



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT
MACHAKOS
Criminal Case 18 of 2004

REPUBLIC PROSECUTOR

ERSUS

MWENDWA MULUU RESPONDENT

RULING

Mwendwa Muluu is charged with the offence of Murder Contrary to Section 203 and 204 of the Penal Code. The particulars of the charge are that on 4/6/01 at Kavukoni village, Kyanika location, Mwingi district, he murdered Musyoka Muyanga.

The accused denied the offence. To prove their case, the prosecution called a total of 9 witnesses.

PW 1 Ndumi Kirisa who was one of the first people to reach the scene where the deceased Musyoka Muyanga was assaulted, recalled that it was on 4/6/01 at about 5.00 p.m when she heard screams and ran to the direction. She found the deceased crying and he alleged that he had been beaten by the accused Mwendwa Muluu who had called the deceased from his home to go to the boundary which the two shared and which had a problem and it is where the deceased claimed to have been kicked and beaten by the accused. PW 1 did not see the actual beatings being inflicted on the deceased. She found somebody holding the deceased's hand. This must have been PW 3 Benjamin Maithya Mwanzia who said he was with PW 1 when they heard screams but he outran PW1. PW 3 said in his testimony that he found the deceased lying down and the accused was standing there and that the deceased was crying claiming that the deceased had injured him on the chest and this arose from deceased's goats which were tied near their common boundary allegedly crossing into the accused's land. PW3 lifted up the deceased and helped him to go to his home. He did not find the accused with anything in the hands. PW 3 said people arrived who included PW 1 and helped take deceased to his home. Similarly, PW 2 Nthanzai Musyoka who lived across the river heard screams and crossed the river to go and see who was screaming and found deceased who claimed to have been assaulted by the accused. He denied witnessing what happened between the deceased and the accused.

PW 4 Patrick Mutambu the Assistant Chief of Kyanika sub-location, Mwingi district from where both accused and deceased hailed, recalled that the accused went to him in June 2001 and asked him to call the deceased so that they could reconcile over a fight between them. PW 4 learnt that the two had fought. They talked and agreed to settle and the Assistant Chief was given the report and on that day the deceased was given 200/= by accused to assist in hospital expenses.

There was a balance of 500/= agreed upon. Later the deceased died on 15/8/01 and the matter was reported to police.

PW 5 Nzoka Muyanga a brother of the deceased only learnt of the assault on his brother on 5/6/01. He saw where the deceased was injured on the left side of the ribs and the left thumb. He confirmed that after

the parties had agreed to settle, his brother never got well, was admitted in hospital and later died in August 2001. PW 5 said the deceased told him he fell and was injured on the left side of the body.

PW 6 Dr Patrick Mutuku who performed the post mortem on the deceased opined that he died of cardio pulmonary collapse due to collapse of the left lung which was due to disease. He found that the left lung had been infected but was healing. He was not able to ascertain which disease had caused the collapse of the lung. He took specimens of the kidneys, liver, spleen, heart and forwarded to the Government analyst for analysis. He produced the post mortem report as exhibit.

PW 7 Benjamin Makau Nzuku a cousin to the deceased only learnt of the alleged assault and saw the deceased before his death. He only heard of what had happened. He told the court that the deceased died 5 hours after the assault. PW8 Philip Kasina was present in the office of the Assistant Chief when the deceased and accused talked and reconciled and the deceased was given 200/= by the accused for medication. A balance of 500/= was left.

PW 9 Corporal Timothy Mwangi was the one who received the report of the deceased's death on 14/8/01 after an alleged assault by the accused. He escorted the specimens taken from the body of the deceased on 4/9/01 but was told they were insufficient for analysis. I have considered the evidence adduced by the 9 witnesses and the submissions by both Mr Mutuku for the accused and Mr O'Mirera for the state. What is clear from the evidence before court is that of the witnesses called never saw the accused assault the deceased.

PW 1, 2 and 3 found when the deceased was already injured. PW 3 was the first to reach where the deceased lay. He found the accused present. All the three witnesses said that the deceased told them that the deceased had injured him. Apart from the deceased's word as to how he was injured there is no evidence as to how it all started. Was it a fight, scuffle, a push or the deceased was actually assaulted by accused and he did nothing? PW 5 said that the deceased told him that he fell down and was injured. There is evidence that the place where the boundary was in issue was a slope and stony. The other piece of evidence connecting the accused with the offence is that of PW4 and PW8 that the accused actually requested to have the deceased reconcile with him over the fight and he offered to pay for the deceased's medication and actually paid 700/= for the deceased's treatment.

To prove a charge of murder, the prosecution had to prove that the accused had the intention to kill (*mens rea*) and actually caused the death of the deceased which is the *actus Reus*.

The only evidence adduced by PW 1 – 3 is that the deceased claimed the accused beat him because deceased's goats had trespassed onto his land. There has been no evidence to establish that indeed goats trespassed. Even if they did the question is whether the accused intended to kill the deceased. I find no evidence direct or otherwise that goes to show the deceased's intention.

The deceased was injured in June 2001, 4th. He died on 14/8/01 about 2 months after the said injury. PW 6 the doctor who did post mortem did not link the deceased's death to any injury. He found no physical injury on the deceased though he found that the left lung had collapsed but the collapse was due to a disease that had infected the said lung. He was not able to tell what disease it was. Specimens that were sent to the Government Chemist did not yield any results.

PW 1 said the Government analyst said they were not sufficient for analysis. This is the word of the investigation officer. Perhaps the government analyst should have been called to tell the court why he was unable to carry out the analysis on the said specimen. Since the deceased did not die immediately after the alleged assault but 2 months later for the court to find that the deceased caused the death. The injury inflicted during the assault should be the proximate cause of death. There is no evidence linking the assault to the death of the deceased. If the court were to call upon the accused to defend himself, would be tantamount to telling him to explain what led to the death and prove his innocence. It was upto the prosecution to establish a *prima facie* case which is such that if accused was asked to defend himself and he opted to remain silent, the court would still go ahead and find a conviction on the evidence so far adduced.

Such is not the evidence adduced by the prosecution witnesses and this court has no option but acquit the accused person at this stage under Section 306 (1) of the Criminal Procedure Code.

Dated at Machakos this 25th day of January 2005

R.V. WENDOH

JUDGE