



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

Criminal Case 61 of 2004

REPUBLIC PROSECUTOR

VERSUS

MUTUA KIMINZA ACCUSED

J U D G E M E N T

Mutua Kiminza and John Kiminza were 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 the night of 9th and 10th August 2003 at Mwang'a village, Kaluva sub location, Nzangathi location of Kitui District, murdered Joseph Mwova Musyoka. The accused denied the offence.

The prosecution called a total of 7 witnesses whereas the accused gave sworn testimony in his defence. He did not call any witnesses. Before the trial commenced, the court was informed that accused 2 John Kiminza had died in remand and the case against him therefore abated. Before court is only accused 1.

The deceased, Joseph Mwova was the son of Syokau Musyoka (P.W.2), and a brother to John Kilunda Musyoka (P.W.3). P.W.2 did not witness the deceased's death. She however recounted the events that occurred one or two days prior to the deceased's death. She said that on 8.8.2003, at about 10.00 a.m., Accused 1 and his late brother John found her working in her shamba and informed her that Mwova (the deceased) had taken their log of wood. P.W.2 told accused and the brother to go and take the log back. Later, she heard noises at Mutua's place (accused). She went there and found the accused holding a bow and arrow trying to shoot at Mwova. They dispersed. She said that 8.8.2003 was a Thursday and on Friday Mwova went to sell his chicken at the market and P.W.2 later saw him at the home of Kyema where there was a party. On Saturday, the Accused and his deceased brother John went to P.W.2's home in company of several other people demanding that she gives them maize because Mwova had burnt their house. P.W.2 called witnesses and they took the maize. P.W.2 last saw Mwova alive at Kyema's party and later saw his body burnt with his eyes pierced.

John Kilunda Musyoka (P.W.3) did not know how his brother Mwova met his death. However, he recalled that on 7.8.2003 he found Mutua Accused 1, standing on their common boundary armed with a bow and arrow. P.W.3 went to find out what the problem was and Accused 1 said that Mwova had taken his log of wood. P.W.3 separated Accused 1 and Mwova and P.W.3 told Accused 1 to carry away his log of wood which was by then already burning. He carried it away. On 8.8.2003, P.W.3 saw the deceased, Mwova, going to Kisasi to sell his chicken and on 9.8.2003 he only learnt that Mwova burnt a person's

house and he told the owners of the house to go and report at the police station. He next saw Mwova's dead body which was partially burnt and reported to Chief Raphael Mbuvi (P.W.7). On going to report, he found Accused and his deceased brother, John at the chief's house. Upon reporting the death of Mwova P.W.7 arrested the Accused and his deceased brother. P.W.3 and P.W.7 found marks of something having been dragged on the ground to Mutua Accused 1's home.

Muthama Kinoo (P.W.4) a son to P.W.3, did not know what led to Mwova's death. He recalled having been woken up by P.W.3 on the night of 9.8.2003 at about 11.00 p.m. to go and find out who was waking up Mwova, the deceased. P.W.3 and 4 went together to Mwova's house but he was not there. P.W.4 heard noises in the home of the Accused and allegation that Mutua's house had been burnt but on attempting to go there, they were pelted with stones and they retreated back home. Next day he saw Mwova's body lying by the roadside.

Kainde Kiminza (P.W.5) is the mother of the Accused and deceased, John. She denied knowing how Mwova met his death but also recalled the events of 8.8.2003. Mwova had carried away Accused's wood and Accused and the deceased's brother went to ask P.W.2 for their wood. Accused carried back their partially burnt piece of wood. Later Mwova attacked her with a panga claiming that the wood was his but her deceased son, John rescued her from Mwova and chased him. At night as they slept, Mwova came and burnt her three houses though nobody got injured. P.W.5 said he was able to see Mwova using light from the burning houses as he hid behind a paw paw tree. Though he called Mwova by name he did not respond. On 9.8.2003, Mwova went to her house again threatening to finish her and that he cut her door. She recognized his voice. She shouted for help and because of the shock, she fell unconscious and came back to on Sunday when she learnt of Mwova's death. She said that on the day she fell unconscious, she had sent the Accused 1 to get money from her daughter's home to enable her seek treatment.

