



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

Criminal Case 34 of 2003

REPUBLIC PROSECUTOR

VERSUS

JEFF MUTUNGA MULWA ACCUSED

JUDGEMENT

The accused, Jeff Mutunga Mulwa, is charged with the offence of Murder Contrary to Section 203 as read with section 204 of the Penal Code.

The particulars of the offence are that on 14.11.02, at Ngovu village, Kako location of Makueni District, he murdered Ingui Nthuku. Accused denied the offence and gave un-sworn statement in his defence. The prosecution called a total of seven witnesses in support of their case.

A summary of the prosecution evidence is as follows;-

Kiiti Maingi (PW1) who hails from Kavingu area, knew both the deceased, Ingui Nthuku who was his friend and neighbour, as well as the Accused who owned a shop at Ngovu. He had known Accused for about 3 months. PW1 recalled the 14.11.02 when he met the deceased and they went to Ngovu market to the place where pool is played. Accused was already there. PW1 left Accused talking to deceased as he went to open the door to the place where pool is played. As he did so, he heard screams and he recognized them to be Ingui's voice. He could not see where Ingui was because there was a wall between them. He went to the place where screams emanated from and found Ingui bleeding from the left hand side and was already dead. He said it took him about 25 minutes to reach where Ingui lay. He denied knowing what the deceased and accused talked about. PW1 said that he was with PW2 Mwaniki Wambua and PW3 Muema Nzuki, Accused and Ingui.

Nicholas Mwaniki Wambua (PW2), recalled that on 14.11.02, at about 3.30 pm he was at Ngovu market where pool game is played. PW1 arrived there in company of Ingui, the deceased. The Accused who was already there then asked the deceased why he had beaten him the previous night but Ingui denied ever beating Accused. Accused started to chase the deceased round the house and then in the direction of PW1's home. He lost sight of Accused and deceased. He then heard noises and went to the scene only to find Ingui lying on the ground and he saw Accused ran off. He saw Accused holding something like a knife as he ran off, which was red in colour. By then he was about 70 – 80 metres away. He noticed that Ingui was bleeding from his back. PW2 called for help. Save for the allegation by the Accused that the deceased had beaten him the night before. PW2 had not heard of any dispute between Accused and deceased.

Muema Nzuki Mwangangi (PW3), testified that on 14.11.02, at about 4.00 p.m he was at Mbithi's

Kiosk where he found the Accused and shortly thereafter PW1 arrived in company of deceased. Accused then asked deceased why he had beaten him but the deceased did not answer. He said Accused got hold of the deceased's hand and the deceased ran off and Accused chased him towards the bush. PW 3 said that when they were about 40 metres away, chasing each other, he saw Accused remove a knife from his pocket and after they entered the bush he heard Ingui screaming. He said the three of them PW1, PW2 and PW3 ran to the scene where deceased lay on the ground bleeding from the left shoulder.

PW 6 Doctor Francis Musyoki, produced the postmortem report of Doctor Mwangi who performed the postmortem on deceased but was said to be outside Kenya and procuring his attendance would cause delay and unnecessary expense. PW6 said that the Doctor found a cut wound on the left chest of the deceased posteriorly. He did not dissect the body but found a sharp edged 3 ½ centimeter long penetrating wound on the left side of the chest between the second and third ribs. The Doctor formed the opinion that the cause of death was haemorrhage due to a penetrating wound. PW4 Matata Kioko and PW5, Nthuku Mwangangi, deceased's father identified the deceased's body to the Doctor who conducted the postmortem.

Chief Inspector Johana Chebii, officer in charge, Makueni police station took over the station on 18/5/04 and some exhibits in relation to this case were handed to him and he produced a knife as an exhibit No. 2.

Accused in his unsworn defence denied having been involved in the alleged offence. He said that on 14/11/02, he was in his kiosk from morning till 8.00 p.m. when he went to sleep. He went to buy his wares at Wote next day when he met police who told him of Ingui, having been injured and they arrested him. Nobody witnessed how the deceased was actually injured. However, there is ample evidence from PW1, PW2 and PW3 that Accused and the deceased were in their company on 14/11/02, at about 3.00 p.m to 4.00 p.m at Ngovu Market at the place where pool is played. I find the evidence of PW1, PW2 and PW3 consistent and find no reason to doubt it. That evidence does displace the accused's alibi that he was in his kiosk the whole day on 14/11/02, and only left when going home to sleep. Besides, that alibi is raised as an afterthought in his defence. This court finds and holds that accused was with the deceased in company of PW1, PW2 and PW3 on that fateful afternoon.

PW2 and PW3 also told the court that the Accused confronted the deceased demanding to know why the deceased had beaten him the previous night and that is when deceased ran off and the accused gave chase. There is no evidence that anybody else was involved in the chase. From the evidence of PW2 and PW3 it is apparent that accused and deceased had had some form of prior disagreement which none of the witnesses were aware of.

It is the direction that accused allegedly chased the deceased that PW1, PW2 and PW3 went after hearing the screams and found the deceased lying, injured and already dead. Death was instant.

PW2 said that when they approached he saw accused running away from the place where the deceased had fallen. I am satisfied on the evidence of PW1, PW2 and PW3 that it is Accused who chased the deceased and soon thereafter deceased was found injured and dead. There is no evidence of any other person having intervened. The Doctor who performed the postmortem found one wound on the deceased's chest at the back. This is evidence that he was stabbed from the back as he fled. This is corroborated by PW2 and PW3's evidence.

PW2 and PW3 talked of having seen the Accused take out a knife before Accused and deceased disappeared into the bush. From the distance named by the witnesses that is 80 metres and 40 metres away, I doubt that they were able to see a knife from that distance. However, the Doctor found that the deceased suffered a deep-penetrating stab wound. It was only one. If indeed the deceased and Accused disagreed the day before, that does not amount to provocation. A day had gone by. Infact the deceased ran off on being asked about the previous night. He did not fight back. He was stabbed from the back and was defenceless. I find the attack on the deceased to have been planned as accused was armed and he executed the plan as he was motivated by the disagreement of the previous day. The Accused had not been provoked suddenly to act as he did. In any case Accused did not raise the defence of provocation.

His defence was a bare denial. I dismiss Accused's defence as untrue. I do find that Accused murdered the deceased on the fateful day. I disagree with the findings of the assessors who did not consider the evidence in its totality. The evidence before court though circumstantial points at none else but Accused as the murderer. He is found guilty of the offence of murder Contrary to Section 203 as read with Section 204 of the Penal Code and is convicted accordingly.

R.V. WENDOH

JUDGE

Read and delivered at Machakos this 27th day of October, 2006

In presence of

R.V. WENDOH

JUDGE