



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL CASE 2 OF 2002

REPUBLIC PROSECUTOR

VERSUS

MBOYA NDINDI ACCUSED

SUMMING UP BY JUDGE

The accused, Mboya Ndindi, 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 27/7/01, at Ivuuni location, Mwitika location in Kitui District, murdered Ndindi Kimanzi.

He denied the offence.

The prosecution called a total of 9 witnesses whereas the accused made an unsworn statement in his defence. He called no witnesses.

Now assessors, having heard the evidence by the prosecution witnesses in support of the above charge and the accused's unsworn defence, I urge you to bear in mind the following salient issues of law and evidence before arriving at your verdict in this case.

Please also bear in mind the submissions by both the state counsel and counsel for the defence with particular regard to the following:

1. This being a criminal case, the burden of proof that the accused person committed the offence charged is entirely upon the prosecution and at no time can such burden shift to the defence - accused person.
2. The prosecution case against the accused person must be proved beyond any reasonable doubt.
3. The existence of any doubt in your minds leads to an acquittal; that is you can entertain any slightest doubt that the accused person could or could not have committed the offence charged, that benefit of doubt goes to the accused person and you must return a verdict of not guilty.
4. You must consider the case of the defence. Failure to consider the defence case will be fatal to any verdict that you may arrive at.
5. The offence of Murder with which the accused is charged with is defined in Section 203 of the Penal Code. These elements of the offence which must exist and be proved before the accused

person can be found guilty of the offence are:

- a. Malice aforethought
- b. Causing of death
- c. By an unlawful Act

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

- i. Intention to cause death or grievous harm
- ii. Knowledge that an act will cause death of grievous harm.

Evidence:

This is a brief summary of the evidence that was adduced in this case by both the prosecution and the defence which you should consider.

The deceased was the father of the accused. On the fateful day, 20/7/01, the deceased sold his plot at Emusi market to one Ndululu. The sale took place in the presence of the deceased, his wife Kavele Ndindi (PW1), his sons Elijah Muveva (PW3) and PW6 Mutambuki Ndindi. Accused was not present. PW1 recalled that after the sale, the deceased received part payment of the purchase price of 4,000/=. Accused then arrived when they were seated at PW6's canteen (kiosk) and asked to be given his share of the sale price but the deceased said he would not give anybody part of the money. PW1 said that she was seated next to the deceased facing a different direction when she suddenly saw her husband lying on the ground and people present said that accused had cut him. She was shown the panga that had been used. She got shocked. She said that accused's brothers then got hold of accused and in the process PW6's hand was cut. She recalled that a police officer was present when this incident occurred, that was PW2, APC Robert Mwangela.

PW2, APC Mwangela, testified that on that day at about 3.30 p.m, he was at Mwitika on patrol with a livestock officer Juma Kithome and on reaching Emusi centre, he found people making noises. He noticed two men fighting on the ground. One had a panga. He managed to snatch the panga from the accused, threw it aside and tied up accused. He noticed the deceased lying beside where the accused and PW6 were fighting. He later took the panga to Endau police station. He noted that the deceased was injured in the middle of the head. He identified the photographs that were produced as Ex. 2 as those of the deceased. He arrested accused and took him to Endau Police station.

PW3 Elijah Muveva, is the deceased's brother who was present when the sale transaction took place. He recalled that his father was paid Kshs.2,000/= for the sale of a plot and that after payment the accused arrived, called the parents aside and asked for a share of the money. He was seated about 30 metres away and did not hear exactly what they discussed but they told him that accused wanted money. He saw accused lift a panga, cut the father (deceased) and deceased fell down. Accused then started to chase PW1 and Mutambuki (PW6) intervened. He said that accused fell and Mutambuki got hold of the panga and that Mwangela came, held him and took the panga. PW3 helped arrest accused. He identified the panga (Ex. 1) that accused used in assaulting the deceased as one which belonged to their younger brother who worked in Nairobi. It had blood stains and a mark. He said that he saw the cut on deceased's head and that deceased died on the spot. He guarded the body of the deceased till the next day when police came. He said that before this incident, they all lived peacefully with accused and the parents. PW6 Mutambuki, also a brother to the deceased recalled that the father sold his plot for Kshs.4,500/= and was paid cash of Kshs.2,500/=. This transaction took place outside PW6's kiosk. The deceased owed some money to one Kinyumbu and he paid the whole sum to him. They went back to his kiosk. PW6 entered the kiosk while the others were left outside. He then heard noises and on going out saw people running one direction. He noticed his father lying down and accused blocking the mother (PW1) wherever she moved and she was screaming. PW6 enquired from the accused what the problem was and accused turned to him and chased

