



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

Criminal Case 13 of 2002

REPUBLIC.....PROSECUTOR

VERSUS

JUMA BONIFACE MUNYWOKI

MUTHENGI KITHUNGA.....ACCUSED

SUMMING UP BY JUDGE

We are drawing to the end of this trial and as required by the law and practice, I will sum up all the evidence that has been adduced in this case and bring to the attention of you, assessors, any salient matters that you ought to bear in mind before returning your verdict. Each assessor will return to this court his or her verdict as to whether or not the accused is guilty of the offence as charged.

The accused persons, Juma Boniface Munywoki (accused 1) and Muthengi Kithunga 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 15/10/00, at Kaveta sub location, Kyangwithya location in Kitui district, jointly murdered Mukula Kinyili. They denied the offence. The accused had been charged along with Mwendu Munywoki who was acquitted by this court under Section 306 Criminal Procedure Code for lack of evidence.

Assessors, I urge you to consider all the evidence adduced before you by both the prosecution and the defence in its totality. Also bear in mind the submissions by both counsel for the accused and the state with particular regard to the following:

1. This being a criminal case, the burden of proof that the accused committed the offence is entirely upon the prosecution and at no time does the burden slight to the defence or accused.
2. The case against the accused person must be proved beyond any reasonable doubt.
3. The existence of any doubt in your minds leads to acquittal, that is, if you entertain the slightest doubt that the accused could not have committed the offence charged, that benefit of doubt must go to the accused and you must return a verdict of not guilty.
4. The offence of Murder which accused is charged with is defined in Section 203 of the Penal code. These are the elements of the offence which must exist and be proved before the accused person can be found guilty of the offence:

- i. Malice aforethought
- ii. Causing death
- iii. By unlawful Act

Malice aforethought is defined in Section 206 of the Penal Code. The ingredients are:

- a. Intention to cause death or do grievous harm
- b. Knowledge that an act will cause death or grievous harm

Use of a dangerous weapon or hitting a blow on a vital part of the body implies malice aforethought.

5. Common intention – is provided for under Section 21 of the Penal Code. (I now read out that Section)

This means that if two persons have a common intention and an act is done by one of them with the object of furthering that intention, both are guilty of the offence.

Evidence:

Muteki Lela, (PW1) a niece to the deceased, Mukula Kinyili, recalled that on 13/10/00, she was coming from the river when she passed through the home of Mwendu who was the 2nd accused, she found the 1st accused Shelu and Wambila and that Shelu told her that she (PW1) should go and tell her uncle Mukula that because he had beaten Mwendu's children, they would kill him. She told her mother Lena (PW6) and they both informed the deceased about the death threats. On 15/10/00 at about 6.30 p.m, PW8 Moses Mutunga Kinyili, was with his brother the deceased at a neighbour's house. The neighbour was said to be Peter. PW8 said that accused 1 came carrying Mwendu's child he called the deceased outside and they talked in a friendly manner as they were friends. The only bit of the conversation he heard was that accused 1 would call the deceased later and they parted. He did not see his brother on 16/10/00 but on 17/10/00 he received a report of the brother's death.

On the same date, 15/10/00 at about 9.30 p.m, PW7, Kiema Kinyili, a brother to the deceased went to the deceased's house to ask him help him to bake bricks and while there, accused 1 and 3 arrived and claimed to have come to pick the deceased to go for a dance at Misuni. The deceased dressed and they left at about 9.45 p.m. He did not note anything abnormal as they were friends and normally went to places together. PW7 did not see the deceased again till he was found dead in Mwangangi's plot. He never saw accused 3 till he was arrested at his parents in law's place and he saw accused 1 after his arrest.

James Mulu Mbuvi, (PW2), testified that he was at a traditional dance on 15/10/00 at about 8.00 p.m at the home of Mukai. He saw the accused 1, 3, the deceased and one Wambila and many other people. At about 11.00 p.m he heard accused1 ask the deceased why he was disclosing their secrets. The nature of the secrets were not disclosed. They argued and disagreed and wanted to fight but PW2 told the deceased that since the three wanted to beat him, he should go home. Deceased left and accused 1, accused 3 and Wambila followed him. After a short while PW2 told his young brother that they should go home. They were about 40 metres behind the lot that left earlier and there was moonlight. At Mwendu's gate the three got hold of deceased accusing him of revealing their secrets. PW2 saw accused 1 hit the deceased on the head as he passed.

