



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**CRIMINAL CASE NO. 2 OF 2000**

**REPUBLIC ::::::::::::::::::::::::::::::::::::::: PROSECUTOR**

**VERSUS**

**1. DAVID NZIOKA NYOTA ::::::::::::::::::::::::::::::: 1 ST ACCUSED**

**2. ELI JAH MUTHOKA WAMBUA ::::::::::::::::::::::: 2 ND ACCUSED**

Coram: J. W. Mwera J.  
 Mulu Advocate for both Accused persons  
 Orinda State Counsel for Republic  
 C.C. Mulu

\*\*\*\*\*

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

The two accused persons here were charged with the death of one Daniel Makau Matolo C/S 203 as read with S.204 Penal Code in that on the night of 17th/18th February 1997 at Kathome village, Kitanga, Machakos jointly with others not before court murdered the said Makau. They denied the offence; the prosecution called eleven (11) witnesses while the two accused testified in their defence.

Christine Kanini Daniel (P.W.1) the wife of the deceased testified first. At 6 P.M. on 17.2.97 the two accused persons came to their home, the deceased was there. The two accused are neighbours and thus well known to P.W.1. They were also friends and drinking mates of the deceased. There had been an allegation that the deceased sold a radio belonging to one Beatrice to somebody called Kisumo (James Kyeve Musi P.W.2) and that the deceased and the two accused persons were going to discuss the matter. They left. P.W.1 told the court that at about 8.30 P.M. the same evening the two accused returned to her home and one of them entered the bedroom (in the main house). That Elijah Wambua (accused 2) told her that they had come to collect certain item they had forgotten when they were there earlier that day. The deceased had not returned with them. That P.W.1 who had been in the kitchen then went into the bedroom and found her blanket missing. That at about 10 p.m. the same evening the deceased's brother one Elijah Matolo (P.W.2) came to P.W.1's home. He inquired if the deceased had returned. P.W.1 answered him in the negative. Then P.W.2 told her to inform him when he returned to go and collect the radio from Kisumo's home. That at 6 a.m., quite probably on the following day Kyalo Mutua (P.W.4) Elijah Mutua's (P.W.2) son went to Kisumo's (P.W.6) home and collected the radio and took it to his home. In turn the deceased Daniel would collect it from there. When P.W.1 herself went to Elijah Mutua's home, after some reluctance she took the radio. The deceased had still not returned. She left in the bush, though, because as it transpired later it seemed that the deceased stole and sold that radio. P.W.1 returned home.

At 8.30 A.M. she discovered the deceased's body lying on a terrace under a banana tree in their shamba. He was dead and their blanket lay nearby. He lay on his back and had vomited. P.W.1 screamed and the deceased's brother Daudi Matolo with others arrived to see what she had discovered. Martin Matolo (P.W.3) reported the incident to the police and the deceased body was removed from the scene.

In cross examination, Kanini told the court that she was no longer in her marriage home, the deceased's home, because family disagreements followed Daniel's mysterious death. That a week before this death the deceased and Daudi Nzioka (accused 1) had a row over a cow that had gotten lost. When accused 1 came to the deceased's house to ask about it the latter beat him thoroughly. She did not know when the two became friends again by 17.2.97 when accused 1 came with accused 2 and they went off with the 10 deceased. They had left together without force or coercion.

She added that although it was dark when the 2 accused returned to her home on the evening of 17.2.97 he saw and recognized them. She talked to accused 2 while Daudi (accused 1) went into the bedroom. P.W.1 did not notice accused 1 taking anything from there. It may be remembered that in examination in-chief P.W.1 said that when these two returned by themselves to her house that evening they took a blanket.

P.W.1 added that the deceased had no regular sickness; not even a heart problem. That the radio did not belong to the accused persons. P.W.1 told the court that her mentioning of the two accused persons, quite probably meaning to the deceased's family and the police, was because they had left with the deceased on the evening of 17.2.97 and that not too long before, he had fought with Daudi Nzioka (accused 1). But she could not for sure claim that indeed these two accused persons murdered Daniel Makau.

Elijah Mutua (P.W.2) the deceased's brother on 17.2.97 drunk at Kisumo's bar (James Kyeva P.W.6). As the bar closed Kisumo's wife asked P.W.2 to go and tell the deceased to come and collect a radio from the bar. So P.W.2 passed via the deceased's home at about 9 p.m. and told his wife (Kanini P.W.1) the message. Kanini told P.W.2 that her husband had not returned home. The following day the deceased had not returned home to go and fetch the radio. But Kanini passed via Elijah Mutua's home and he convinced her to take the radio away. She did. But at 9 a.m. P.W.2 heard screams from P.W.1. When he answered them he proceeded to the deceased's shamba and found him lying there murdered. He observed the body with people who were there. Police came and took it away. This witness had not seen the accused persons on 17.2.97 but he had found his deceased brother earlier at 9 A.M. that day working on the floor of his house.

Martin Matolo (P.W.3) gave more or less the same story of 18.3.97 when the body of Daniel was discovered in the shamba and a scream was raised. He reported the incident to police who arrived to move the body from the scene. P.W.3 too had seen the deceased in good health on the morning of 17.2.97 at his house.

Kyalo Mutua (P.W.4) on 18.2.97 took milk to Kisumo's home. He was paid for it and Kisumo's wife gave him a radio to deliver to his uncle, the deceased. He left it at his own home as he was rushing to school. His father told him to leave word at his uncle's home to go and collect the radio. P.W.1 told P.W.4 that the deceased had first left the home that morning. It is on 19.2.97 that Kyalo learnt of his uncle's death.

