



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MACHAKOS**

**CRIMINAL CASE 21 OF 2002**

**REPUBLIC .....PROSECUTOR**

**VERSUS**

**BENSON MATHEKA JUMA .....ACCUSED**

**J U D G E M E N T**

Benson Matheka is charged with the offence of Murder contrary to section 203 as read with Section 204 of the Penal Code.

The allegation against the accused is that on 9.12.2000 at Kaseve village, Kiima Kiu Location Makueni District he murdered one Stanslaus Thiongo. The accused denied the offence and testified on oath in his defence. He called no witnesses. The prosecution on the other hand called 14 witnesses.

On the night of 10.11.2000 and 11.11.2000 thieves broke into the shop of Joseph Mutungai Leshai (P.W.1) at Kiu. He sought the intervention of witch doctors to find out who broke into his shop. He was directed to Matheka of Kangani Kiu. He was accompanied by Pc. Wafula, Thiongo and one Kingoo to accused's home where they found the accused seated on his veranda. Police introduced themselves and informed accused that they had come to look for stolen goods. He was asked to open the 2<sup>nd</sup> house in his compound which was grass thatched, accused was reluctant to do so but later; did open. P.W.1 identified his bicycle and shop goods that had been stolen from his shop in that house. Accused was unable to produce receipts for the goods. When asked to open and cupboard that was in that house he declined and demanded a search warrant. Accused started to argue with accused and handed over the gun which he had to Pc. Thiongo who went to stand outside the house. Accused suddenly ordered them out of the house, took a sword and cut Pc Wafula (P.W.6). P.W.1 and 6, ran out, jumped the fence and did not know what happened to the others who had been with them. They later noticed that P.W.6 was seriously injured on the fingers on one hand and P.W.6 went to seek treatment whereas P.W.1 got members of Public and went back to the scene when they found Thiongo at a tree near accused's house. He was injured on the head and was dead. They did not get the gun which Thiongo had.

Daniel Kiteng'e Juma (P.W.2) the younger brother of the accused, recalled that he had been at a funeral on 9.12.2000 when the chief announced that some people had entered a person's home and the people had been beaten. He went to witness and about 2 kilometres away from accused's home he found the deceased's body and people were gathered at the body. He then went to accused's home told him that the people had gone to his home to enquire what happened who told him that people had gone of to his home, claimed to be police and wanted to search his house. Later, P.W.2 met the Assistant Chief of the area who sent him to go and get the rifle left behind in accused's home and he did so (Ex.No.1).

The assistant chief of Mgaambo sub location of Kiima Kiu Location Jonathan Musyoka Nzomo, (P.W.3) recalled that on 9.12.2000 at 6.00 p.m. he was called by the chief, Kituku (P.W.5) who asked him to accompany him where a police officer had been killed. They found the deceased's body near a tree. Accused, who was armed with a bow and arrow came nearby and called them to go near him but they feared. P.W.3 was left at the scene while P.W.5 went to report at the Police Station. P.W.3 later met P.W.2 and asked him to go and get the rifle from accused. P.W.2 got it and they handed it to IP. Mutua, who came with the chief.

David Mule Muvuti (P.W.4) said that on 9.12.2000 P.W.1 asked him to accompany him to where his shop goods which had been stolen were. P.W.4 corroborated P.W.1's evidence as to how they arrived at accused's house until the time when an argument arose between accused and the police and he ordered them out of his house. P.W.4 said he was outside while P.W.1, 5 and the deceased were inside accused's house. Thiongo had the rifle. He suddenly saw those who had been in the house ran out and he too ran off leaving others behind. He later saw that P.W.6 was injured on the hand. He went back to the scene with members of public to look for the deceased whom they found was dead and near a tree.

The chief of Kiima Kiu John Kituku learnt that a police officer had been killed and went to the scene in company of P.W.3. He found deceased's body leaning against a tree.

