



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**CRIMINAL CASE 2 OF 2003**

**REPUBLIC .....PROSECUTOR**

**VERSUS**

**MBOYA NDINDI ..... ACCUSED**

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

Mbonya 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. Accused gave an unsworn statement in his defence and called no witness.

The deceased, Ndindi Kimanzi, was the father of the accused. On the fateful day, which is 20/7/01, the deceased sold his plot at Emusi Market to one Ndululu. The sale of the plot took place in the presence of the deceased, his wife Kavele Ndindi (PW1), his sons Elijah Muveva (PW3) and Mutambuki Ndindi (PW6). Accused was not present.

PW1 testified that after the sale was finalized, the deceased was paid Kshs.4,000/= being part payment. Accused arrived when they were seated at PW6's canteen or kiosk and asked to be given his share of the sale price. The deceased said he would not give anybody the money. PW1 recalled that she was seated with the deceased but they faced different directions when she suddenly saw the deceased lying on the ground and the people who were present said that it is the accused who had cut him. She was shown a panga that was allegedly used. She was in shock. Accused's brothers then got hold of accused and in the process PW6's hand was cut and injured. She remembers seeing PW2 Administration Police Constable Mwangela at the time of this incident.

PW2 recalled that on that day at about 3.30 p.m he was on patrol with a livestock officer Juma Kithome at Mwitika. On reaching Emusi Centre, he found people making noises and noticed two men fighting and were on the ground. Accused who was one of the two fighting men had a panga which PW2 snatched, threw it aside and helped tie up accused. He noticed that the deceased was lying nearby, was injured on the middle of the head. He identified photographs which were taken of the scene by the scenes of crime officer Police Constable Samuel Mbiti (PW8). He is the one who arrested accused and took him to Endau Police Station along with the panga that he snatched from accused.

PW3 confirmed having been present at the time of the sale of land. He said that the father was paid Kshs.2,000/= being part payment and after the payment, accused arrived, called their parents aside and asked for his share of the money. PW3 sat about 30 metres away and did not hear exactly what they discussed but the parents told him that accused wanted money. PW3 saw accused lift a panga, cut the deceased, who fell down. Accused started to chase their mother PW1 and PW6 intervened. At one time accused fell, PW6 got hold of the panga and it is then PW2 arrived and got hold of the panga. PW3 helped arrest accused and identified the panga which accused used to cut the deceased as Exh. No. 1. He said the panga belonged to the younger brother who worked in Nairobi. PW3 saw blood stains on the panga and the panga had a mark. Once the deceased was cut he died on the spot and PW3 guarded the body till police came. He said that they lived peacefully with accused and their parents before this incident.

PW6 is also a brother to the accused and son to the deceased. His testimony was that his father sold a plot for Kshs.4,500/= on that fateful day and was paid Kshs. 2,500/=. This sale transaction took place outside PW6's kiosk. The deceased owed one Kinyumbu some money and the deceased gave him what he had received. PW6 entered his kiosk only to hear noises from outside. On going out he saw people running one direction. He noticed that his father was lying down and the accused was blocking the mother (PW1) whenever she moved and that she was screaming. PW6 enquired from the accused what the problem was but accused turned to him and chased him. PW6 ran and fell. Accused reached PW6 and wanted to cut PW6 and he fell. PW6 held onto the accused tightly and his fingers were cut in the process. PW2 helped him arrest accused and took him to

Endau Police Station. PW6 said he was informed that accused was drunk at the time. He did not realize that his father was dead till the next day when he went back to the scene.

Michael Kavua (PW4) the Assistant Chief of Kavingo sub location heard of the murder, proceeded to the scene at about 5.30 p.m. He found PW 2 with the panga, the murder weapon and asked him to take it to the police station. He identified the photographs taken at the scene (Exh. No. 2). He noted that the deceased's injuries were on the head.

Matuti Muoki, a cousin to the deceased identified the deceased's body to the Doctor on 2/8/02 before postmortem was done.

Doctor Ansen Nzioka (PW7) produced a postmortem report on behalf of Doctor Kilungu who performed the postmortem on the deceased. This is because Doctor Kilungu could not be traced without unnecessary delay in this matter (Section 77 Evidence Act). The Doctor found that the deceased had an open wound on the occipital part of the head, brain tissue was exposed and there was a fracture on the occipital area. The Doctor formed the opinion that the cause of death was cardio pulmonary arrest Secondary to head injury. He found the body to be that of a female and it was identified by one Matuti Muoki PW5 and Julius.

Police Constable Samuel Mbiti (PW8) was asked to go and photograph the scene of murder on 21/7/01. He produced the photographs of the scene as Exh. No. 2. Acting Inspector Julius Mutumu (PW9) visited the scene on 21/7/01 in company of PW8. He later collected accused from Endau Police Station and received the panga which is the murder weapon which he kept and produced as Exh. No. 3. He is the one who escorted the deceased's body to Kitui Mortuary.

