



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**Criminal Case 20 of 2004**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**JOEL MUTISYA MWANZA.....ACCUSED**

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

Joel Mutisya Mwanza, 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 the 10th day of November 1999 at Kaliani village, Kambu sub-location, of Makueni district, jointly with another not before court murdered Peter Muindi.

Accused denied the offence and opted to remain silent in his defence.

Briefly, the prosecution case is as follows:

PW1 Robert Mutua Kivindu, a cousin to the deceased, Peter Muindi, recalled that on 10/11/99 at about 11.00 a.m they were planting using oxen with the deceased. They were joined by PW2 Muoki Mutua, the son of PW1 who had been sent away from school to get some money from the parents. PW1 was driving the oxen as the deceased planted. Suddenly, the accused who had been in his garden about 50 metres away came running towards them while armed with a panga and cut PW1 on the elbow joint and chased PW1. PW1 ran towards the direction the deceased was. The deceased ran for a while but was tripped by a stick which Mwanza Mutisya had and after he fell Mutisya Mwanza cut him with a panga and he died on the spot. Mwanza Mutisya is said to be accused's son but was not arrested despite the fact that PW1 reported to police about his involvement. PW1 said that at the time he was cut, the accused's son Mwanza Mutisya was beating the deceased with a stick. It was not clear at what stage Mwanza Mutisya arrived at the scene or where he came from

PW2, Job Muoki Mutua, a minor aged 14 years testified on oath and reiterated what PW1 told the court. He saw the accused come and cut his father PW1. His father ran off on being cut and he saw Peter the deceased being beaten by Mwanza Mutisya, the accused's son using a hooked stick and the accused then went where the deceased had fallen and cut him three times on the head.

Both PW1 and 2 identified the panga that was used to cut up the deceased though it was never produced in evidence as an exhibit.

PW3, Alexander Kivindu, was at his home at about 11.00 a.m on the fateful day when he heard screams and on going to the scene found people administering 1st aid on PW1 who was injured and he was shown the deceased who had head injuries. The accused, his wife and son stood some distance away about 50 metres.

PW4, Titus Muindi a brother to the deceased identified the deceased's body to the Doctor for purposes of postmortem at Makindu Mortuary on.

The accused opted to remain silent in his defence. That is his right and it does not in anyway lighten the prosecution burden to prove their case beyond any reasonable doubt.

This is one case where the police acted irresponsibly and failed to call all the necessary evidence in support of their case. Despite several adjournments, the prosecution did not call the police officers involved in the arrest of the accused nor did they call the Doctor who performed the postmortem on the deceased person.

The above notwithstanding, this offence was committed in broad daylight at about 11.00 a.m. PW1 and 2 were present. Though PW1's P3 form was not produced by police, there is ample evidence on record that he was assaulted by the accused on his elbow joint even before the deceased was attacked. PW2 saw the attack on PW1 and PW3 who came to the scene on hearing screams saw the injuries on PW1.

Though PW2 is a minor aged 14 years, the court had a chance to examine him and was satisfied that he understands the meaning of oath and was intelligent enough to understand why he had come to court. His evidence is corroborated by that of PW1 as to how the deceased met his death. Accused and his son one Mwanza Mutisya, attacked them as they ploughed and planted on the deceased's land. PW1 said that the accused told him that the deceased had disturbed him for long enough. PW1, PW3 also said that there had been a boundary dispute between accused and deceased there before but PW3 added that it had been long resolved. But from the utterances which PW1 heard, it seems this attack arose out of a land issue over this land that was being ploughed by PW1 and the deceased.

PW1 and 2 were also consistent on the injuries that were inflicted on the deceased. He was cut on the head about 3 times. PW3 who came to the scene confirmed the said injuries. The deceased died on the spot. Even without a postmortem report, it is obvious what caused the death of the deceased. He had been planting and that was cut short by the vicious attack by accused who inflicted injuries on the deceased. There is doubt no that the injuries inflicted were intended to cause grievous bodily harm to the deceased. This establishes the presence of malice afterthought.

The deceased's son was not arrested and charged for this offence though mentioned by both PW1 and 2. The son of the deceased was the first to beat the deceased with the stick he had. Infact the accused may not have caught up with the deceased had the accused's son not tripped him with the hooked stick he allegedly had. Their actions point to their having had a common intention whose object was to cause grievous bodily harm to the deceased and which they did. The motive as earlier observed was the issue of land and I am satisfied beyond any reasonable doubt that the accused and his son caused the death of the deceased. I agree with the verdict of the assessors that accused is guilty.

I accordingly convict the accused of the offence of Murder Contrary to Section 203 and 204 of the Penal 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**