Pc. Jack Van Wafule (P.W.6) recalled how P.w.1 approached him on 8.11.2000 and asked him to go and arrest a person who had stolen his goods. They set off to accused's home on 9.11.2000. They had a rifle with 19 rounds of ammunition. He reiterated what P.W.1 and 3 said upon the arrival at accused's house and how they ended up in his house. Accused attacked him with a sword after an argument over receipts for the goods found in his house. Accused cut him with a Masai sword. He tried to block it with his hand when he blocked with his hand and it was injured and he lost one finger. They all ran off and he sought medical help. He denied using the rifle. He found bow and arrows in accused's house. He denied seeing who killed the deceased.

Chief Inspector Zakayo Mutua was the officer in charge of Kajiado Police Station on December 2000. He received information of his officer's death at Kiu while arresting a suspect. He proceeded to the scene and met with (P.W.5) who led him to the scene. He received a rifle and 19 rounds of ammunition which had been signed for at Police Station. He visited accused's house where he found a pool of blood about 100 metres from the house, assorted goods in accused's house a sworn or simi which had blood stains. He took all the items to Kilome Police Station. (Ex. 3 – 6)

Pc. James Mutisya (P.W.8) and Pc Andrew Ngeno were sent to lay ambush for accused at his home on 28.2.2001. As accused approached his home with a bicycle they stopped and who claimed to be one 'Mutua' upon being asked for identification he drew a sword and threatened to injure them. They fired in the air and shot at him to disable him by shooting in the legs. Accused was arrested with a bicycle and sword (Ex. 4 and 10) Pc Robert Kiema (P.W.9) of C.I.D. Muranga scenes of crime took photographs of the deceased's body while at Machakos Mortuary. – (Ex. 8 a – b).

While accused was admitted at Machakos General Hospital, Pc. Wycliff Wanjala, P.W.10 was assigned to guard him.

Dr. Cyrus Karuga (P.W.2) produced the Post Mortem report (Ex. 9) on behalf of Dr. Mwangi who could not be traced without unnecessary delay. Dr. Mwangi had found that the deceased sustained deep cuts on the head, had a depressed skull, massive intra cerebral haemorrhage and found the cause of death to have been cardio pulmonary arrest secondary to head injury.

Corporal Thomas Odenyo (P.W.14) was in charge Crime at Kilome Police Station as of 2.6.2005. He recalled having received some exhibits from one Pc. Uta who had proceeded on transfer. They were a rifle and 19 rounds of ammunition Ex. No.1 and 3.

Accused opted to make a sworn statement in his defence. He said that he works as a tailor as well as a farmer. He owns a kiosk at his home. He recalled the events of 9.12.2000. When he was at his home

about 1.00 p.m, when 4 people arrived, did not identify themselves but asked to search his home. They did not reveal what they wanted to search for. They forced him into one of his houses, 3 entered while one with a gun remained outside. One was armed with a Masai sword and another with a metal bar and the 4<sup>th</sup> with a syringe one of them saw bed sheets and goods in the accused's house and claimed they were his. On seeing this accused feared those people and that they go to the chief. One person got hold of Accused, a struggle ensued and accused snatched the Somali sword as another struck his shoulder. The struggle spilled till outside the house. He tipped the person with the gun and he fell and he snatched the gun. He also snatched the metal bar from the other. Accused denied that he ever fought with the person with the gun or any other. They ran off and he took the gun to the chief's office, and saw one of the people being chased by members of public a kilometer away. He did not get the chief or assistant chief and met them on the way and they asked him to keep it. He denied ever stealing any goods or having a license for his kiosk. He did admit in cross examination that he had told the chief fought the people and they injured each other.

I have now considered all the evidence of the prosecution witnesses, and the accused's defence. It is not in dispute that Mutunga (P.W.1) in company of Pc. Wafula (P.W.6), David Muvutu and Thiongo the deceased went to accused's home on the fateful day with a view to searching his house for stolen goods. The accused person confirms that the 4 did go to his home though he denies knowing who they were or what they wanted to search for.

