



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

**Criminal Case 25 of 2003**

**REPUBLIC ..... PROSECUTOR**

**VERSUS**

**JOSEPH TALIA KILONZO ..... ACCUSED**

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

Joseph Talia Kilonzo, the accused, 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 14.11.2002 at Kawethei market, Kawethei sub location of Machakos District, he murdered Peter Katumo Mbithi. The accused denied the offence and gave an unsworn statement in his defence. He did not call any witnesses. The prosecution called a total of 10 witnesses in support of the charge.

Michael Musau Mutisya P.W.1, testified that it was a market day at Kawethei on 14.11.2002. There was a sales promotion and people were being entertained. On the same day there were election campaign meetings at the market. There were many people at the market. Mr. Ngutu who was campaigning on a KANU ticket arrived at the market with his supporters who included the Accuse shouts of Rainbow. The deceased who was drawing water on a cart stood by to see what was going on. P.W.1 was present and refused to join the Ngutu camp as a bouncer when he was requested to do so because he was then in Rainbow. P.W.1 said Accused attacked three people who uttered anti-KANU slogans. After that he attacked the deceased by kicking him. The deceased questioned why he was being attacked and yet he was not involved in the campaign. A fight broke out between the accused and the deceased. Though P.W.1 at first said that accused was armed with a knife, he later said it was a sword and according to him there is no difference between the 2 – sword and knife. Nobody intervened to try and stop the fight. The deceased fell down and P.W.1 who was nearby snatched the sword from the Accused and handed it over to the police officer who was nearby. The police officer requested P.W.1 to help take accused to the police station but P.W.1 was hit with a stone on the head and fell unconscious. P.W.1 came to later and found Accused lying down near the Administration Police Camp having been stoned by people. The deceased was dead and the body lay where he fell. P.W.1 noticed blood on the blade of the sword he snatched from the Accused. P.W.1 knew Accused for over 10 years whereas the deceased was his cousin. P.W.1 denied there having been a free for all fight between rival political groups.

P.W.2, Cpl Joel Mbinda, who is attached to Kawethei Chief's camp was at the camp on 14.11.2002 at about 6.45 p.m. when he received information that Joseph Talia had stabbed somebody at the market and the person needed help. He proceeded to the scene with APC Kilonzo, found Accused had been arrested

by 3 people and P.W.1 was holding the sword allegedly recovered from the Accused. P.W.2 took possession of the sword and as he tried to arrest Accused, people started to stone them and Accused managed to run off towards the police camp but the mob chased him. Accused entered a kiosk but people threatened to burn it and Accused got out, ran but fell in a pit and P.W.2 arrived just then and rescued Accused. Later Accused was transferred to Kangundo Police Station.

Mbithi Nzyuko (P.W.3) is the father of the deceased. He did not witness the incident but was called to the scene about 6.00 p.m. where he found his son lying dead. He got a vehicle, rushed him to Kangundo Hospital but was confirmed dead. On 22.11.2002 the Post Mortem was done on the deceased and the body released to P.W.3 for burial.

Titus Nthiwa Ngumo P.W.4, was at Kawethei market at about 4.00 p.m. on 14.11.2002. He denied there having been any political activity but agreed that Mr. Ngutu had passed by but never addressed people. He said there was indeed a promotion and people danced to the music and it is then Accused came with a knife hanged on his hand and threatened to kill somebody. People dispersed but the deceased was left leaning against a post and Accused went straight to deceased and stabbed him in the stomach. P.W.4 denied that accused and the deceased ever fought before the deceased was stabbed. He said that Accused was arrested on the spot and the knife he used recovered from him and was handed over to police. He described the weapon used as a long knife with a long handle like a Masai knife. P.W.4 is the one who went to call the deceased's father.

Julius Musembi Mbithi (P.W.5), is a younger brother to the deceased. He was called to the scene about 6.00 p.m. He found the deceased bleeding profusely and rushed him to Kangundo hospital where he was pronounced dead on arrival.

P.W.6 Mutisya Kwinga's role was only identification of the deceased's body to the Doctor for purposes of conducting post mortem.

Paul Muasa Mbuka (P.W.7) was at the said market at about 6.30 p.m. He is the one who got the vehicle to take deceased to hospital but on arrival, deceased was pronounced dead. He did not know how deceased met his death.

Inspector Lazarus Wambua received information of there having been a fracas at Kawethei market and that a person had been stabbed. He visited the market later that night but the crowds had dispersed.

Dr. Thomas Muoka (P.W.9), the M.O.H. Kangundo was requested to perform a post mortem on the deceased on 22.11.2002. The body was identified to him by Peter Nzioka and Mutisa Kwinga. He found a cut wound 2 cm. superficial on left elbow joint, another on left forearm, a deep penetrating cut wound on the left side of the chest at the back at 10<sup>th</sup> – 11<sup>th</sup> ribs, Blood in the left side of the chest, penetrating cut wound on the lower lobe of the left lung, 2 – 3 cm penetrating wound to the heart and there was blood in the heart. The Doctor formed the opinion that the cause of death was a penetrating cut wound to the heart caused by a penetrating object which was inflicted from the back. He found multiple injuries which were all inflicted by a sharp object.

