

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
Criminal Case 37 of 2003

REPUBLIC PROSECUTOR

VERSUS

1. MUSEE MUTHUI

2. MUTISYA MUTHUI ALIAS MBOI ACCUSED

R U L I N G

The two accused, Musee Muthui and Mutisya Muthui alias Mboi are jointly 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 19.8.2003 at Siveta village, Ngereni sub location, Musavani Location, in Mwingi District, jointly murdered Joseph Musyoka Kithome. The accused persons denied the offence. The prosecution has called a total of 7 witnesses in support of the charge. Before accused persons can be called upon to defend themselves the burden is upon the prosecution to establish a prima facie case against the accused persons.

P.W.1 Beth King'ola Musyoka, the wife of the deceased did not witness how her husband met his death. All she recalled is that he was working on their farm on 19.8.2003 and she had taken to him water at about 10.00 a.m. Deceased was well. However, at about 12.00 p.m. one Kasyoka Musila (P.W.3) informed her that the deceased had been shot. The land on which the deceased was working had been bought from one Mwanza Katumbao (P.W.7) but one Muthui had settled on this land and had refused to vacate even after the sale. P.W.1 and P.W.7 said it had been subject of a court case and the said Muthui had been ordered to vacate the land by 14.8.2003.

Kitheka Mbiti (P.W.2) was on 19.8.2003 working on this land with his children at about 10.30 a.m. when he heard screams from the shamba of the deceased and went to see what was happening. He saw Musee Muthui accused 1, shoot an arrow at the deceased and it hit the deceased on the head. He did not see anybody else at the scene and he went to inform P.W.3 Kasyoka and Mukesya as he went ahead to report at Kaningo Police Post. In cross examination he denied having separated the accused 1 and deceased when he found them fighting.

P.W.3 Kasyoka recalled that she was in her shop at about 1.00 p.m. on 19.8.2003 when P.W.2 informed her that the deceased had been attacked by accused 1. she proceeded to where the deceased was lying in company of Mukesya Mbiti. As they were trying to raise up the deceased who had arrow wounds on his head and neck, they saw arrows fall near them. At first P.W.3 said that she saw Mboi (accused 2) shooting at them. Later in cross examination she changed and said she suspected he was the one who shot at them because she saw him holding at bow.

P.W.4 David Mukesya did not testify. He was stood down to enable the accused's counsel to go

through the statement but he was never recalled.

P.W.5 Julius Mbila Kithome and P.W.6 Samuel Mwendwa identified the deceased's body to the Doctor who performed post mortem on 28.8.2003.

P.W.7 Mwanza Katumo testified that he is the one who sold land to the deceased and that Muthui had illegally settled on the land. The court had ordered him to vacate but he had not done so. He did not however produce the court order in evidence.

This is one case where the police who must have taken part in the investigations, arrest and preferring of charges sat back and did nothing. Despite several adjournments, the police officers involved in arrest and investigations have not attended court. The Doctor who conducted Post Mortem was not called as a witness. The court has no idea what caused the death of the deceased.

P.W.2 saw accused 1 shoot at the deceased. P.W.3 said she found arrows shot at the deceased and he was injured. However, later on they found the deceased had cut wounds on the head and neck. It is not known who inflicted these cut wounds and when they were inflicted and whether they are the cause of death or not. Though death was instantaneous, the Doctor's evidence was material to establish what was the cause of death.

The dispute herein seems to have arisen over the piece of land sold to deceased by P.W.7. Accused 1 and 2 having been seen at the scene are prime suspects but it is not for the accused persons to prove their innocence. The burden still rests on the prosecution to establish a prima facie case against the Accused which they have not done and the court will therefore acquit the Accused persons at this stage under Section 306.

Dated, read and delivered at Machakos this 23rd day of October 2006.

R. V. WENDOH

JUDGE

Read and delivered in the presence of

R. V. WENDOH

JUDGE