



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL CASE NO. 34 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

MWINZI KITHEKA.....ACCUSED

RULING

1. **Mwinzi Kitheka** is charged with the offence of **Murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code (Cap. 63), Laws of Kenya**. Particulars of the offence are that on the night of **31st day of May, 2011** at **Ukati Village, Ngungi Sub-Location, Mui Locaion** of **Mwingi East District** within **Kitui County** murdered **Kitheka Mbua** (Deceased).
2. Facts of the case were that on the **1st day of June, 2011**, the Deceased was found dead at **Ukati, Mui Location** with deep cut wounds on his body. Investigations carried out established that he had disagreed with the Accused, his son following sale of land. He was arrested and charged.
3. To prove the case, the Prosecution called eight (8) witnesses. PW1 **Kawee Kitheka** the wife of the Deceased found him already dead.
4. PW2 **Felix Mulinge Munyasia** the Assistant Chief of **Mavomo Area** got a report from **Nano Ndawa** the Village Elder who informed him of the Deceased's demise.
5. PW3, **Joseph Mwaniki Munyasia** the grandson of the Deceased found him dead.
6. PW4 **Mbaya Mbuu** was at **Serah Mwongela's** home on the **31st May, 2011** where the Deceased, his son the Accused and **Safari Kilonga** were among the revellers. He testified that the Accused and the Deceased disagreed over money realized from the sale of land. The Accused sought to be given some of the proceeds. His demand made the Deceased to call him a dog. He reminded him that he was enjoying his property. The Accused retorted that he would squander the money then die. He (PW4) intervened by telling the Deceased to leave and he complied but returned ten (10) minutes later. The Deceased continued drinking alcohol. PW4 then advised the Accused to leave and he heeded to his advice. Thereafter the witness left the Deceased drinking alcohol. The following day he woke up and went to **Serah's** place only to learn that the Deceased had passed on.
7. PW5 **Alex Safari Kitonga** was at the home of **Mwongera**. He witnessed when the Deceased disagreed with the Accused his son. They hurled insults at one another but when they were warned they stopped. Thereafter he (PW5) left. The following day his wife informed him of the Deceased's demise.
8. PW6 **Serah Mwongela** denied having been present when the quarrel between the Deceased and

Accused ensued. It was her evidence that she got the information from her daughter, **Mangi Mwangela**.

9. PW7 **Doctor Gitonga Thakuru** produced a post-mortem report authored by **Doctor Allan Balongo** who performed the post-mortem on the body of the Deceased.

10. PW8 No. 235509 I.P. **Alex Ogutu** visited the scene, investigated the case and charged the Accused.

11. To establish a *prima facie* case warranting the Accused to be called upon to defend himself the Prosecution was duty bound to prove:

(i) The fact of death.

(ii) That it was caused by an act/omission committed by the Accused.

(iii) The act was done with malice aforethought.

12. The fact of death was proved by evidence of a post-mortem report. The body in question was identified by **Joseph Mwaniki** and **Mutunga Kitheka**. The body had deep cut wounds on the head and the skull was fractured. It was opined that the cause of death was cardiopulmonary arrest secondary to severe head injury due to penetrating head injury.

13. None of the witnesses who testified saw the perpetrator of the act that caused the death of the Deceased. Evidence adduced was therefore circumstantial in nature.

14. In the case of **Republic vs. Taylor Weaver and Donovan (1928) 21 Cr. App. 20** it was stated that:

“Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination, is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial.”

15. In **Abanga alias Onyango vs. Republic Criminal Appeal No. 32 of 1990 (UR)** the Court of Appeal stated that:

“It is settled law that when a case rests on circumstantial evidence, such evidence must satisfy three tests:

(1) The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(2) Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(3) The circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

The Accused was suspected to have committed the offence because of the quarrel he had with the Deceased on the fateful date.

In the case of **Joan Chebichi Sawe vs. Republic Criminal Appeal No. 2 of 2002** the Court stated that:

“The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt. As this court made clear in the case of Mary Wanjiku Gichira vs Republic (Criminal Appeal No. 17 of 1998 (unreported), suspicion however strong cannot provide a basis for inferring guilty which must be proved by evidence.”

16. Seemingly the revellers who testified left the Deceased imbibing alcohol. PW6 disassociated herself with the sale of the liquor but admitted that it was being sold at her home by her daughter an adult, **Maangi Mwongela**. The Prosecution conveniently failed to call **Maangi** as a witness. She is the only person who could have enlightened the Court in what state the Deceased left their home.

17. The Deceased sustained deep cut wounds that could have been occasioned by a sharp object, but the evidence adduced did not unerringly point at the Accused as the only person who may have occasioned the injuries on the person of the Deceased. The suspicion about him may be strong but there is no proof beyond doubt that he was the assailant.

18. Therefore, at the conclusion of the Prosecution's case, I find the Accused not guilty. Accordingly, he is acquitted pursuant to the provisions of **Section 306(1)** of the **Criminal Procedure Code**.

19. It is so ordered.

Dated, Signed and Delivered at Kitui this 4th day of July, 2019.

L. N. MUTENDE

JUDGE