Police constable Peter Musyoki (P.W.6), received a report of Mwova's death on 10.8.2003. Before he went to the scene, P.W.7, Raphael Mbuvi the area chief brought the two suspects to the police station. P.W.6 in company of Officer in charge Station Inspector Ndonye visited the scene where Mwova's body lay and noted that the body lay on the road, about 200 metres from deceased's home and it had a deep cut wound on the right side of the head, bruises all over the body which resembled burns. P.W.6 was informed of the disagreement over a piece of wood and the house that was allegedly burnt. From the body, he followed footsteps to the home of the deceased and then to the home of the two suspects. From the scene the 2 sets of footmarks and marks of something having been dragged on the ground from the deceased's house and from accused to deceased's home were footprints of 3 people. He did not see any blood anywhere else save for the place where the body of the deceased lay. He confirmed that P.W.4's kitchen was burnt but no other structure or house was burnt in the same home.

Raphael Mbuvi Musyoka (P.W.7) is the chief of Nthangathi location. He recalled that on 9.8.2003 at about 8.00 a.m, he was in his office when the accused and his deceased brother John went to report that Mwova had set their mother's kitchen on fire. P.W.7 asked them to bring Mwova and they said he had disappeared and he asked them to look for him. On 10.8.2003 at 8.00 a.m, Accused and John, the deceased, went to his office and said that the body of the deceased was lying along the road. Accused 1 and John led him to the scene where Mwova's body lay and he noticed that the body was pulled from John's home to the road as there were marks, as it had rained the previous night. He saw blood at John's homestead near the kitchen. He followed footsteps from the kitchen which led to deceased's home and deceased's door had been broken and there was a big stick which was blood stained inside the deceased's house. Accused and his brother denied injuring the deceased and P.W.7 took them to the police station.

Dr. Musyoka David Mutiso (P.W.1) performed a post mortem on the deceased on 16.8.2003. He found a rugged cut, 5 cm on the anterior part of the scalp with a visible skull underneath; 2nd degree burning on the anterior part of the trunk and both feet; internally he found a compound fracture of the frontal bone and haematoma in the brain. He formed the opinion that the cause of death was cardio respiratory arrest due to head injury. He found the burns not to be fatal.

In his defence the accused denied knowing how the deceased died as he had been sent by his mother to his sister's home and brother in law, Mulovi Kasingu. That was 18 kilometres away from their home. He

left home at about 3.00 p.m. and slept at his sister's home because Mulovi promised to get money for him on 9.8.2003. Mulovi gave him money on 11.8.2003 and he left for home. On arrival at home at about 10.00 a.m. he found the house had been burnt. On enquiring, he was told by Musangi, the wife of John, that Mwova had attacked the mother, cut the mother's door and John had gone to the mother's rescue. They chased Mwova, people responded to their screams and they caught the deceased and beat him. He denied having been at home when the deceased met his death. Before that, he recalled having seen Mwova carry away their piece of wood and they went to get it back. He left home briefly and on his return found the mother had bruises and she informed him that Mwova had chased her and she was injured. That is why his mother sent him for money from Mulovi for treatment and make its own independent determination.

I have now carefully considered the evidence of both the prosecution and defence. Though the assessors returned a verdict of guilty, the court will now independently consider the evidence on record and the submissions of counsel.

It is not in doubt that nobody saw how the deceased Mwova met his death. All there is before court is circumstantial evidence. In the case of **OMAR MZUNGU CHIMERA V. REPUBLIC CR. APP. 56/98**, the Court of Appeal set out the three tests that must be satisfied to prove a case which entirely depends on circumstantial evidence and they are:-

“(i) The circumstances from which an inference of guilt is

sought to be drawn, must be cogently and firmly established;

(ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused.

