hospital. That they were all drunk and that once the deceased was seated he started to sleep and she told him to rise and go home which he did and was followed by Kameme, Accused 3. That Mbai and Mulunga were left behind talking to her. She did not know the route that the deceased and Kameme took. That Mulunga left after about 5 minutes of the deceased's departure. That Mbai was left behind for some time as he asked for some paper in which to roll tobacco and P.W.1 asked him to roll it as he went his way. She did not notice anything peculiar or unusual between the deceased and the accused persons for the short time that they were at her house. On the next day, the deceased's brother by the name Mukunga (PW6) went to enquire from her if she saw the deceased with anybody and she told him that he left alone. That is when she learnt that he was injured. She denied having heard him scream. She did not visit the scene where the deceased was lying and injured.

P.W.2, Ngina Musyoki recalled that on 24/12/02, as she left her home to go to fetch water with a donkey, she noticed her donkey raise its ears, and on checking why, she saw somebody lying beside the road and she recognized the clothes as belonging to Mbeni, a person she had known for a long time. She returned home to inform Kavwele Mukelemu, that Mbeni was lying about 1 km from his home. P.W.2 did not take a close look at the deceased to see how he was injured.

John Nzumbi, (P.W.3), was at home on 24/12/02, at about 8.00 a.m., when Cosmas Kamanda Musyoki, informed him that he had found Mbeni lying besides the road near Kiliniki Market and was injured. P.W.3 went to Kiliniki and found the deceased lying beside the road and upon observing him, noted that the jaw was fractured. P.W.3 asked the deceased who had injured him and the deceased said that Mbai Muli and Kameme Mulunga. P.W.3 said that by then, there were many people at the scene. The Assistant Chief send him to look for Mbai Muli whom they found at his home. He did not however get Kameme at his home. Mbai was arrested and taken to Migwani Police Station. P.W.3 said that when the deceased named those who injured him, he was in pain and talked in a faint voice. PW 3 admitted that there are other people known by the name Mbai but that is the Assistant Chief who told him to go and get Mbai Muli. P.W.3 knew the accused persons well.

John Ndovoi Mathua (P.W.4), is the Assistant Chief of Nzawa sub-location. Both the deceased and Accused Persons were his subjects. He recalled that on 24/12/02, at about 7.00 a.m., Kavwele Nzavya, the brother of Mbeni went to his home and reported that his brother had been beaten by people known to him who were Mbai Muli and Kameme. He accompanied Kavwele to the scene where the deceased lay, about 100 metres from Kiliniki trading centre. Upon observing the deceased, he saw that he was injured, some teeth were missing from the mouth and the deceased's clothes were blood stained. P.W.4 asked the deceased who had injured him and he named Mbai Muli and Kameme Mulunga but did not tell him why they assaulted him. According to P.W.4 he had no difficulties in communicating with the deceased. That is when he sent people to look for the Accused 1 and 3. That Kameme was not found but Mbai was arrested and brought to the scene; Accused and the deceased were taken to the police station from where the deceased was taken to hospital.

P.W.5 Kavwele Mukelemu, is an older brother of the deceased. He recalled that on 24/12/02 at about 6.30 a.m., Ngina Musyoki, (P.W.2) the wife of his cousin woke him up and informed him that he had seen Mbeni lying by the road side and was injured. P.W.5 went to the scene and found people had gathered including his mother. That Mbeni was injured on the cheek above the eye and his clothes were blood stained. At first, he said that Mbeni was unable to talk. It is P.W.5 who sent for the Assistant Chief (P.W.4) and when P.W.4 talked to Mbeni, he started to talk and when asked who assaulted him, he named Mbai and Kameme. Mbai was arrested on the same day. P.W.5 got a vehicle to take Mbeni to hospital. Later on 27/1/03, P.W.5 identified the deceased's body to the Doctor for purposes of postmortem.

