



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MAKUENI**

**HCCR NO. 59 OF 2017**

**REPUBLIC.....PROSECUTION**

**-VERSUS-**

**PHILIP KING'OO MBITHI.....ACCUSED**

**RULING**

1. **Philip King'oo Mbithi** the accused herein, is charged with the offence of murder contrary with Section 203 as read with Section 204 of the Penal Code.

The particulars are that the accused on **23/08/2015** at Mathangathi Village, Mavindini Location of Makueni County murdered **Muteti Kisavi**.

2. Three witnesses testified on behalf of the prosecution. **Pw2 Naoma Nduleve Kiundi** and **Pw3 Michael Nzioka** did not witness the incident. They were at the health facility where the deceased was rushed for treatment. Pw2 testified that on a date she can't recall but in 2017 at 9:00 am found a body lying on a bench. Being a nurse, she observed the patient and confirmed he was dead. The body had blood all over.

3. **PW3** a watchman at the said health facility testified that on 24<sup>th</sup> August, 2017 at 3:00 am, a patient was brought to the facility by two people. That **PW2** observed the body and decided to go to the police.

4. The only other evidence is that of **PW1 Dancan Ndeto Musyoki**. It was his evidence that he had met the deceased who was his cousin on 22<sup>nd</sup> August, 2015 at Mavindini and they had lunch together at Kunda Kindu bar. They then took some alcohol. While there, the accused who is also his cousin called and told him he was at Mathangathi Market. When they were through with lunch and drinking, the deceased got some vodka. He took two and was to take one to the accused.

5. They left for Mathangathi arriving there at 11:00 pm. They walked to the accused's home a distance 1-2 kilometers, and it took them an hour. This means they arrived there at midnight. Upon arrival, the accused and deceased started taking vodka. They got drunk and started quarrelling and trading insults.

6. This escalated and they both fought using chairs. The incident was outside the house and it was dark. He saw the deceased bleeding and when he removed the chairs they were fighting with, both of them fell down. He noted that the deceased was bleeding from the left rib cage. One Phillip was there but did not say anything when asked what had happened to the deceased.

7. It was his evidence that the accused was not holding anything in terms of a weapon during this time. **Pw1** organized for a motorbike which took the deceased to hospital at Mavindini at 4:00 am. He was helped by **Josephat Musau Mbithi** (a brother to the accused) to lift the deceased. A report of the accident was made to Mavindini police post. The accused was arrested the next day. At the scene was blood, as witnessed by **Pw1** and the police.

8. In cross examination, **Pw1** stated that it is the deceased who hit the accused with a chair and the latter did not hit back. That when the deceased hit the accused, they fell down fighting. Even as he separated them he did not see anything in the accused's hands. He stated that the deceased had two stab wounds, which appeared to have been caused by a sharp object. He denied having stabbed the deceased.

9. The doctor who conducted the postmortem did not testify and so the report was not produced. The Investigating Officer did not also testify.

10. The evidence also shows that **Pw1**, the deceased and accused who are cousins were all drunk that night. **Pw1** was very careful not to mention how the deceased received the injuries that led to his death. He does not state what part of the deceased's body was hit by the accused using the chair. The accused's mother and brother who knew what happened and would have assisted the court arrive at a just decision chose not to come to court.

11. The only question this court has to ask itself is whether the evidence before it would sustain a conviction in the event that the accused was placed on his defence and he elected to remain silent. The answer is a big **no**.

12. My finding therefore is that the prosecution has not established a prima facie case against the accused person. **On my part, I find him not guilty and acquit him under Section 306(1) Criminal Procedure Code.**

13. **He will be released unless otherwise lawfully held under a separate warrant.**

Orders accordingly.

**DELIVERED, SIGNED & DATED THIS 14<sup>TH</sup> DAY OF JUNE 2019, IN OPEN COURT AT MAKUENI.**

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**H. I. ONG'UDI**

**JUDGE**