

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS
Criminal Case 44 of 2004

REPUBLIC PROSECUTOR

VERSUS

ALBANUS WAMBUA NZUKI ACCUSED

R U L I N G

Albanus Wambua Nzuki, 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 15/7/02 at Nthangu sub location, Kilala location, Makueni district, he murdered one Martin Musango Kyengu.

The prosecution called a total of 5 witnesses in support of their case. The key witness in this case is PW2, Boniface Mutua. He testified that on 15/7/02 he was at his place of work with the accused, Wambua Nzuki. The accused was his subordinate at work. On this day the accused asked for permission to go home but PW2 declined to grant it. When the two were in PW2's house, the deceased, Musango arrived and started to abuse the accused telling him that his mother was a witch and wanted to finish them but would not manage. They started quarrelling and PW2 told them to go out. They went outside the house and while there PW2 heard a sound and on going found the deceased lying down and the accused stood beside him. PW2's mother came from her house and told accused not to bring her any more problems and the accused left. Deceased was left lying there. PW2 left the deceased lying there and went back to his place of work. PW2 came back home at 8.30 p.m. and did not get the deceased where he left him and did not know how he left.

Meanwhile, PW2 Francis Kyalo, and PW5 Andrew Mulonzi, recalled that on 15/7/02 at about 7.00 p.m, they were walking home when they reached near Kithuku's home; they found the deceased lying there. As they passed, he called them by name and asked them to help him as he was drunk and claimed to have been drinking at Ukwala. PW3 and 5 held the deceased on both hands escorted him up to his house. PW3 said he lit his lamp and left him in his house. He then informed the mother of deceased PW4 that they had brought the deceased home and he was very drunk. PW4 did not check on the son that night. The next morning, she noticed he was oversleeping as it was 9.00 a.m. She went to deceased's house and found his door open. On calling on the deceased, he found his neck leaning on one side as if broken and he said that he had been assaulted by Wambua Nzuki, the accused, using a chair. She observed his body and found the right side ribs were overlapping. PW4 said that the deceased and accused were long time friends and used to visit each other. She was not aware of any disagreement between them. PW4 sent for her daughter PW1 Tabitha Wambua, who came home and talked to deceased who said the accused hit him with a chair. She found he was swollen on the back of the head and left side of the hip and face. She later identified the deceased to the Doctor for purposes of postmortem.

From the evidence on record, nobody saw how the deceased got injured. PW2 who was in the house where accused and deceased started to quarrel and he ordered them out did not bother with what happened with the two after they left the house. I find PW2's conduct very suspect. It seems he had something to hide regarding the happenings of that day. Despite the fact that he heard a fall and found the deceased lying down, he never bothered to find out what had happened to him. Since accused and deceased had left the house, it cannot be known whether they fought or not as they were quarreling. The only conclusion I can reach is that if at all the deceased got injured the most likely suspect is accused person with whom they had a quarrel.

PW1 and 4 say that deceased told them that the accused had hit him. On the other hand, PW3 and 5 who helped the deceased to get home that night said all that the deceased said was he was very drunk. Infact,

he told PW1 that he had been drinking at PW2's home. He never mentioned a fight or being assaulted.

There is no medical evidence to support the evidence of the allegation that deceased was assaulted. The State Counsel closed his case and said that the medical evidence indicated that deceased died of natural causes, that is Meningitis. He saw no need to call that Doctor and closed the prosecution case.

I find no direct evidence linking the accused with the death of the deceased person. There is only suspicion which cannot amount to sufficient evidence to warrant the accused to be called upon to defend himself. He is acquitted under Section 306 of the Criminal Procedure Code

R.V. WENDOH

JUDGE

Dated at Machakos this 17th day of August 2005

Read and delivered in the presence of

R.V. WENDOH

JUDGE