



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**Murder Case 10 of 2003**

**JULIUS MUINDE MAKAU.....ACCUSED**

**VERSUS**

**REPUBLIC.....PROSECUTOR**

**JUDGEMENT**

The Accused Julius Muinde Makau is charged with the offence of Murder Contrary to Section 203 as read with S 204 of the Penal Code.

The particulars of the charge are that on 29.9.1999 at Uthini Village, Mutituni Location, in Machakos District, he murdered Lucia Nthue Makau. He denied the offence.

The prosecution called a total of 8 witnesses in support of their case whereas the accused gave a sworn testimony in his defence. He did not call any witnesses.

The deceased, Lucia Nthue, was the wife of the accused. According to the evidence of Prosecution Witness 1 Loise Kiloko an aunt to the deceased and Prosecution Witness 2 Teresia Ayabei, a sister to the deceased, as at 25.9.99 the deceased was living at Ngumo Estate in Nairobi where she worked for PW2. PW2 testified that the accused had requested her to employ the deceased in July of 1999. Also living in

PW2's house at the time was PW1 who had come for treatment. PW 1 recalled that on 29.9.99, Lucia left Nairobi for her rural home because the accused had called Prosecution Witness 2 and requested that the deceased goes home. PW2 also confirmed that the accused had gone to her house on 24.9.99 and asked her to release the deceased to go home. PW2's child was sick on 25.9.99 and the accused came to visit the child and insisted on going back home with the deceased. Deceased did not go home till 29.9.04. On the same night, PW2 got a telephone call from accused who informed PW2 that he was travelling to Kenyatta National Hospital in an ambulance because a wall had collapsed on Lucia. On 30.9.99 the accused went to inform PW2 that the deceased was admitted at Kenyatta National Hospital Intensive Care Unit. PW2 visited her sister, the deceased at the hospital and found that she had suffered bruises on the chest, face, body was swollen, had marks on her neck, tongue was protruding out, some flesh was missing from the leg. On 2.20.99 PW2 decided to go and see the wall that had collapsed. She noted that bricks had fallen from the wall that separated the sitting room and bed room and were on the side of the sitting room. She leant that a child who was asleep in the adjoining bedroom was not injured. The deceased died on 22.10.99 as she underwent treatment at Kenyatta National Hospital.

Prosecution Witness 3, Munywoki Makau, a brother to the accused who lived near accused's home heard his mother shout at about 11.00p.m saying that the wall had fallen on Lucia. He went to the scene and confirmed that indeed the wall had collapsed on Lucia and helped pull her from under the bricks. He estimated that 200 bricks fell on Lucia. He helped take Lucia to Mwema's Clinic who referred them to Machakos General Hospital. They took Lucia to Kenyatta National Hospital the same night. His evidence was that the accused and Lucia were alone in the said house save for a little child. The rest of the children slept with the grandmother in her house.

Musembi Muinde PW4, a son of the deceased and accused, aged about 7 years gave a sworn statement in his evidence after the court examined him and found him capable of understanding the meaning of the oath and he was intelligent enough to understand the proceedings. His testimony was that he was in bed with his younger brother in his fathers house when he heard the father threaten the mother that he would kill her. The father (accused) went to the bedroom, came out with a panga and iron bar and hit the deceased with the iron bar 3 times on the head and she became silent. PW4 peeped through a curtain that covered the door and asked the accused to stop what he was doing but accused ordered PW4 to sleep and threatened him. He saw the father scratch the deceased around the neck. Accused made a hole in the wall using a page and the wall fell near his mothers head. It is then Accused called his mother Beatrice Mbeneka (Prosecution Witness 5) who screamed and people came to assist accused. PW4 also reiterated Prosecution Witness 1 and 2's evidence that the deceased was working in Nairobi at the time.

Prosecution Witness 5 recalled that she had parted with the deceased and accused at about 9.00p.m. when she went to sleep with the children of accused except the youngest one who went with the parents. Later in the night she heard accused shout and asked her to call the brother because a wall had fallen on the deceased. He went to accused's house and found that indeed the wall had fallen on the deceased.

Prosecution Witness 6, Joseph Kilonzo heard screams at about 1.00p.m. and went to accused's house. He found that the deceased had already been removed from under the bricks.

