



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT MACHAKOS**

**Criminal Case 24 of 2004**

**REPUBLIC .....PROSECUTOR**

**VERSUS**

**NYAMAI MWENGEA .....ACCUSED**

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

The accused, Nyamai Mwengea, is charged with the offence of Murder Contrary to Section 203 as read with Section 204 of the Penal code.

The particulars of the charge are that on 15/2/01, at Mwangeni Market, Kitui sub location, Athi location, Kitui district, he murdered Paul Mwendwa Kisangi. The accused denied the offence. The prosecution called a total of 9 witnesses to prove their case whereas accused gave a sworn statement in his defence but called no witnesses.

Ruth Mutiso Kisangi (PW1) was the mother of the deceased. She recalled that on 11/2/01, the deceased found his house broken into and a radio and a solar panel had been stolen from therein. A neighbour's house was also broken into on the same night. The matter was reported to Athi Police Post by PW1 and she was told to investigate. She made her own enquiries and reported back to the police station that Peter and Nyamai the accused, were suspects. Peter was arrested. Later on the same day that she had made a report to police her son, the deceased was killed and she was called to the scene and found the deceased's body leaning against a kiosk on the outside, at Mwangeni market.

Kyeva Muasya (PW2) recalled that on 15/12/01 at about 7.30 p.m. in company of the deceased and PW8 Mutie Kisangi, they went to Mwangani market. PW2 entered Peter's hotel to drink some water while the deceased and Mutie remained outside at the door. As he drunk water, PW2 heard noises as if people were fighting. He saw the deceased and accused holding each other and the deceased said that Nyamai had stabbed him. By then, PW2 was about 2 paces away. Nyamai (accused) ran off with a long knife. PW2 called Doctor Muthini to attend to the deceased while Mutie went to call the deceased's mother. PW2 said he was able to see the deceased and accused 1 as they struggling because there was moonlight and a lamp that had been hang at the entrance of the kiosk.

PW8, Mutie Kisangi, was a step brother to the deceased. He testified halfway and the state applied for adjournment to enable the state counsel to get original statement of PW8 made to police. PW8's evidence was incomplete as it was not tested on cross-examination by the defence. The case was adjourned when the witness's statement recorded with police could not be found. The recalling of the witness was therefore overlooked. The evidence of PW 8 is therefore incomplete and is hereby disregarded by court.

Daniel Mutua Mwengea (PW3) is a step brother to the accused. He told the court that on 15/2/01 at about

8.00 p.m. accused went to his home and he told accused to enter the house so that he could show him something. On entering accused showed him a blood stained knife and told PW3 that he had stabbed a wild beast. Accused then left with the knife but when accused reached the gate, he shouted to PW3 that the blood was that of Paul Kisangi, the deceased and accused ran off. PW3 admitted that his mother sold some land to the deceased's brother but denied that he had a grudge with accused because of the land issue.

Ezekiel Kisangi (PW4), deceased's father did nothing in this case except identifying the body of the deceased to the doctor who performed postmortem.

PW5 Corporal Obed Kiiro, received a note from Athi Police Post that he should help arrest Nyamai Musee the accused who was residing in Makindu area. One Mutiso led him to a nearby house where accused was arrested and later transferred to Athi police post.

After receiving a report of murder on 16/2/01, Police Constable Philip Muchiri visited the scene and found the body near a kiosk. Later, accused volunteered to go and show a murder weapon and a kitchen knife was recovered in a thicket which accused showed them. It was produced in evidence as exhibit No. 1.

Doctor John Logedi (PW9), produced the postmortem report on behalf of Doctor Maundu who could not be traced within reasonable time to testify. He was familiar with Doctor Maundu's signature. Doctor Maundu had found a deep penetrating wound above the left clavicle. Upon dissection of the body, the lung had collapsed; left chest cavity was filled with blood. The pulmonary artery and vein were pierced. The Doctor opined that the cause of death was pulmonary arrest due to excessive bleeding due to a penetrating wound in the chest and large blood vessels.

Accused gave a sworn statement in his defence. He recalled that on 15/2/01 while at Mwangeni market, he was standing at the door of a hotel at about 7.30 p.m when somebody held his collar from the back. They were 3 people whom he did not know. A fight broke out. One of them had something which he did not see as the person ran off. He later learnt that it is the deceased who attacked him and was with PW2 and another, for suspicion that accused had stolen a radio but accused had sold his own radio to get money to take his child to hospital. He said that the deceased was his friend and he had no intention to fight or kill him. He said he too was injured in the fight but police refused to take him to hospital. Accused did not however show any sign of the injuries that he sustained during the alleged fight.

