



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
Criminal Case 8 of 2004**

REPUBLIC

VERSUS

- 1. ELIZABETH WANZA MUVEA**
- 2. DANIEL MATHEKA MAITHYA**
- 3. JULIUS NYAMAI KIKUMA ACCUSED**

JUDGMENT

1. Jeremiah Muvea Nzioka died on 2/3/2002 and his wife, Elizabeth Wanza Muvea, Daniel Matheka Maithya and Julius Nyamai Kikuma were arraigned in court on 19/3/2002 and later charged with the offence of murder contrary to section 203 and section 204 of the Penal Code. It was alleged that the offence was committed on 2/3/2002 at Kwanzilili village, Ekalakala Location in Machakos District.

2. In the course of the trial, the 2nd accused Daniel Matheka Maithya died on 15/10/2004 and the evidence tendered was as follows:-

PW1, Mbuvi Nzioka, a brother of the deceased received the report of his death on 3/3/2002 from a daughter of the deceased. He proceeded to where the body was and he found a panga next to it while the deceased had multiple cuts including complete mutilation of his penis.

PW2, Josephat Mutune recalled that on 2/2/2002 he was with many other people at the home of one Grace Peter where there was a traditional ceremony. He recalled that the deceased and Daniel Matheka aforesaid had a quarrel according to information given to him by Elizabeth Wanza but when he went to her home, he did not find the alleged combatants. The next day the same Wanza went to his home and told him that her husband had been killed. He accompanied her back and found the deceased's body with a panga next to it. His penis had been cut and stuffed into his mouth. PW2 then made a report to the police and both Wanza and Matheka were arrested. Matheka allegedly told the police that Wanza had paid him Kshs.1,000/= to kill the deceased.

PW3, Ngusye Nzioka Peter was the one who had a traditional ceremony at his home on 2/2/2002 and he recalled that the deceased, Wanza and Matheka were present and were all drinking traditional liquor. At about 11 p.m he heard noises from where the group was drinking and when he went there, the 3rd accused, Julius Nyamai Kikuma was shouting and wanted to disrupt the session. PW3, called PW2 who was the village headman and the group dispersed to their homes. Early the next morning PW2 informed

him that the deceased had died and that he suspected the accused persons as having been his murderers.

PW4, C.I.P. Soita Mwanja, OCS Matuu Police Station received the report of the deceased's death on 3/3/2002 at 2.00 p.m and together with other police officers, he proceeded to the scene at Ekalakala. The body was between the deceased's two houses and it had cuts on the head and a panga was placed on his chest. The deceased's penis had been cut off and placed in his mouth and after investigations, Matheka and Wanza were arrested the same day while Kikuma was arrested later.

PW4 said that during investigations he found out that Wanza had a sexual affair with Matheka and that fact may have triggered the murder.

PW5, P.C. George Bosire was with PW4 when they went to the scene of the deceased's murder and it was he that interrogated Wanza and Matheka and it was his evidence that Matheka confessed to the crime having been hired by Wanza to kill the deceased. The alleged confession is inadmissible and was not produced in any event.

PW6, Dr. Simon Kioko performed the post-mortem on the deceased's body on 10/3/2002 and he noted the deep cuts on the deceased's forehead and the amputation of the penis shaft. The cause of death in his opinion was loss of blood due to those injuries.

PW7, Dominic Ngonzi Ndunda was at the ceremony at PW3's home and he confirmed that he saw Wanza, Matheka and the deceased drinking traditional liquor. At some point in the night, Matheka kicked the deceased who fell down. The fight was stopped and the deceased left. PW3 then asked the others to also go to their homes. PW7, Wanza Matheka and Kikuma all walked together as did Angelina, a daughter of the deceased. Along the way, the accused persons asked PW7 to turn back and so he did but after picking his bicycle from PW3's home, he returned and found Wanza and Matheka squatting in a bush nearby. He passed them but stood about 100 metres away and that is when he heard Matheka and Wanza asking the deceased to open up. He then went away and slept but the next day, he got information that the deceased had been murdered.

It was his further evidence in cross-examination that when Matheka and Wanza asked the deceased to open up, he answered that he would not do so. That although he found nothing strange about that episode, he was still surprised because Matheka was there at that time. Matheka apparently had also previously been employed by the deceased while Kikuma, 3rd accused was married to Angelina, daughter of the deceased.