Sgt. Lawrenius Odinga (P.W.10) received a report of the attack on the deceased. Before he visited the scene, the deceased was taken to the station by his relatives. He referred them to hospital where deceased was pronounced dead on arrival. He visited the scene of crime the same night and recovered a sword and a sheath from Cpl Mbinda (P.W.2) Ex. No.1. he took the sword and a sample of the deceased's blood to the Government Chemist for further investigations. He learnt of there having been a clash between supporters of rival political groups.

In his unsworn defence, accused said that he was at Greenland Bar where he drunk till 6.00 p.m. He left for home and saw people running in the market. He enquired what was going on and was told that campaigners were throwing stones. He was hit on the right eye and fell. He woke up at Kangundo hospital. He was arrested on 15.11.2002 and was informed that he murdered the deceased which he denied. He was nursing a fracture at the time and was not in a position to kill anybody. The fracture had

been inflicted by one Musau Mutisya an uncle of P.W.1. He said he was framed because of a grudge.

I have now considered all the evidence adduced, submissions by both counsel. This offence was committed in broad daylight. The key witnesses to the incident are P.W.1 and 4. The two witnesses were well known to both the accused and the deceased.

I find some variation in the evidence of P.W.1 and 4 as to what exactly happened on the fateful day. Though P.W.1 said that Mr. Ngutu tried to address people but they booed him for Rainbow, P.W.4 totally denied it. P.W.1 also talks of there having been a fight between Accused and deceased though the Accused was the aggressor. On the other hand P.W.4 says Accused just attacked the deceased suddenly though he threatened other people who retreated. From the evidence of the other witnesses it is evident that there were many people at the scene. P.W.1 and 4 agree that there was a sale promotion with music playing and it was a market day. Although P.W.2 denied that there were campaign meetings on that day because they had not been asked to provide any security, P.W.1 does confirm that accused was incensed by people who uttered anti – KANU slogans. Indeed P.W.8 and 10 received reports of there having been a clash between rival political groups. Though P.W.2 says that they were not aware of any political meetings because there was no request for security, it seems there was indeed some clash between rival groups that led to this incident and I do prefer the evidence of P.W.1 as it is supported by other evidence as to the cause of the disagreement.

Accused's defence that he was just framed is an afterthought. He never raised that defence all through the prosecution evidence. P.W.1 whose uncle Accused alleges to have quarrelled with and who inflicted a fracture on Accused, testified and no such questions were put to him. P.W.1 and 4 who know both accused and deceased saw accused at the scene of the incident. P.W.2 who came immediately found accused at the scene and people were threatening to stone him and indeed P.W.1 became a victim of the stoning. I find that Accused really never left the scene of the crime. I do find that accused was at the scene at about 4.00 p.m. was arrested at the scene and was not just accosted on his way home at 6.00 p.m. Accused's defence is unbelievable.

P.W.1 said that there was a fight between Accused and deceased after Accused attacked deceased. P.W.4 denied it. However, I do agree with P.W.1's evidence that there was some fight between Accused and the deceased because of the injuries that P.w.9 found on the deceased. He found some other injuries on the shoulder, right ear, elbow and mid chest. It was not just one stab wound as P.W.4 wanted the court to believe.

The Doctor (P.W.9) found that the injury that caused the death must have been caused by a very sharp object with a sharp edge. There was the question of whether the weapon used was a knife or a sword. P.W.1 is the one who recovered the weapon from accused. He handed it over to P.W.2. P.W.2 confirmed that fact. P.W.4 also saw P.W.1 recover it and hand over to P.W.2. P.W.4 also described the weapon as a knife with a long stick like the Masai knife. P.W.1 explained that his reference to the object as a knife and sword means one and the same and the weapon was the one produced in court as Exhibit No.1. Mr. Konya requested the production of the Occurrence Book in which the report was made to ascertain (verify) exactly which weapon was recovered. The court made an order for production of the Occurrence Book on 8.2.2005. But the issue was never revisited till the prosecution case was closed on 13.12.2005. There may have been an oversight on the prosecution not to have it produced but that notwithstanding, I do find that the weapon that was recovered was produced in court and identified by the 2 witnesses P.W.1 and 4. It can be referred to as a sword or knife, that does not change it. Besides its description is supported by Doctor's findings that the deep penetrating wound must have been inflicted by a long sharp object. I find there to be no miscarriage of justice in failure by prosecution to produce the Occurrence Book to verify whether what was recovered was a knife or sword. It is properly identified.

The 2 assessors reached different verdicts. One returned a verdict of guilty of murder while the other found that it was manslaughter. The court has considered the evidence in its totality and comes to the conclusion that though Accused was the aggressor deceased did fight back and in the cause of it, deceased seriously injured by accused who was armed with a sword. There is also evidence of the mood of the day, political campaigns of which the deceased fell victim though P.W.1 and 4 said he was not

involved. I will therefore find accused guilty of a lesser charge of manslaughter contrary to section 202 Penal Code as read under Section 205 Penal Code and he is convicted accordingly.

Dated. Read and delivered at Machakos this 27<sup>th</sup> day of October 2006

R. V. WENDOH

JUDGE

Read and delivered in the presence of Mr. Omirera for state

Mr. Konya Advocate for accused

Accused present

Catherine C.C.

R. V. WENDOH

JUDGE