The deceased was injured at about 7.30 p.m.. The issue of identification, however, does not arise because the accused has admitted that he did have a confrontation with the deceased at the said place and time though he alleges that he was the victim of attack by the deceased and two others.

The deceased being no more, the court has to weigh the evidence of PW2 and accused as to what happened on that night before deceased was fatally injured. This is because PW8's evidence has been disregarded by the court for reasons that he was not subjected to cross-examination because after an adjournment he was not taken up again on cross-examination.

It is not in dispute that the accused was a suspect of theft of the deceased's radio. Accused admits as much alleges that the radio he allegedly sold was his own to raise money for treatment of his child.

PW2 is the only witness to the incident. He denied knowing how the struggle between accused and deceased started. He was in the kiosk taking water when he saw accused and deceased holding each other struggling. The question is whether it is really the deceased who attacked the accused in company of PW2 and whether each of them who was armed.

I have carefully considered the evidence adduced by all prosecution witnesses and the defence. It is interesting that the accused waited till his defence to come up with this allegation that it is infact deceased and PW2 who attacked him. It is an afterthought as he never raised it during the cross-examination of prosecution witnesses so that the prosecution could have had a chance to rebut it.

Apart from the evidence of PW2, we had the evidence of PW3 Daniel Mwengea, a step brother of accused who said that accused went to his house on the night of 15/2/01 at about 8.00 p.m. and with a long knife which was blood stained and claimed that it was Paul Kisangi's blood and then accused ran off. After PW3 testified, all that accused alleged was that PW3 had disagreed with him because PW3's mother had sold land to accused's brother. PW3 denied there being a grudge though he admitted there having been sale of land. It was not clear why the sale of land to accused's brother could create a grudge between accused and PW3. PW3 saw accused with a knife at about 8.00 p.m. soon after the deceased had been injured. PW3 had not even known of deceased's injuries by then. I have no reason to doubt PW3's evidence as to the events of that evening. The court does believe and find that accused did go to PW3's home and showed him a knife and told him whose blood was on the knife.

Deceased died instantaneously, soon after the attack. PW2 said he saw accused ran off with a long knife. PW2 actually tried to get hold of the accused but accused managed to run. PW3 then testified of seeing accused with a long blood stained knife on the same night which he claimed had deceased's blood. Upon performing postmortem on the deceased, Doctor Maundu found a pierced deep penetrating wound near the left clavicle. Upon dissection, the pulmonary artery and vein were pierced and blood had filled the chest cavity. The Doctor opined that the cause of death was pulmonary arrest due to excessive bleeding due to penetrating wound into the chest and large blood vessels. Though the doctor did not say it, a pierced, penetrating wound must have been inflicted by a sharp object like a knife.

The arresting officer's (PW6's) evidence was that after re arresting the accused, accused led them to a thicket where he alleged to have thrown the knife, the murder weapon, and they did recover a kitchen knife (PEX No. 1). PW6's evidence, like that of PW2 and PW3 was never challenged or shaken. The evidence of PW6 goes to corroborate the evidence of PW2 that he saw accused run off with a knife after the attack and PW3 who was shown the blood stained knife by accused. I have no doubt in my finding that after due consideration of both the prosecution and defence cases, I come to the inevitable conclusion that it is accused who attacked the deceased. The motive for the attack was due to suspicion of theft and a report had been made about it to the police. Accused was aware of the suspicion. I dismiss the accused's defence as a total lie and an afterthought.

The assessors found that the accused and deceased fought and that the offence committed is one of manslaughter. However, I am of a different view. PW2 had just left the deceased outside the kiosk. Deceased did not anticipate an attack. Accused came armed with a kitchen knife and suddenly attacked the deceased. The alleged fight did not take long. Accused never showed any sign of an injury. Accused armed himself and set out on a mission. The mission was to attack the deceased and he did attack while armed with a dangerous weapon which he used on deceased by stabbing him on a very vital part of the body thus inflicting a deep penetrating wound. I find that malice aforethought does flow from the nature of the attack and injuries sustained and I find that accused set out to cause grievous harm on the deceased the motive being the suspicion over theft. I find accused guilty of the charge of murder Contrary to Section 203 of the Penal Code as read with Section 204 of the Penal Code and he is convicted accordingly.

**R.V. WENDOH**

**JUDGE**

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

Read and delivered in the presence of

**R.V. WENDOH**

**JUDGE**