(iii) The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the accused and none else.

In this case, there is no doubt that there had been a dispute between the deceased Mwova, on one hand and Accused and his deceased brother on the other hand, over a log of wood which the Accused 1 claimed had been stolen by the deceased, Mwova. Accused 1 and his deceased brother recovered the log of wood from the deceased. P.W.2, 3, 5 all testified to this fact. Accused 1 did admit that fact of the dispute over a piece of wood.

Further to the above there was allegation that Mwova the deceased burnt the kitchen of P.W.5. P.W.5 exaggerated in her evidence alleging that 3 houses were burnt but all the witnesses who visited the scene including P.W.6 and 7 only saw that the kitchen had been burnt. Mwova was a suspect in burning the kitchen after he had disagreed with accused and his brother over the place of wood. The incident had taken place on the night of 8th and 9th August 2003. Only P.W.5 witnessed it. She did not see the person who burnt the kitchen. She claimed to have seen Mwova hiding behind a banana plantation using the light of fire from the burning house. The circumstances were not conducive to identification but the bottom line is that Mwova was the suspect of the arson.

In addition to this incident, P.W.5 alleged that the deceased had chased her; injured her and even went as far as cutting her door. This incident is supposed to have been witnessed by John, 2nd accused who is now deceased, who intervened and chased Mwova. All these three incidents go to show the bad blood that existed between Mwova on one hand and the Accused 1 and his brother, and P.W.5 on the other as from about 7.8.2003 till the deceased was found murdered. Those three incidents go to establish motive on the part of the Accused and his deceased brother. They had a reason as to why they would want to injure the deceased.

After the finding of Mwova's body, those who visited the scene P.W.3, P.W.7 and P.W.7 saw marks of something having been dragged on the ground from John's house to the scene. They also found footmarks leading to Accused's home from the scene of the body. The drag marks might have been that

of deceased's body.

Accused 1 denied having been present when the deceased met his death but there is overwhelming evidence to the contrary. Accused 1 was with his brother John when they went to demand the log (piece) of wood from P.W.2. Later on same day P.W.2 and 3 found Accused 1 and his brother threatening the deceased with a bow and arrow.

After the house of P.W.5 was burnt, both Accused 1 and his brother went to demand maize from P.W.2. P.W.7 said that on 9.8.2003, Accused 1 and his brother John reported to him at about 10.00 a.m. about Mwova having burnt their house. On 10.8.2003, the Accused and his deceased brother went back to P.W.2 to report that they found Mwova dead. Just then P.W.3 also arrived at the office of P.W.7 to report his brother's (Mwova) death and found Accused and his deceased brother at the chief's home. Both were arrested at the chief's office. From this sequence of events, and evidence of P.W.3, 6 and 7 there is no time that Accused 1 was away from his home between 8th August 2003 and 10.8.2003 when he was arrested. P.W.6 testified as to having arrested Accused 1 person on 10.8.2006. The evidence of the P.W.2, 3, 6 and 7 totally displaces the alibi raised by the Accused that he was away from home from 8.8.2003 evening till 3.00 p.m. of 11.8.2003. P.W.5, accused's mother's testimony is not truthful. She testified for example that her three houses were burnt by Mwova yet all witnesses who visited the home including P.W.6 and 7 only found the kitchen burnt. She lied to court and this court finds that she also had to try and save the Accused's skin by claiming that she had sent him away at the time of Mwova's death.

I do find that the circumstantial evidence on record does satisfy the three tests required and it irresistibly points at none else as the person who murdered the deceased Mwova but Accused 1 and his deceased brother. The Doctor found serious injuries inflicted on deceased that led to his death. The had the motive. I will find accused person guilty of the offence of Murder contrary to section 203 Penal Code as read with section 204 Criminal Procedure Code and convict him accordingly.

Dated, read and delivered at Machakos this 26th day of October 2006.

R. V. WENDOH

JUDGE

Read and delivered in the presence of

R. V. WENDOH

JUDGE