Alexander Mukunga Nzavya (P.W.6) a brother to Mbeni was asleep at about 6.00 a.m. when he got a report that Mbeni was injured. He went to the scene and found the mother already there. P.W.6 asked Mbeni what had happened to him but he could not speak. He observed that Mbeni was injured on the jaw, teeth had fallen out and the right side of the head was also injured. P.W.6 went to Mbwika's house where he had left Mbeni at 6.00 p.m. on 23/12/02 drinking traditional liquor. He had left Mbeni drinking with Mbai Muli and Kameme. When P.W.6 enquired from P.W.1 when the deceased left, P.W.1 told him that Kameme had left first, followed by the deceased, then followed by Mbai and that by then it was night. P.W.6 went back where Mbeni lay. That Mbeni was given tea and was able to talk to whoever asked him a question. But the deceased did not say why he was assaulted. P.W,6 said the incident took place about 100 metres from deceased's house at Kiliniki. P.W.6 said he talked to the deceased till 29/12/02 when he last visited him at Kenyatta National Hospital. P.W.6 said that they had been drinking at Mbwika's first wife's house and when liquor got finished, he left the deceased and Accused persons going to P.W.1's house who is Mbwika's 2<sup>nd</sup> wife where there was more liquor.

P.W.7 is Masaa Nzavya, the mother of the deceased. She testified that on 23/12/02, she woke up and was informed by children that Mbeni was lying by the road side. She proceeded there and found a group of people surrounding the deceased, on asking who assaulted him, Mbeni named Mbai and Kameme. That Mbeni talked with difficulty due to the injuries on the mouth/jaw. That the deceased said that Kameme

cut him with an axe whereas Mbai had a knife. She observed that he had injuries on his right jaw, some teeth missing, had a cut on the face, vomited blood and some teeth fell out.

P.W.7 also said that there is only one Mbai in the village save for a small boy by the same name while Kameme is her grandson and there is no other in the village by that name.

Julius Muusya Kathuka testified as P.W.8. He is a resident of Nzawa and he recalled that on 24/12/02 at about 7.00 a.m. he saw people gathered on the road and upon approaching the crowd found Mbeni Nzavya lying by the roadside injured on the jaw which looked crushed and some teeth were missing from the mouth. P.W.8 enquired who injured Mbeni and he replied with difficulty that it was Mbai Muli and Kameme Mulunga but did not say why they assaulted him. P.W.8 denied hearing any screams or commotion from the scene even though his home is about 130 metres from where Mbeni lay. He accompanied the deceased to Kenyatta National Hospital and during the time they were together, Mbeni told him the persons who assaulted him and that they had been drinking at Mbithe Mbwika's house.

Kamanda Musyoki (P.W.9) of Nzawa sub-location was going to cultivate on 24/12/02 at about 9.30 a.m. when he saw people gathered and he went to see. He found a person seated, his head was covered in blood and a cut on the cheek. When he was told it was Mbeni, he called Mbeni by name and asked what happened but he murmured things that P.W.9 did not understand.

Police Constable Peter Muthini (P.W.10) who was then based at Migwani Police Station recalled that on 27/12/07 he went with 2 of the deceased's relatives to the City Mortuary where the relatives identified the body of the deceased before postmortem was done.

P.C. Dominic Ngangi (PW 11) of Migwani Police Station was on duty on 24/12/02 when he received a report from the area Assistant Chief – Nzawa sub-location, who took to him 2 suspects for an offence of assault. The victim of the assault was also carried on a pick up. He booked the report, and Mbai Muli and Mulunga Ikotho were booked for an offence of assault but one Kameme Mulunga was still at large. P.W.11 talked to the deceased who talked in a low voice and pointed to the two as the assailants but they said nothing.

The deceased was taken to hospital and PW 11 handed over the matter to PW 10. On 15<sup>th</sup> November 2003 they arrested accused 3 who went to police station to report that he had learnt that he was being sought. PW11 observed that the deceased had a cut wound on the right jaw and the deceased told him that they had been the accused persons on 23<sup>rd</sup> December 2002.