PW9, P.C. Mark Bor gave evidence similar in all respects to that of PW4 and PW5 and I see no need to repeat it.

3. When the two accused persons were put on their defences, DW1, Elizabeth Wanza Muvea gave a sworn statement in which she denied the offence. She instead said that whereas she was at PW3's home on the material night, she stayed there until 6.00 a.m. and when she went home, she found him dead outside his house. She reported the matter to the village headman. She confirmed that the deceased had a quarrel with Matheka on the material night. She denied knowledge of her co-accused, Kikuma and denied that she paid Matheka to kill her husband.

4. DW2, Julius Nyamai Kikuma also denied the offence and said that although he was at PW3's home, on 2/2/2002, he never saw the deceased, Wanza or Matheka because he did not know them and that he left for his home later that evening without incident.

5. I have heard submissions made on behalf of the accused persons and also for the Republic and my evaluation and analysis of the evidence is as follows:-

There cannot be any doubt because it is in fact admitted that the deceased, Wanza, Matheka and Kikuma amongst others were at PW3's home on 2/2/2002. There is also no doubt that Matheka and the deceased picked a quarrel forcing PW3 to intervene and that all the revelers at his home left for the night. That is

as far as uncontested evidence reaches because thereafter, it is only PW7 who has something to say about what happened. His evidence was that he was with Wanza, Matheka and Kikuma as well as Angelina but the accused persons forced him back but when he returned, he found Matheka and Wanza outside the deceased's home before he heard them ordering him to do open up. The evidence thereafter becomes purely circumstantial. I say so because there was no eye witness to the injuries inflicted on the deceased but the Republic has advanced a theory that it was Wanza and her alleged lover, Matheka who after PW7 had passed them, proceeded to chop up the deceased.

6. Circumstantial evidence is good evidence but it is upon the Republic to show that if all the circumstances obtaining are inter-linked, they would point to the irresistible conclusion that it is the accused persons and no other person who may have committed the offence – see R vs Kipkering arap Koske & Another (1949) 16 EACA 135 and Musoke vs R (1958) EA 715. In this case, save for the evidence of PW7 that he saw Matheka and Wanza at the deceased's home on an unclear hour on the material night, there is no other evidence that one can see connecting the accused persons to the offence. That evidence in any event does not implicate Kikuma. Whereas it may be true that he caused a row at PW3's home and whereas it may be true that he walked off with Wanza and Matheka according to PW7, what else is there to connect him to the deceased and his death? I submit no evidence points irresistibly to him and as regards Matheka and Wanza, can I comfortably say that they had something to do with the death? Sadly not. It was Wanza who implicated Matheka and then Matheka implicated Wanza. As was said in Anyangu & Others v R (1968) E.A. 239 at 240 such a statement “is not only accomplice evidence but evidence of the weakest kind (Anyuna s/o Omolo & Another vs R (1953) 20 EACA 218); and can only be used as lending assurance to other evidence against the co-accused.” As was stated in Geoffrey Mutuma & Another vs R, Cr. Appeal 324 and 329/2006, where there is no other evidence to do so, then a conviction cannot be sustained. I have attempted to reconcile my mind with the law as I understand it, and sadly however strong my suspicious are, I am not able to say that the case before me has been proved beyond reasonable doubt.

7. I should end by alluding to the alleged love affair between Wanza and Matheka and the alleged payment made by Wanza for Matheka to kill the deceased. That issue would have been pertinent had evidence been properly tendered but none was. I cannot therefore use it as a basis for convicting because as was said in Okethi Olale vs R (1965) E.A 555, “in every criminal trial, a conviction can only be based on the weight of actual evidence adduced and it is dangerous and inadvisable for a trial judge to put forward a theory not canvassed in evidence or in counsel's speeches”. I agree and that is all there is to say on that matter.

8. Lastly I find that the Republic has failed to prove its case against the accused persons beyond reasonable and whatever suspicious that have been laid before this court cannot be enough to sustain a conviction.

9. I shall acquit the accused persons and order their release from custody unless they are otherwise lawfully held.

10. Orders accordingly.

Dated and delivered at Machakos this 23rd day of September 2008.

ISAAC LENAOLA

JUDGE

In presence of: Mr Wang'ondy for Republic

Mr Sila for Accused

ISAAC LENAOLA

JUDGE