



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**Criminal Case 6 of 2002**

**REPUBLIC .....PROSECUTOR**  
**VERSUS**

**1. JACKSON MUTUA**

**2. STEPHEN MURIITHI KITEMA .....ACCUSED**

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

The accused

1. Jackson Mutua
2. Stephen Muriithi Kitema

stand charged with the offence of murder contrary to Section 203 read with section 2004 Penal code in that on 18/2/1997 at 11.55 p.m. jointly with others not before the court murdered Felista Nduku Kasyoka (hereinafter called deceased).

The prosecution evidence is that the deceased was residing in Kongowea (The court visited the scene) where she was carrying on the business of selling home brewed liquor. Nearby was a bar called Milimani Bar where regular beer was being sold to customers. At about 10.00 p.m. to 11.55 p.m. the accused and others came to drink beer they were said to be frequent customers according to PW 1. There was the deceased and the other woman Salome. The accused were asking for Salome. Eventually PW 1 was informed that her mother had been attacked she went outside and followed a road to where people were and she saw the body of Salome on the ground. Salome was not dead. She moved on and she found her mother fallen on the ground and on examination she was dead.

Pw 1 gave statement to Nyali Police Station and later on 4 years later the accused were arrested. The two and another called Mapengo were seen at the bar regularly by PW 1 for a period of about 2 weeks.

The most important witness in this case is PW 2, Jackson Musyoka Ngethwani. On 18/2/97 he had gone to the house of Felista deceased to drink Mnazi beer. He used to reside in Kongowea area. As he was taking Chang'aa there at about 3 p.m. four men came. He knew three of them. Their faces were familiar. He had seen them for about 3 times. There was one with a toothless gap on the top jaw and was called Mapengo. He was sitting 2 feet from the 4 men. The deceased was given some beer and went to sit with Mapengo at the door of Milimani Bar. PW 2 saw Mapengo with a gun. Stephen also had a gun. Stephen was with

Salome. PW 2 who was looking from inside the plot was later told that the two ladies had been shot. He got out of the plot and walked to the scene where he found Salome was shot in the lower abdomen.

PW 2 did not see the accused at the scene or another time. PW 2 was later in December 2000 to meet these accused in Shimo la Tewa prison when was arrested for a minor offence. In the cells he spoke to them in Kikamba (their vernacular) and they told PW 2 the story of Milimani Bar. How they killed the deceased.

When the case of PW 2 was decided, PW 2 was released and he got out of jail. The date was 22/12/2000. He came to know the name of Stephen because he had written a letter for PW 2 to deliver to his cousin near Pandya Hospital. He said he knew the first accused.

It was about this time that he (PW 2) reported the matter to deceased's husband. He told him to go to report at Nyali Police Station. He appeared at the Police Station and attended identification parade. He already knew the accused. Indeed in cross-examination he said he had known first accused since 1983. PW 2 made a statement on 24/1/01. Were it not for this witness statement to police the accused would never have been arrested.

Of the statements that were taken on 26/4/97, one of P.C. Kizito states how he and other police officers went to the scene and found the two women shot but the thugs had already disappeared and there was no leads upon which he opened the file and continued with investigations.

On the issue of identification, PW 1 could not identify the accused by name. She said one was Mapengo. He had a gap in his upper gum. She said the other man was tall wearing a hat. None of the men were charged with this offence. It was 4 years later that she was able to identify them after she was briefed by PW 2. At the scene where there was beer drinking it was outside in the open. There was a security light only and being near a bar there were several people coming in and out of Milimani Bar. PW 1 did not witness the shooting by the time she reached the bodies her mother was already dead and the assailants had already disappeared. She did not see any weapon on the accused. The facts stated indicate that the circumstances surrounding the area was not conducive to positive identification or that PW 1 did not know the accused at all.

Of the evidence of PW 2 he said on cross examination that he had known Kasyoka first accused since 1983 but he never gave his name to police as one of the assailants. In the prison is where he met them and he said that they told him of the killings at Milimani Bar. He should have known this information because he was present on the night of the incident. Failure to have reported that the two accused were at the scene indicates that he was doubtful about the role they played that night. In fact he said he saw the deceased walk with the Mapengo and Salome was seen being escorted by some other men. PW 2 does not say that he saw the deceased being shot by any of the accused. He relies on the information he said the accused gave him while in prison. The accused denied having made the statements and swore that the witness had a grudge with them in prison over food.

The other aspect is that the accused in their sworn statement said that they were not in Kongowea on that night. First accused said he was working at Akamba Handicraft in Changamwe area and that when he left work he went to his home.

Accused Number 2 also gave sworn evidence and stated on that night he was residing in Changamwe. He was doing casual jobs. He did not know Milimani Bar but he went there when the court made a site visit.

Both accused admitted having met PW 2 at Shimo la Tewa Prison 4 years after the incident. The other matter that is of concern is that the pathologist certified cause of death as a result of gunshot wounds. No gun was recovered or bullets or spent cartridges and it was outside on the road. No investigation was carried out to obtain this murder weapon.

The upshot of the above is that the prosecution in this matter were relying purely on circumstantial evidence.

In the case of **James Mwangi Vs. R, Court of Appeal decision [1983] KLR at 327** it was held:

1. In a case depending on circumstantial evidence in order to justify the inference of guilt the incriminating facts must be incompatible with the innocence of the accused, the guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of guilt
2. In order to draw the inference of the accused guilt from circumstantial evidence there must be no other coexisting circumstances which would weaken or destroy the inference.

Again in the case of **Gabriel Kamau Njoroge V. Republic (1982 – 88) IKAR. 1134**, it was held that:

A dock identification is generally worthless a witness should be asked to give the description of the accused and the police should then arrange for an identification parade.

I have considered the circumstances surrounding the identification of the accused. They were seen walking away from the Milimani Bar into the night Mapengo who was walking with the deceased was not arrested. I am not therefore convinced that the accused before the court or any of them are the ones who shot the deceased.

The place was a drinking place and the witness and other persons there were all drinking the chances of mistaken identity is high. I have also to consider the defences advanced by the accused although they appear to be jailbirds. Their defences cannot be ignored. They both testified that they were not at the scene in Kongowea.

They said they slept in their respective homes in Changamwe on the other side of town. I have no reason to doubt this sworn statement.

On the evidence of PW 2 I have already said that were it not their chance meeting in prison the accused would not have been arrested.

However it is to be noted that on the night of incident he never disclosed that he knew the accused or any of them either to the police or to his friend the husband of the deceased (Felista) and the way he went about to get the accused arrested appears clumsy and proves that they were not at the scene in 1997. He had to enlist the assistance of PW 1 who may not have noticed these men.

For the above reasons, I am not satisfied that the prosecution, have proved this case beyond reasonable doubt.

I do not find them guilty and I acquit them. The accused shall be set at liberty forthwith unless otherwise lawfully held.

**Delivered and dated at Mombasa this 14th Day of December 2005.**

**J. KHAMINWA**

**J U D G E**