He did not see the object used. PW2 said he went straight to report this incident to the mother of the deceased on the same night. On 16/10/00 he met Shelu at Kalundu, and accused 1 threatened him with dire consequences if he mentioned what happened to anyone. He went to where the deceased's body was found on 17/10/00 and he saw a metal bar at the scene. He did not report to police immediately because he feared to be killed by accused 1, but that he later led police to accused 1's hide out on 4/5/01.

PW3, Elizabeth Kivau Kinyili, the mother of the deceased last saw her son on 15/10/00 at about 8.00 p.m

when he left to go and see PW5, Maua. When she did not see the deceased by 11.00 a.m on 16/10/00, she sent PW6 Penina Kinyili, to enquire from Maua, PW5 whether she knew where the deceased was. PW5 said that the deceased went to her house at about 9.00 p.m on 15/10/00, ate some food and went back to his home after about 20 minutes. She did not hear of him till next day when PW6 went to her house to enquire about the deceased's whereabouts and she denied knowing where he was. It is then PW3, PW5, 6 and deceased's family started to look for the deceased. PW6 was with her mother PW3 when they found the deceased's body partially covered with bricks. She did not know who killed her brother save that she knew of the threats that were made on his life but she had not made any report to police.

PW9 Corporal Stanley Manore, removed accused 1 from police cells and he led to arrest of accused 2 on 21/5/01 for alleged involvement in the offence. Postmortem report was produced by Doctor David Mwangi the Medical Officer, Health Kitui, in place of Doctor Salim who performed the postmortem on the body of the deceased to ascertain the cause of his death. Postmortem was done on 21/10/00 and the doctor was not able to ascertain the cause of death due to decomposition as he could not see any external injuries.

Accused 1 opted to make an unsworn statement in his defence. He said that the deceased was his friend and they had grown up together. He learnt of the deceased's death on 17/10/00 at 6.30 p.m and went to the scene. He denied having seen the deceased on 15/10/00. He participated in his burial. 2nd accused also gave an unsworn statement in his defence. He knew the deceased well. He could not recall seeing the deceased on 15/10/00. He denied any knowledge of his murder. He took part in his burial and was just at home till his arrest in 2003.

Now assessors, consider the evidence of PW2 who claims to have seen the 2nd accused in company of the deceased at a dance and later as the accused persons allegedly forced the deceased to go a different direction; the alleged assault; and the alleged report to deceased's mother (PW3) on the same night but PW 3 did not seem to be aware of this report as she looked for her son on 16/10/00. Also bear in mind the evidence of PW8 who saw accused 1 come to converse with deceased on the evening of 15/10/00 and PW7's evidence who claims to have been with the deceased when accused 1, 3 and another picked the deceased up to go for a dance. Apart from PW2's evidence that he saw the accused 1 assault the deceased nobody actually saw the accused person actually murder the deceased. Also consider whether PW2 was in a position to identify the assailants. Was there sufficient light –it having been at night? It is circumstantial evidence. Consider whether the evidence is cogent and irresistibly pointing at the guilt of the two accused and whether all the circumstances taken cumulatively form such a claim that it would be impossible to reach any other conclusion other than that the death was caused by the accused and no one else.

What of the conduct of the accused persons after the alleged murder. It is not clear how they were arrested. Accused 1 was arrested in May 2001 as per evidence of PW2 whereas accused 3 was arrested in 2003. If their identity was known all along why did it take so long to have them arrested?

That was the evidence adduced before us in this court. As judges of fact, go over the evidence, consider it in its entirety, that is, both the prosecution and the defence and the submissions of both counsels. Consider whether on the evidence before court, the accused persons killed the deceased. Was there a motive for so doing? Each of you is individually expected to arrive at his own conclusion on the evidence and return his own opinion as to whether the accused is guilty or not guilty. Remember the elements of Murder that I earlier explained to you.

If you need any clarification on any matter, do notify the clerk to call me so that I can do it in open court in the presence of the accused persons and their counsel. You are free to take as much time as you require. **R.V. WENDOH**

JUDGE

Dated at Machakos this 17th day of August 2005

Read and delivered in the presence of

R.V. WENDOH

JUDGE