Accused in his unsworn statement recalled that he had worked in the shamba on that day, till 11.30 a.m. He left to go and drink some local brew. He went back to the shamba at 1.00 p.m when PW6 went to inform him that they had been looking for him to inform him that they would sell the plot at the price discussed but accused told PW6 that their other two brothers' consents had not been obtained. He told PW6 that the price of Kshs.4,000/= was too low. Accused informed PW6 that PW6 was smelling of Cannabis Sativa which was affecting him and that PW6 slapped him. He wanted to fight but PW3 intervened. Accused feared that his two brothers would beat him and he ran towards the kiosk. The deceased called accused and explained what had happened and that PW6 arrived, threatened accused and a fight broke out between them. Accused picked a piece of wood. Their father tried to intervene but

Muveva PW3 came near them and he hit him with the piece of wood. PW6 then came with a panga from behind the kiosk. PW6 raised the panga to cut accused but the father came in between them and that accused blocked the panga with the piece of wood. He denied seeing his father being cut as he was drunk. He noticed he was being overpowered and ran into the crowd but a piece of wood was thrown at him and he was injured. He had differed with his brothers over dowry of his sisters as his brothers alleged that he was preventing the father from giving them part of the dowry but that he had a good relationship with his father.

I have carefully considered the evidence that was given in this case by both the prosecution witnesses and the defence and even the submissions by counsel. There is no dispute that Ndindi Kimanzi met his death on 27/7/01. It is soon after he has sold his plot and has got some part payment. From evidence of those present PW1, 2, 3, 6, he died instantly. PW8 took photographs of the scene the next day with the body still lying at the scene. These witnesses testified to seeing a gaping wound on the head of the deceased. The Doctor who performed postmortem indicated that the person he performed postmortem on was a female. However the postmortem report (PEX 1) does show that postmortem was carried out on Ndindi Kimanzi, whose body was identified by Matuti Muoki (PW5). It is PW9 who took the same body to the mortuary. Unfortunately, the Doctor who performed the postmortem was no where to be found to testify. This court is satisfied that the finding that the body was that of a female was a mere mistake. The injuries that the Doctor found and cause of death, that is, open wound on occipital area, Brain tissue exposed which led to cardio pulmonary arrest secondary to head injury were consistent with evidence of the witnesses who witnessed the incident or saw the deceased while at the scene. The fact of the deceased's death cannot be disputed as the defence tried to allude to in their submissions.

There is overwhelming evidence on record that a disagreement arose out of the sale of plot by the deceased. PW1 said the accused wanted a share in the sale price which the deceased declined to give. PW4 and brother of the accused saw accused call his parents aside though he did not hear what they talked about. Indeed in his defence, accused claims to have referred to a discussion they had over sale of a plot and he had objected to the sale without the other brothers' consents and the price of 4,000/= which he considered to be low.

There is no doubt as to the cause of the dispute that resulted in a death.

Those present at the scene where deceased died were PW1, 3 and 6. PW1 denied seeing exactly how or who cut the deceased as she was seated with them but facing a different direction. PW6 claims to have gone back into the kiosk when it all happened. It is only PW3 who saw accused lift a panga and cut the deceased and that PW6 responded to the commotion that ensued by enquiring from accused what had happened. I had a chance to see these witnesses and assess their demeanor and have no doubt that the accused is the one who cut the deceased when he refused to part with some of the money from the plot. PW6 found him with the panga. PW2 found accused holding the panga as they struggled with PW6 and snatched it from him. The accused alleged to have had a grudge with the brothers. This issue of grudge was introduced in the defence as an afterthought. At no time during the hearing of the case was the issue of the grudge put to PW1, 3 and 6. I find that no grudge existed. Besides, we have the independent evidence of PW2 who snatched the panga from him.

The accused gave a vivid and detailed account of what happened before the father was cut though he denies having seen him being cut. He then gives an excuse for his failure to see the father being cut to his having been drunk. PW6 alluded to the fact that accused had been drunk but PW6 claimed to have been told by those who allegedly drunk with accused. They did not testify.

In any event from the vivid and detailed account given by accused as to the events of that day, it is this court's view that if he had been drunk he could not remember these details. To avail himself the defence of intoxication, accused should have shown that he was so drunk that he did not know what he did or that it was wrong. From his defence he was very alert. Even though the P3 form was not produced to show his status of mind at the time of the incident, it is him raising the defence of intoxication and it is upon him to prove intoxication. Accused cannot avail himself that defence of intoxication.

The defence alleged that deceased met his death during a struggle between PW6 and accused. There is overwhelming evidence on record that PW6 was involved in a struggle with accused after accused cut the deceased. PW2 found the two fighting on the ground and it is accused who had the panga which is the murder weapon.

The accused was aware of the sale transaction; he went to the venue of the sale while armed. He then accosted his father inflicting injuries on his head which caused a fracture of the occipital bone and exposure of brain tissue. These injuries inflicted on the deceased establish beyond any doubt that the least he intended was to cause grievous bodily harm. This establishes the existence of malice aforethought at the time.

This offence was committed in broad daylight I believe the prosecution evidence. There were no serious or material contradictions in the prosecution case apart from PW1 who never testified to having been chased by accused but she claimed to have been in shock after the incident.

All in all, I am in agreement with the unanimous opinion of the assessors that the prosecution has proved their case beyond any reasonable doubt against accused.

I find accused guilty and convict him of the offence of murder Contrary to Section 203 as read with Section 204 of the Penal Code.

**R.V. WENDOH**

**JUDGE**

Dated at Machakos this 12<sup>th</sup> day of October 2005  
Read and delivered in the presence of

**R.V. WENDOH**

**JUDGE**