Chief Inspector Damaris Kali (PW 12) was the officer in charge of Migwani Police Station in 2002. She received a report on 29<sup>th</sup> December 2002 from Assistant Chief of Nzawa that Mhai Muli, Mulunga Kithuka and Kameme had assaulted somebody. Accused 1 and 2 were brought to the station in company of the victim and learnt of deceased's death on 4<sup>th</sup> January 2003. Later, Accused 3 was arrested when he presented himself to the police. PW 12 said she supervised the investigation.

Dr. Alan Owino (PW 13) of Mwingi District Hospital recalled that he was requested to carryout a psychiatrist examination on one Alexander Kamene on 23<sup>rd</sup> April 2003 and found that he had no mental illness. He filed the P3 form to that effect. Accused 2 was examined by Dr. Nderitu on 1<sup>st</sup> February 2003 and found to be mentally fit and filled the P3 and was produced as Ex No. 2

Dr. Jane Wasike (PW 14) produced a postmortem report in respect of the deceased. She performed the postmortem on 27<sup>th</sup> January 2003 and found bruises on the deceased's forehead lacerated wound on right cheek, a fracture of both mandibles with the loosening of the teeth, a fracture of the base of the skull with bleeding in the brain. The Doctor formed the opinion that the cause of the death was head injury due to a blunt object, and sutured wound. The postmortem report was produced as Exh.3.

Accused Mbai Muli testified on oath and recalled that he saw the deceased on 23<sup>rd</sup> December 2002 at 4.00 p.m. at Kavunda Mbwika's home where they were taking traditional liquor ie Karubu. He found the

deceased drinking there with other people. He left Kavunda's home at 5.00 p.m because the liquor got finished. He left the deceased and others behind. He went to Mbithe Mbwika's home to take more liquor but found it finished though there were about 5 people there. He entered the house and sat till 6.30 p.m. as the owners of the home are his inlaws. He left at 6.30 p.m. to arrive at his home at 7.00 p.m. and slept. He denied seeing the deceased quarrel with anybody on that night.

Accused 3 Alexander Kameme Mulunga made his defence on oath. He said that he knew the deceased as they hailed from the same area, but denied murdering him. That at the time of the alleged offence, he was doing casual jobs and when he came back home, he learnt that the police were looking for him and he presented himself to the police on 14<sup>th</sup> April 2003. He had last seen the deceased on 23<sup>th</sup> December 2002 at Mbwika's home where he had gone at 1.00 p.m. and found the deceased already taking alcohol with many other people. He also saw accused 1 at the said drinking place. He left for his home at 5.00 p.m. and noticed no incident at that place

He learnt of the deceased's death on 22<sup>nd</sup> April 2003. That when left Mbwika's home the deceased was with his two brothers. He last saw the deceased on 24<sup>th</sup> December 2002 having been injured. He denied there being any bad blood between him and accused on one hand and the deceased. He denied ever seeing the deceased at Kavunda Mbwika's house on 23<sup>rd</sup> December 2002.

It is not in dispute that nobody saw the Accused 1 and 3 assault and injure the deceased. Infact nobody witnessed the attack on the deceased. We only have the word of witnesses who claim to have spoken to the deceased on 24<sup>th</sup> December 2002 when he was found lying by the road side when the deceased had already sustained injuries. This case therefore turns on a dying declaration.

