



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL CASE NO 71 OF 2015

REPUBLIC

VERSUS

DAVID NGII KIVUNGWA.....1ST ACCUSED

PETER KIVINDYO MULINGE.....2ND ACCUSED

RULING

1. **David Ngii Kivingwa** (1st accused) and **Peter Kivindyo Mulinge** (2nd accused) are charged with the offence of **murder** contrary to **section 203** as read with **Section 204** of the **Penal Code**. Particulars of the offence are that on the **24th day of October, 2010** at **Kabati Market of Kauwi Location in Kitui District** within the **Eastern Province** murdered **Alex Musili Musee** (deceased).

2. The facts of the case are that on the **23rd October, 2010** the deceased was alleged to have stolen timber and wood preservative belonging to the 1st Accused. He was arrested and taken to the Police Station.

The following day his body was found lying outside the shop. Investigations carried out culminated into the arrest of the accused persons who were subsequently charged.

3. To establish the case the prosecution called **eight (8)** witnesses. **PW1, Justus Musyoki Isaiah** stated that he was at the stage waiting to board a public service vehicle when he saw the deceased being beaten by two people, people gathered and the two (2) individuals put him on a handcart and took him away. On the **24th October, 2010** he heard the deceased had passed on.

4. **PW2, Silas Nderitu Kathungu** testified that on the **24th October, 2010** he was woken up by noise on the **24th October, 2010** at **1.00 am**. He identified the voices to be for the deceased and the **2nd accused**. He went out and with aid of a torch confirmed they were the ones who were fighting. He urged them to stop fighting and they listened to him. He noticed that the deceased was too drunk. The **2nd accused** went to call his employer, the **1st Accused** who did not come out. The deceased lay down and other watchmen also came by. They advised the two (2) not to fight. Thereafter he learnt of the deceased's passing on.

5. **PW3, Kaboso Kileta Mulungulu** stated that on the **23/10/2010** at **1.00pm** the **1st accused** called him after arresting a suspect, the deceased whose hands had been tied with ropes and he was sitting down. He returned to his place of duty as he was a watchman. The following morning he learnt of the deceased's demise.

6. **PW4, Dr Patrick Mutuku** did an autopsy on the body of the deceased. **PW5, Bernard Kariuki Ileri** stated that on the **23rd October, 2010** he found people having surrounded the deceased who had been arrested. Among them was the 1st accused who demanded to know where he had hidden the pieces of timber. When he denied having knowledge of the issue the 1st accused slapped him and he volunteered to show them where he had hidden the timber. Two (2) handcarts one of them that carried the deceased were pushed. Thereafter they returned, the one that left without anything returned with the timber but the 1st accused argued that two pieces of timber were missing. The following day he heard about a person having died. On going to check it turned out to be the deceased.

7. **PW6, Phedius Nzuma** found the deceased having passed on. **PW7 No. 52149 PC Japheth Muluma** received a report of a person having been found lying on the ground outside a shop. He went to the scene and confirmed the report. Per his observations the person had injuries on the face, limbs and generally on the body and he was bleeding from the mouth. A rope had been used to tie the deceased's hands and legs. He arrested **2nd accused** that he found near the deceased. Having learnt that the deceased had stolen from the 1st accused the previous day he arrested him too.

8. **PW8, No. 49090 Corporal Painito Ingosi** took over investigations in the matter. He found the **1st accused** the owner of a hardware and

his watchman the **2nd accused** who were treated as suspects. He forwarded the file to the **Office of Director of Public Prosecutions** was instructed to charge them. On cross examination he denied the allegation that the deceased was bleeding from the mouth or that the bruises the body had were caused by their action of loading the body on the motor vehicle.

9. At the close of the prosecution case it was the submission of the defence that there was no direct evidence as to who inflicted any injury on the deceased. That police officers who went to the scene were not clear on the circumstances of the death and did not take photos of the body in situ as the photos adduced in evidence were those taken at the mortuary. Regarding the cause of death he stated that none of the witnesses linked the accused to the case per the post-mortem report.

10. It was urged by the prosecution counsel that the deceased met his death through the hands of the two (2) accused who had formed a common intention to prosecute an unlawful purpose.

11. Issues to be determined are :-

- i. The fact of death of the deceased
- ii. The cause of death;
- iii. The perpetrator of the act/omission that caused the death ;
- iv. Proof that the act/omission was done with malice aforethought.

12. All witnesses who went to the scene alluded to the fact of the deceased's mortal remains lying on the ground. Subsequently autopsy was conducted on the body by PW4 who confirmed the death and a **death certificate No. 066051** was issued in that regard.

13. Per the post-mortem report, externally the deceased had bruises over the whole back, bruises on the temporal area of the right side of the head, hands and a small cut on the left side of the forehead. There was a small fracture on the right temporal area that was not penetrating to the brain which was normal and had no evidence of intracranial haemorrhage. As a result he formed the opinion that the cause of death was cardio-pulmonary arrest due to suffocation after inhaling of fluids that he queried to be alcohol.

14. According to PW1, the **1st accused** assaulted the deceased a day before he was found dead with another person. He did not identify the **2nd accused** as the **2nd assailant** and after he was taken away on a handcart he did not follow up the issue. PW3 saw the deceased having been arrested by the **2nd accused**, a watchman at a hardware shop owned by the **1st accused**. He had been restrained by ropes and he was being taken to the police station. PW5 saw the **1st accused** slapping the deceased before he led them to where they found the timber. PW7 the investigating officer moved to the scene after receiving a report from **Cpl Mwangi**. He stated that the accused did not make any report regarding theft to the police. PW8 who went to the scene before PW7 stated that he found **Corporal Mwangi** and **PC Muluma** guarding the scene. He took over investigations from **PC Muluma** in particular who had collected timber and wood preservatives. None of the officers who testified could tell what happened such that a report, if any, made to the police regarding stolen timber was not investigated. **P.C. Muluma (PW7)** who was at the scene stated that he did not find anybody assaulting the deceased but the **2nd accused** was with the body and on learning that the shop in which the deceased had allegedly broken into belonged to the **1st accused** he summoned and interrogated him.

15. PW2 who seems to have been the last witness to see the deceased alive alluded to an incident that happened on the **24/10/10** at night, **1.00am**. The scene was between his shop and that of the **1st accused**. He took note of the deceased's person's drunkardness. He saw the deceased and the **2nd accused** fighting and when they were advised to stop they did. On cross examination he said that he heard a voice that he identified as belonging to the **2nd accused** asking the other person why he was interfering with his work yet he had been sacked because of stealing. When he opened the door and found the two fighting he separated them and asked the deceased, a person he knew very well to leave. However, he lay down and did not rise. This witness did not tell the court if the deceased sustained any injuries as a result of the fight.

16. I do note that what caused the death of the deceased was not the soft tissue injuries that were apparent on the external part of the body but suffocation after inhaling clear liquid into the lungs. From the evidence adduced, it cannot be emphatically stated that the accused persons caused the death of the deceased.

17. Consequently, the accused are not guilty and are accordingly **acquitted** pursuant to the provisions of **Section 306(1) Criminal Procedure Code**.

18. It is so ordered.

DATED, SIGNED and DELIVERED at KITUI this 9TH day of JANUARY, 2019.

L.N. MUTENDE

JUDGE