Ancient Mailu (P.W.5), the deceased's cousin identified his body to the doctor who performed the post mortem operation on it. To P.W.5 he had had a suspicion that deceased took poison. But when the head was opened, P.W.5 noticed a blood clot below the skin.

Next to testify was James Kyeva Museni also known as Kisumo (P.W.6). On the day Daniel Makau's body was discovered lying in his shamba (P.W.6) he had woken up ready to travel to Nairobi. He then noticed people streaming to the lower side of his home. He joined them and arrived at the scene of murder of Makau.

Prior to this Kisumo had drunk with Elijah Mutua (P.W.2), the deceased's brother, and he had noticed a

wooden radio on the counter of the bar which he owned and also ran. He learned that the deceased left the radio when he was too drunk to carry it home after repairs. A day or two later some youths brought milk to his bar-cumresidential place. He was still asleep. His wife Kamanthe Ndivo (P.W.7) gave them the radio to take to Daniel, the deceased. According to P.W.6 he had not seen the two accused persons for about 4 days before the murder. He did not see them on either 17th or 18th February 1997.

Mercy Kamanthe Ndivo (P.W.7) sold at the bar of the husband (then) Kisumo. On 15.2.97 the deceased came and left a radio there intending it to be taken to a local fundi for repairs. The fundi did not come. The deceased had directed that in that event she give the radio to the boy who used to take milk to Kamanthe's home (i.e. Kyalo Mutua) to return it to him. She did just. That the accused persons whom P.W.7 knew at no time came to her place to sort out any dispute over this radio. She did not know if Daniel's death had anything to do with this radio. She did not see him on 17.2.97 but she had seen him on 15th and 16th only. She did not on any occasion see the accused persons in company of the deceased at her place coming to ask about the radio. The deceased was alone when he left it and he did not direct that the accused persons be given the radio or that they would come for it.

On 18.2.97 P.C. Kilongozi (P.W.8) and another police officer visited the spot where the deceased lay after it had been reported at Machakos Police Station. They found the body covered with a blanket. It bore no physical injuries, it was removed to Machakos General Hospital. P.W.8 had not noticed signs of struggle at the scene at all. APC Maigwa (P.W.9) on 10.2.99 arrested Daudi Nzioka (accused 1) in connection with the death of Daniel, and took him to Machakos Police Station as he had been asked to. But asked to point at the man he arrested as the two accused persons sat in court, P.W.9 pointed at Elijah (accused 2).

P.C. Imo (P.W.10) placed accused 2 (Elijah) in the cells on 23.3.99. He had been arrested in connection of the reported murder case at Kathome – on 15.2.97 (could this be right?).

Dr. P. Lumumba (P.W.11) worked for long with Dr. Kisiangani at Machakos General Hospital. Dr. Kisiangani operated on the deceased on 21.2.97, filled and signed a post mortem form. Dr. Lumumba was conversant with Dr. Kisiangani's handwriting. So he produced the report. It said that the deceased died due to cardio-pulmonary arrest following internal bleeding in the brain. The deceased bore swellings at the back of his head (Exh.P1). They were caused by pressure from a blunt object.

In defence accused 1 David Nzioka denied murdering Daniel Wambua. He said that he was in Nairobi on 15th and 16th February 1997 – offloading lorries of potatoes. That he was not near Kathome, his home at all. He was a neighbour of the deceased and they had no grudges between them. All the time accused 1 (D.W.1) referred to dates particularly 16.2.1997 as when offence took place. [The charge sheet spoke of the night of 17th and 18th February 1997). David denied that he with his co-accused showed up at Daniel's home at 6 p.m. and went away with him to settle the radio matter. He denied returning at 8.30 p.m. the same night and on the whole said that he did not take part in the death in question. He maintained that all the material time he was in Nairobi.

Accused 2 Elijah Muthoka (D.W.2) similarly denied the offence. That on or about 10th or 11th February 1997 he travelled with his mother to Taveta on her business trip until after about 20th of that month when they returned. Then he learnt of Daniel's death which had occurred earlier. He denied having gone twice to the deceased's house on the evening before his death was discovered. He said that he had no cause to murder Daniel and he did not know why Kanini (P.W.1) implicated him.

After final submissions and summary of the case to the assessors, the latter returned opinions of not guilty for both the accused persons. This court agrees with those opinions.

In this court's mind there is no evidence direct or circumstantial adduced to link the accused persons with the death of Daniel Makau Matolo. The only evidence that seemed to link them to the death is only that of Kanini (P.W.1) who claimed that both accused came to her home at 6 p.m. on 17.2.97 and took the deceased away on the basis that they were going to sort out the radio issue. She added that later at 8.30 p.m. the accused persons returned without the deceased on account of an item they said they had forgotten

during the earlier visit. P.W.1 maintained that the accused persons whom she knew well had come that day twice and on the latter visit, though it was night she talked with them and recognized them. The accused persons deny this though. Much as the court was left wondering what version of the two sides was truthful, it still remained with a view that there was no evidence that the accused persons murdered Daniel. Indeed P.W.1 said as much. Her fast impression to name the two accused persons to the family members and police was left by her claim that they came for the deceased and that a week earlier Daudi (Accused 1) had fought with the deceased – the latter beating the former badly. All these are well appreciated but they do not constitute evidence that the 2 accused persons were the murderers of the deceased.

In this event, the case against them having not been proved or proved beyond a reasonable doubt they are acquitted as charged.

Judgement accordingly.

Delivered on 2nd April 2001.

**J. W. MWERA**

**JUDGE**