him. PW6 fell and when the accused arrived where he lay and wanted to cut PW6, PW6 pulled at accused's leg, and tripped him with his legs and accused fell. PW6 was cut on his fingers in the process and he held the accused tightly. Accused was arrested. It is the next day when he went to the scene that he noticed that his father was dead. He said that APC Mwongela was one of those who helped arrest accused and took him to police station at Endau. PW6 added that accused was drunk because PW6 was told by those who drunk with him.

PW4 Michael Kavua, an Assistant Chief of Kavingo sub location heard of the murder on same day at about 5.30 p.m., went to the scene. He found PW2 with the panga and asked him to take it to Endau Police Station. He identified the photographs Ex. No. 2 as what he saw at the scene. He saw deceased had been injured on the head.

PW5, Matutu Muoki, a cousin to the deceased identified the deceased's body to the Doctor who performed postmortem on 2/8/02.

PW7, Dr Ansen K Nzioka produced the postmortem report on behalf of Dr. Kilungu who performed the postmortem. He found that the deceased had an open wound on the occipital part of the head, brain tissue was exposed and a fracture of occipital area. He opined that the cause of death was cardio pulmonary arrest secondary to head injury. He found the body to be that of a female, was identified by one Matuti Muoki (PW5) and Julius.

PW8 P.C. Samuel Mbiti, was summoned to go and take photographs of the scene of murder on 21/7/01 which he did. He produced them as Ex. No. 2. PW9, Acting Inspector Justus Mutumu, visited the scene on 21/7/01 in company of PW8. He collected accused from Endau Police Station and was also given a panga allegedly used in the murder. He took deceased's body to Kitui Mortuary and kept the panga as an exhibit. He said that Ndindi Kimanzi was male and the body he saw at the mortuary was one of a male.

The accused recalled that on that day he worked in the shamba till 11.30 a.m. He went to drink some local liquor. He went back to work at 1.00 p.m. PW6 went to tell him that he had been looking for him to inform him that they would sell the land at the price discussed but he told PW6 that there were two other brothers whose consents had not been obtained. He informed PW6 that the price of 4,000/= was too little. He then told PW6 that he was smelling Cannabis Sativa which was affecting him and PW6 slapped him. He wanted to fight but PW3 Muveva intervened. Accused feared both his brothers would beat him and he ran towards the kiosks. His father called him at the kiosk and explained what had happened. PW6 again arrived, threatened him and a fight broke out between them. He had nothing in his hand but he picked a piece of wood. He does not know how long the fight took. Their father told them to stop but Muveva came near him and he hit him with the piece of wood. PW6 came with a panga from behind the kiosk. The father came in between them and PW6 raised the panga intending to cut accused but he raised the piece of wood. He never saw his father being cut as he was drunk. Since he was being defeated he ran into the crowd but a piece of wood was thrown at him and injured him. He said that he had differences with his brothers over dowry as they alleged he was preventing the father from giving them part of the dowry but he had a good relationship with his father.

That is the evidence that was adduced before us in this court. Specific assertion be placed on the evidence of PW7 as to whether postmortem was performed on a male or female in light of the rest of the prosecution evidence and even the defence. As judges of fact, go over the evidence. Consider it in its entirety; consider the circumstances under which the deceased met his death and decide whether on the evidence before court, the accused killed the deceased. Each of you is individually expected to arrive at his or her conclusion and return their own opinion as to whether the accused is guilty of the offence charged or not. Remember to consider the submissions that were made before you and the elements of the offence of murder.

Take as much time as you need. If you need any further clarification, notify the clerk to call me in open court so as to clarify the issue in the presence of accused and both counsels. Assessors now retire to consider your verdict.

R.V. WENDOH

JUDGE

Dated at Machakos this 27th day of September 2005

Read and delivered in the presence of

R.V. WENDOH

JUDGE