



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**CRIMINAL CASE NO. 24 OF 1999**

**REPUBLIC .....PROSECUTOR**

**VERSUS**

**10 MUNYOKI KYETHO MUTHANGYA ..... ACCUSED**

Coram: J. W. Mwera J.  
Makau O. Advocate for Accused  
Mrs. Ntarangwi Senior State Counsel for Republic  
C.C. Muli

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

The charge that the accused Kyetho faced was under S.203 Penal Code as read with S.204 Penal Code as read with S.204 Penal Code in that on 21.5.98 at Kakunika 20 village, Kamwongo Mwingi he murdered Sila Muthusi.

The trial herein opened on 12.6.2000 with Musya Kali Mwombombo (P.W.1) in the witness box. The accused called him to come to his shamba and witness something. When P.W.1 obliged he found the deceased Sila Muthui tied to a tree.

The accused then told P.W.1 that that youth had stolen his, P.W.1's pawpaws, bananas and cassava. Observing Sila, P.W.1 noticed that from his face he had been beaten. That the accused was contemplating releasing the boy whose mother he had informed and was awaiting. That P.W.1 told accused not to release the boy until his mother came. Being sick P.W.1 went to his home. Later the accused told P.W.1 that the deceased had untied himself and escaped. When the deceased's mother came, all the 3 neighbours went to the accused shamba. The boy was not there but the accused showed them the farm produce that the boy had stolen.

The following day Sila had not shown up at home. His mother sent P.W.1 to inform the accused and to get him to deliver the boy to his mother. The court heard that the accused answered that he could not go looking for the missing Sila. When P.W.1, Sila's mother and another, went to check for Sila at the accused's home, the latter was not there. That the next day a police man came. P.W.1 led him to the 10 accused's home, he was arrested and taken to the chief's home where there was a baraza. Further talking did not lead anywhere. So those gathered selected six strong men and the accused led them to a spot where Sila's body was recovered – on his father's shamba.

In cross-examination P.W.1 said he saw the deceased bound – legs and hands, and lying on the ground. He was talking. He asked for water. That the accused was there armed with a panga and looking pretty hostile. So P.W.1 did not render any assistance to the boy when he asked for it. That the accused had told P.W.1 that he beat the deceased for the said theft. To the deceased's mother, it was said, the 20 accused said that that was sufficient punishment, he did not have to be compensated at all. That when the accused was before the chief, he admitted to show where Sila's body was. He led them there and not that all those

assembled forced/threatened him to do so. They did not know where the body was. P.W.1 concluded that he had noticed a twig on the ground where he had found the deceased on the accused's shamba. He suspected that it was used to beat the deceased but at no time did P.W.1 think that the accused would murder Sila. That the accused did not try to escape or resist arrest at all.

Rose Muthui (P.W.2) was Sila's mother. About 11 a.m. on the material day, the accused passed past her home and told her to go and collect Sila. He did not tell P.W.2 that the boy had done anything wrong. At 4 p.m. P.W.2 passed via the accused's home. He called Musya Kiili (P.W.1) and all went to the accused shamba. There the accused showed them 2 pawpaws, one cassava and two bananas adding that Sila had stolen them. Rose wished that the accused had held the boy until she came. 10 The accused became argumentative. P.W.1 told her that he had seen her son badly beaten. He was nowhere. The accused was not cooperative. So P.W.2 went to report to the village elder and later to the assistant chief. She ended up at the chief's home. The chief gave a note to the police (administration?) and the accused was arrested. He led them to where Sila lay dead.

Where the stolen produce was shown to P.W.2, had signs of much struggle. The bushes were disturbed and that the accused told her that he had been beating Sila there – the beating he said, made up for monetary compensation. As the story goes she had not seen the accused beating Sila. Neither did P.W.1, it may be added. But 20 on the scene she noticed a twig. She thought it was used to beat her son.

Kilonzo Muthengi (P.W.3) is the village-elder to whom P.W.2 reported about the missing boy. He advised her to report to the assistant. That was the course of things until the chief knew of it. P.W.3 in the meantime got APC John with other villagers to begin searching for Sila. From Musya's home (P.W.1) they heard his story and proceeded to the accused's shamba. The deceased was nowhere there. The accused showed up and the AP arrested him. They took him to the chief's baraza; he was interrogated; he volunteered to show them where Sila's body was – all voluntarily. He led the group to a bush and there lay Sila's body. P.W.3 observed the body and noted bruises on the face. He also observed a deep depression on the face as if the deceased was hit with a stone. The body was swollen. This witness did not witness his nephew, the accused beating the deceased. But he led the search team to the body of the deceased, albeit not directly. The injuries which P.W.3 saw, he attributed them to use of a stick or stone to inflict.

10 .Dr. Daniel Nguku (P.W.4) carried out a post mortem operation on Sila. His body was decomposing and the most notable injuries were a fractured skull along the fissure lines above the eyeballs. There had been bleeding inside the brain. This caused the death (Exh.P1). He told the court that James Kilonzo, Nzavi and Kilonzo Manuve identified the deceased body to him – relatives. P.W.4 was of the opinion that great force was used to fracture the skull of the deceased. It was broken into a section because of compression. P.W.4 concluded that he thought Sila was hit. If he fell then P.W.4 could not tell.

