



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

CRIMINAL CASE 13 OF 2002 (1)

REPUBLIC PROSECUTOR

VERSUS

JUMA BONIFACE MUNYWOKI

MUTHENGI KITHUNGA ACCUSED

J U D G M E N T

The two accused persons, Juma Boniface Munywoki and Muthengi Kithunga, who were accused 1 and 3 respectively 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, Kyan'gwithya location in Kitui district jointly murdered Mukula Kinyili. They denied the offence.

The prosecution called a total of 10 witnesses in support of the charge whereas both accused gave unsworn statements in their defences. After summing up of the evidence adduced in court, the submissions by counsel, the assessors returned a verdict of guilty for both accused.

A brief summary of the prosecution evidence is as follows:

On 13/10/00, Muteki Lela (PW1), a niece to the deceased and daughter of PW6 Penina, was coming from the river and passed by Mwende's home. She found accused 1, Shelu, there. He told her to go and inform the deceased that because he beat Mwende's children, they would kill him. PW1 said that at the time accused 1 uttered these words, he was with one Wambila. PW1 went to inform her mother, PW6 and later they informed the deceased about the death threats.

PW8, Moses Mutunga Kinyili, a brother to the deceased recalled that on 15/10/00 at about 6.30 p.m. he was with the deceased at a neighbour's house when accused 1 came there carrying Mwende's child. He said that accused 1 called the deceased outside and they talked in a friendly manner since they were friends. The only conversation he heard was that accused 1 would call the deceased later and they parted. He never saw the deceased on 16/10/00 but on 17/10/00 he received a report that his brother was dead.

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 home to ask the deceased to help him bake bricks and while at the deceased's house, accused 1 and 3 arrived and claimed to have come to pick the deceased to go for a dance at Misuini. The deceased dressed and the three left at about 9.45 p.m. PW7 did not note anything abnormal as the three were friends and normally went to places together. PW7 never saw the deceased again till he found him dead at Mwangangi's plot. He never saw accused 3 till he was arrested at the parents in law's home at Tungutu. He also saw accused 1 after his arrest.

James Mulu Mbuvi (PW2), testified that he was at a traditional dance on 15/10/00 at the home of one Mukai at about 8.00 p.m. He saw the accused 1, 3, the deceased and Wambila present at the said dance. There were many other people. He said that at about 11.00 p.m. he heard accused 1 ask the deceased why he was disclosing their secrets. Accused 1 did not disclose the nature of the secrets. PW2 said the deceased on one hand and accused 1, 2 and Wambila on the other, argued and disagreed and wanted to fight but PW2 intervened and he told the deceased that since the three were against one he should go home. The deceased left and accused 1, 3 and Wambila followed him. After a short while, PW2 told his younger brother Juma that they should go home. They walked about 40 metres behind those who had left earlier. He said there was moonlight on that night.

On arrival at Mwendé's gate the three accused 1, 3 and Wambila got hold of the deceased accusing him of letting out their secrets. PW2 then saw accused hit the deceased on the head. PW2 just passed by. He did not see the object used to hit the deceased. PW2 went straight to the home of the deceased and informed deceased's mother what he had witnessed. On 16/10/00, he met accused 1 at Kalundu market and accused 1 threatened PW2 with dire consequences if he mentioned what he had seen to anyone. He saw the deceased's body on 17/10/00 and besides the body was a metal bar. He did not report to the police about what he witnessed immediately because he feared to be killed by accused 1. He however led to accused 1's hideout on 4/5/01 at BAT Trading Centre.

Elizabeth Kivau Kinyili (PW3), is the deceased's mother. She last saw her son alive on 15/10/00 at about 8.00 p.m when he left to go to see PW5, Maua with whom he was cohabiting. When she did not see the deceased by 11.00 a.m. on 16/10/00, she sent PW6 Penina, to enquire from PW5 whether she knew deceased's whereabouts. PW5 said that the deceased went to her house at about 9.00 p.m on 15/10/00, ate some food and left after about 20 minutes. She did not hear of him until the next day when PW6 went to her house to enquire about deceased's whereabouts and she denied knowledge. It is then PW3, 5 and 6 started to look for the deceased. PW3 and 6 said they were together when they came across the deceased's body which was partially covered with bricks. She did not know who murdered her brother save for the report of threats on deceased's life but she had not made any report to the police.

Postmortem on deceased's body was conducted by one Doctor Salim on 21/10/00. At the hearing of this case the postmortem report was produced by Doctor David Mwangi Medical Officer Health, Kitui (PW10). Doctor Salim could not be traced without unnecessary delay in the matter. As per the postmortem report PEX No. 1, the Doctor's findings were that he was not able to ascertain the cause of death due to decomposition. He was unable to see any external injuries.

PW9, Corporal Stanley Manore, removed accused 1 from police cells on 21/5/01 and led to arrest of accused 2 who was discharged by this court for lack of evidence against her. In his unsworn defence accused 1 said that the deceased was his friend as they had grown up together. He learnt of the deceased's death on 17/10/00 at 6.30 p.m and he went to the scene. He denied killing the deceased or ever seeing the deceased on 16/10/00. He participated in the burial arrangements.

Accused 2 also gave an unsworn statement in his defence in which he admits having known the deceased well, but could not recall ever seeing deceased on 15/10/00. He denied knowledge of the murder. He took part in the burial and remained at his home till 2003 when he was arrested.