It is also not disputed that the 4 went into accused's house and purported to search for goods when accused objected. The issue is what happened because from then the prosecution evidence varies from the accused's.

Mutunga, PC Wafula and Muvutu vividly recalled how accused suddenly turned violent and just attacked Pc Wafula when accused was asked for receipts of some of the goods found in his house and which Mutunga had identified as his goods that were stolen from his kiosk. Pc Wafula's hand was seriously injured and lost one finger. On the contrary accused said that one of the 4 people got hold of him and another struck him when he managed to disarm all of them and on struggling till outside he also managed to trap Pc Thiongo who had a rifle and even snatched the rifle. What extra ordinary strength accused must have had. Anyway I find accused's version of the events most unsatisfactory and unconvincing. He cannot have just overpowered 4 men who were even armed with a rifle and they never even bothered to use it.

According to P.W.7 Chief Inspector Mutua, Pc Thiongo had signed out 19 rounds of ammunition they were found intact in the rifle. It means that the police officers never used any violence on accused. There would have been nothing to stop them from disabling him. The only plausible explanation and which I accept is that of Mutunga, Pc. Wafula and Muvutu that the accused suddenly drew a sword attacked Pc Wafula seriously injuring him on the hand and fingers. The hand was seen in court. It is because of the sudden attack that confusion reigned and they fled in all directions.

Thiongo had been outside the house with the rifle. Mutunga, Pc Wafula and Muvuti did not know what happened to Pc Thiongo.

Pc Thiongo was later found dead with deep cuts on the head. The post mortem report confirmed they were resultant cause of death.

According to accused all the 4 fled after he overpowered them and that he later saw one being chased by members of public. It is unknown where the members of public came from. Beside Accused never said which one of them was being chased by members of public. He said it was a kilometer away. One wonders how he could confirm that it was one of them being chased. It is also interesting that he did not go near to assist in the chase as the people who had violated his privacy.

P.W.7 Chief Inspector Mutua who visited accused's home on the same day after the death of Pc Thiongo found a pool of blood 100 metres from the accused house. Deceased's body was also near accused's home but outside his compound. Accused remained with deceased rifle. From what I believe happened I

will further find that accused must have suddenly attacked the deceased and cut him on the head with the sword and disarmed him of the rifle. The injuries inflicted on deceased were so serious that they caused this death. Deceased was last in the accused's compound armed with a rifle. The rifle was found with accused whereas deceased was dead a few metres away from his house. Even if there was no test done on the pool of blood in accused's compound. Accused never gave an explanation for it. It is likely to be deceased's.

Accused was unhappy with the presence of the 4 in his house and what they intended to do. He attacked them and this court is satisfied beyond any doubt that even as the others fled accused managed to cut up deceased as a result of which he met his death. Malice aforethought The multiple cuts on the deceased head they were meant to cause grievous harm, and I come to the conclusion that it is accused who murdered the deceased. The injuries found on him are consistent with what he was armed with, a sword which he assaulted Pc Wafula with. Accused totally contradicted himself in his evidence. Though he said that they never fought with the 4 people , he later admitted in cross examination that he had told the chief that they fought and injured each other. I find there to have been no fight. If there had been, maybe Pc Thiongo would have used the rifle he had. Even if no-one saw the accused actually attack and injure the deceased yet the deceased was last seen outside accused's house and as earlier observed accused was found with his rifle and he was dead and found in the vicinity of accused's home. The explanation given by accused is not plausible and it is hereby rejected. He is the murderer and I hereby find him guilty of the offence of murder contrary to section 203 as read with section 204 of the Penal Code and he is accordingly convicted.

Dated and delivered at Machakos this 31<sup>st</sup> day of March 2006.

R. V. WENDOH

JUDGE