I have considered the case law cited by Counsel on when the court can rely on dying declarations. The cases of **NZOMBO CHAI V REP CR APPEAL 256/06, OKETHI OKALE V REP 1965 EA 555** and **CHOGE V REP (1985) KLR 1** dealt with the weight that can be given to dying declarations. In the **CHOGE CASE** the Court of Appeal at holding No. 5 & 6 had this to say of the law on dying declarations,

**“The general principle on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at the point of death and the mind induced by the most powerful conditions to tell the truth. In Kenya however, the admissibility of a dying declaration does not depend upon the declarant being at the time of making it in a hopeless expectation of imminent death.**

**There need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in the reception into evidence of such a declaration as it is generally unsafe to base a conviction solely on a dying declaration of a deceased person.”**

What did the Court of Appeal mean? That generally, a dying declaration can support a conviction without necessarily being corroborated by other independent evidence but the court has to take the dying declaration with utmost caution.

The deceased did not die immediately after he was assaulted. He died on 4<sup>th</sup> January 2003 about two weeks later. He was last seen alive when he was well on the evening of 23<sup>rd</sup> December 2002. PW 1 Mbithe said the deceased was at her home about 5.00 p.m. and left soon thereafter while PW 6, the deceased's brother, said he last saw his brother on the same date at Mbwika's house at about 6.30 p.m. Nobody knows what happened to the deceased between about 6.30 p.m. till he was found lying by the road side near Kiliniki Market.

From the evidence of all the witnesses who saw and talked to the deceased on 24<sup>th</sup> December 2002, there is no doubt that the deceased spoke with difficulty due to the injuries suffered. Infact most of the witnesses except PW 4, the Assistant Chief said that the deceased had difficulty talking and was very faint. PW 6 specifically said that the deceased could not talk till he was given some tea. And even after

that, he talked with difficulty and was in pain.

PW3, 4, 5, 6, 7 and 8 all claim to have been told by the deceased that Mbai Muli and Kamene Mulunga assaulted him. According to PW7, the deceased's mother, there was only one Mbai in the village while another is a child and there was no possibility of confusing the two. PW 3 said that he did not know which Mbai was referred to but the Assistant Chief sent him to get the accused 1. Even though the deceased named the two accused as his assailants the question is whether he told the witnesses how he was able to identify his assailants. According to PW 6, the deceased's brother, he left the deceased at Mbwika's house at 6.30 p.m. and that the deceased told him he was suddenly attacked on his way home. That the attack took place at night. Even if none other of the witnesses was told this, deducing from the evidence of the witnesses that the deceased left the beer drinking place late after 6.00 p.m. or there about, it was late and that the attack is likely to have taken place at night. That would therefore raise the question of identity. The deceased was alone, it was at night, he had been drinking alcohol. This court has no idea how much alcohol he had consumed. PW 1 said that when the deceased went to her house he was drunk and started to sleep and she woke him up and told him to leave. The question is whether he was able and was in a state to identify his attackers. There is no evidence that the deceased disagreed with any of the accused persons prior to that evening at the place they had drunk alcohol on the way home. Taking all the circumstances of this case into account, that this incident occurred in the night and with no eye witness, and with a possibly drunk victim, there is no basis for the deceased concluding that it is the two accused who attacked and assaulted him. Though the deceased did not die immediately after the assault there is no evidence as to how he fared thereafter or later or that he ever explained what transpired prior to the alleged attack.

I would find that it is dangerous for this court to found a conviction based on the dying declaration of the deceased alone. All the witnesses denied that the deceased ever told them the reason why the accused persons could have assaulted him and yet they had been drinking together. There are unanswered questions like was there was provocation or a fight, how much had the deceased drunk that day, was he able to identify his assailants? I caution myself that the only available evidence against the accused is the dying declaration by the deceased but I find that it is unsafe to rely on that single witness evidence alone. The accused's explanations may be mere denials but it is not for them to prove the charge against them, but the prosecution. In the circumstances I will give the accused persons the benefit of doubt and acquit them of the offence of murder.

They are hereby set free unless otherwise lawfully held.

Dated and delivered this 2<sup>nd</sup> day of July 2008.

R.P.V. WENDOH

JUDGE

Judgment delivered for and on behalf of Wendoh J. by Lenaola J. on 2<sup>nd</sup> July 2008

LENAOLA

JUDGE