There is no doubt that the deceased was murdered. He was last seen on the night of 15/10/00 and his body was found dumped in somebody's plot, partially covered with bricks on 17/10/00. The accused persons do acknowledge that indeed the deceased's body was found as per the prosecution evidence and they took part in the burial. The doctor who performed the postmortem was not able to establish the cause of death due to decomposition. PW10 told the court that decomposition of a body will start with 48 hours if not preserved. The deceased's body was exposed for about 2 days and that explains the maggot infestation and decomposition and ultimately the inability by the Doctor to ascertain the cause of death. It is immaterial that the Doctor who performed the postmortem did not indicate the date of the postmortem. The fact of death is undisputed.

Nobody witnessed the deceased's murder. The evidence before court is circumstantial. For the court to

find a conviction on such evidence, the evidence must satisfy the three tests that the court of appeal considered in the case of **OMAR MZUNGU CHIMERA versus REPUBLIC CR. APP. 56/1998**. I quote:

i. “The circumstances from which an inference of guilty is sought to be drawn must be cogently and firmly established.

ii. These circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused.

iii. The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the accused and none else.”

This court will therefore consider the evidence adduced bearing in mind the above considerations.

The evidence of PW1 that accused 1 had threatened to kill the deceased because the deceased beat up Mwende’s children was not supported by any evidence. There was no evidence that the deceased had beaten up Mwende’s children. Besides, it seems the said threats if any, were not taken seriously by anybody including the deceased as no report was made to the authorities.

I have carefully considered the evidence of PW7 regarding the events of the evening of 15/10/00. Though the accused persons generally denied that they were with the deceased on 15/10/00 the evidence of the two witnesses PW7 and PW8 was never challenged. There is overwhelming evidence on record that the two accused and the deceased were good friends and moved around together. I have no reason to doubt the evidence of PW7 and PW8 that accused 1 first came to see the deceased on evening of 15/10/00 and they planned to go out and indeed at about 9.30 p.m the two accused picked up the deceased and they left together. That was the last PW7 and PW8 saw their brother.

The evidence of PW7 and PW8 has been corroborated by that of PW2 who later saw the two accused and the deceased at a dance at Misuini. PW2 said that accused 1, 3 and one Wambila disagreed with the deceased over the deceased’s alleged revelation of their secrets. The nature of the secrets was not disclosed. PW2 claimed to have intervened and told deceased to leave and when deceased left, he was then followed by the accused persons. I do accept the evidence of the three witnesses. Their evidence was never challenged or shaken.

PW2 further testified that once the deceased left the dance, he was followed by the two accused and another and he too decided to go home after sometime and found that accused 1 had held deceased at Mwende’s gate still making the same allegation of the deceased having revealed their secrets. It was in the deep of the night. He said there was moonlight by which was able to identify the people. The court was not told the intensity of the moonlight although in my view it would not have been difficult for PW2 to identify people he had been with a few minutes earlier and who were still talking of the same topic of revelation of secrets. PW2 did not say he recognized the voices of those who spoke. He also did not say whether the deceased responded to the allegations made against him when he found them at Mwende’s gate. Identity of those at Mwende’s gate on that night was not full proof.

On leaving people at Mwende’s gate PW2 said he went straight to the deceased’s mother to inform her of what he had seen. It is amazing that the deceased’s mother never made mention of that. In fact, her evidence and that of PW6 that they went in search of deceased on 16th and 17th and never reporting to police about PW2’s report left doubts as to whether PW2 ever made any report to PW3 on that night or not.

This is one case where police never took their work seriously. No arresting officer testified. It is unknown exactly how and when the accused persons were arrested. PW2 told court that he led to the arrest of the two accused in 2001 and 2003 respectively. Since PW2 had information on what happened, the court would have expected an explanation from the police as to why they did not take steps to arrest the accused persons soon after the said murder.

The above notwithstanding, I do find that the two accused who were very good friends to the deceased, were in company of the deceased on the night of 15/10/00 and 16/10/00. There is overwhelming evidence that they were the last people to be seen with the deceased. As per evidence of PW2, they disagreed while at the dance in Misuini and the deceased left the dance followed by the two accused and another. Common sense demands that the two accused do explain where and when they parted company with the deceased on the material night. Since that is a matter that was within their knowledge, all they needed to do is give a plausible explanation as required by Section 111 (1) of the Evidence Act Cap 80 Laws of Kenya and this does not amount to shifting the burden of proof on the accused at all. Since they did not give any explanation but made general denials which the court does not accept, a rebuttable presumption arises that they knew under what circumstances the deceased was killed. This is a presumption of fact which this court is entitled to make under the provisions of Section 119 of the Evidence Act.

PW2 had testified of some weapons having been found near the deceased's body which PW3 and PW6 who were the first people to find the body never alluded to. As considered above the cause of death was not ascertained but the fact of death is not disputed and it is not of much importance what weapons may have been used in the murder. I am satisfied upon my consideration of the evidence on record that there is sufficient circumstantial evidence directly linking the accused persons with the death of the deceased. Though there was alleged disclosure of secrets by deceased, the real motive of the accused person remains unclear and whatever exactly happened is unknown save that it resulted in deceased's death.

I am therefore satisfied upon my own consideration and evaluation of the evidence on record that the offence proved supports a lesser offence of manslaughter Contrary to Section 202 as read with Section 205 of the Penal Code. I therefore convict the accused persons of the lesser offence of manslaughter Contrary to Section 202 as read with Section 205 of the Penal Code.

R.V. WENDOH

JUDGE

Dated at Machakos this 27th day of September 2005 Read and Delivered in the presence of

R.V. WENDOH

JUDGE