Prosecution Witness 7 Festus Ngei a clinical Officer at Mutituni testified that on 1.10.99 the accused went to him for treatment for allegedly taking poison because he was disturbed that people were suspecting him of injuring his wife.

Post mortem on the deceased was conducted by Dr. Olumbe on 29.10.99 at City mortuary Nairobi. The said Doctor has since left the jurisdiction of this court and the court allowed Doctor Jane Wasike who had worked with Doctor Olumbe to produce the post mortem report in evidence (Exhibit No. 1) The Doctor found the following on the deceased; The body had no fractures, it had healing abrasion of the right temple 10cm abrasion over lateral aspect of the right shoulder 14 cm, blood clots, lungs were congested with blood clots, hemorrhages on parietal lobes. The Doctor opined that the cause of death was thrombo embolism due to deep blood veins thrombi following head and neck injuries due to a blunt object. Doctor Wasike explained simply, that the death was due to a blood clot that may have emanated from the injured leg since the deceased was not moving.

In his defence, the accused denied that the deceased ever lived away in Nairobi. He recalled that on the fateful night, he was with his wife, the deceased and the youngest son who was about one year old while the other 3 older children went to sleep with his mother in her house. His wife was seated taking tea and sewing while the accused looked at the child's book The wall separating the sitting room and bedroom suddenly fell on the deceased. People went to assist him. He took the deceased to Kenyatta National Hospital where she later died. He denied that he had any disagreement with his wife or that he beat her on that night. He said the deceased was a business lady. He further stated that Prosecution Witness 4 slept in the grandmothers house on that night.

I have carefully considered the evidence on record including the accused's defence and submissions by Counsel. It is not in dispute that the accused and deceased were together in the house at their home on the fateful night. Though Accused denies that Prosecution Witness 4 was with the parents on that night, PW4 does claim to have been present and witnessed what went on. I will consider PW4's evidence in a while.

PW4 told the court that he is 7 years old. After he was examined by the court, the court formed the opinion that he understands the meaning of the oath and was intelligent enough to understand the proceedings and he gave a sworn statement in his evidence, He vividly explained what the accused did to the mother on that night. If Prosecution Witness 4 is 7 years old, in 2005 he was about 2 to 3 years in 1999 when the deceased died. That was a very tender age for the witness to recall what happened as he purported to do. The police never took his statement then. The police only recorded a statement from prosecution witness 4 on 23.4.2004, over 3 years later. I do have doubts in my mind as to whether indeed PW4 was able to recollect what he saw at a tender age of 2-3 years which was not recorded soon after but 3 years later. I am persuaded to believe the submission of the defence that Prosecution Witness 4 may have been coached and his evidence may have been concocted. He has been living with the parents of the deceased since deceased's demise.

According to PW1 and 2, the deceased lived in Nairobi where she worked for PW2. It is upon the accused's persistence that she went home and was injured the same night. Though the accused says that deceased lived at home, I was convinced by Prosecution Witness 1 and 2 that she lived in Nairobi where she worked. Accused never said where the deceased conducted her business or what type of business deceased did. The fact that accused persisted that deceased goes home and she was injured on some night raised suspicion as to whether accused had a hand in the injury that deceased sustained that led to her death. A part from that suspicion this court having discredited PW4's evidence, it is only accused who knows what happened to his wife.

The post mortem report merely indicates that the object used to injure her was a blunt object. It could have been a club or a falling wall that might have injured the deceased. Accused is a prime suspect but he has an explanation that a wall fell on the deceased. Prosecution Witness 2 visited the scene and saw the fallen wall. There is no evidence to the contrary that the wall could not have caused such injuries to the deceased.

In sum I find that accused has a plausible explanation as to what might have caused the injuries to the deceased. There is a doubt raised in the prosecution case as to whether it is accused who murdered his wife or not motive of the murder is also not established.

This doubt must be resolved in the accused's favour. Accused is therefore acquitted of the charge of murder. He is set at liberty forthwith unless otherwise lawfully held.

Dated and Delivered at Machakos this 14<sup>th</sup> day of December 2005

**R. WENDO**

JUDGE