20 APC John Kingori (P.W.5) who has been referred to earlier got the story of Sila's death. In trying to get to the bottom of it, he inquired from quite a few villagers including P.W.1. When the accused came upon P.W.5 with his team at his shamba, he began by denying any knowledge about Sila's beating but said that the youth used to damage the accused's crops. P.W.5 arrested the accused and took him to the chief's baraza. From there the accused led the search team to where the deceased's body was in a bush. He showed it to them.

P.C. James Mureithi (P.W.6) left Mwingi Police Station with the suspect Kyetho (the accused) to his village at Kamwongo on account of a murder report. They found a chief at a local market centre and the accused led them to a place where the deceased allegedly stole/damaged his crops. From there he led them to where the deceased body was. It was covered and taken to the mortuary. That the accused told P.W.6 with others that he beat the deceased with a small twig but it could not be 10 traced at the scene which was quite disturbed by people walking about. That there the accused had said that the deceased fell from a pawpaw tree, startled by the presence of accused in his shamba.

IP Kamonde (P.W.7) was the senior police officer with P.W.6 whom the accused showed in his shamba the spot he alleged the deceased had dug up tubers from. From there he led them to a bush where

the deceased's body was lying. That the accused did not confess that he murdered Sila, save that he told P.W.7 that he had found the youth stealing his farm produce. Then he took a stick and chastised him.

20 C.I. Agisu (P.W.8) took a charge and caution for the accused. That the accused said that the deceased used to steal the former's potatoes from his shamba. On this day he found the deceased stealing pawpaws. On seeing the accused the deceased fell down from the tree. That the accused had whipped him and the deceased had run to his home. That the accused did not know if the death was a result of the whipping or the fall from a pawpaw tree (Exh.P2).

The accused gave an unsworn statement in defence in which he denied knowing or even caning Sila. He did not see him in his shamba and he did not even go there on the material day. That the group of villagers including APC John Kioko, Kilonzo Manuve, Muasya and a chief arrested the accused from his shamba for no reason. They demanded that he show them where Sila's body was. He did not know. The arresting team beat him thoroughly. That he did not call Musya (P.W.1) to show him Sila, beaten and tied in his shamba. That he never led the search team to where Sila's body was lying via his own shamba. He even denied the charge and caution 10 statement.

After submissions finally and summary to the assessors, the latter returned opinions of the accused being guilty of manslaughter.

On reviewing all the evidence here this court is inclined to agree with the assessors. It is not doubted that no direct evidence says that a witness saw the accused beating up the deceased. But this court believed the evidence of Musya (P.W.1) and Rose P.W.2 – the mother of the deceased. Musya told the court that when the accused called him to his shamba to witness something he found the deceased 20 badly beaten but tied and lying on the ground. P.W.1 noticed bruises as if caused by a stick. Indeed from P.W.1's evidence the accused called on him thrice or so lastly saying that Sila had escaped. Even when P.W.1, 2 and another went on the accused shamba looking for Sila, this court believed their evidence that he told them that the deceased had been found stealing crops from the accused farm. That he had chastised him and he did not want monetary compensation. Other witnesses said that the

accused told them of the deceased's thieving conduct and that on this day, Sila was found stealing tubers, pawpaws etc. That he jumped down a tree but the accused caned him. The accused seemed to say something different from this version but from the witnesses and his charge and caution statement that was not disowned, this court was left with the impression that although the accused did not intend to murder Sila he beat him when he found him stealing from his farm.

Now comes the issue of the fractured skull which Dr. Nguku (P.W.4) saw as the cause of death. He could not tell whether it was inflicted after death or before. 10 P.W.4 attributed it to much force being applied to cause the injury. He could also no say whether this severe head injury was caused by beating or a fall. At least the beating spoken of by witness was inflicted by using a twig. It was not suspected that a heavy object was used by the accused and none was recovered. However this is what P.W.1 Musya said in cross examination:

“What I noticed were bruises left on the boy's face. At the scene where the boy lay tied, there was a broken twig quite probably used to beat him. It was a thick piece.”

20 Then the witnesses told the court that the accused led them to the bush where the deceased's body was recovered. The accused seemed to deny this conduct but the court did believe the witnesses. The natural flow of things was that the accused – not intending to murder the deceased, nonetheless beat him with a thick piece of a twig. It left injuries on the face. Dr. Nguku said that fractures fell across the fissures above the eyes. The accused did not know how to handle the case. He took Sila's body and his it in a bush. When the net closed on him, he showed the relatives, villagers and police where it was.

In the opinion of this court the accused unlawfully caused the death of Sila Muthui. He is found guilty of manslaughter and convicted of the same under S. 205 Penal Code.

Delivered on 27th November 2000.

***J. W. MWERA***

***JUDGE***