



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CRIMINAL CASE NO. 70 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

JOSEPH KALONZO MUTUNGA.....ACCUSED

RULING

1. **Joseph Kalonzo Mutunga**, the Accused, 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 **27th day of March, 2008** at **Kyamboo Sub-Location, Migwani Location, Mwingi West Sub-County** within **Kitui County** unlawfully murdered **Cosmas Mwendwa Musyoka** (Deceased).

2. Facts of the case are that on the **27th March, 2008**, PW1 **Patrick Musyoka Mwendwa** was woken up at about **9.30 p.m.** by his son, the Deceased who told him that he had been assaulted by **Joseph Kalonzo Mutunga**, and that he was in pain. He advised him to seek treatment. He was in company of his cousin, PW6, **Mwendwa Moke** and their workman, **Mutembe**. The two (2) individuals took him to **Migwani Sub-District Hospital** where he was treated. They made a report to **Migwani Police Station** and returned home. On the **24th April, 2008** the Accused and his family took a goat to the home of the Deceased as compensation. It was slaughtered in accordance with the Kamba Customary Law.

3. On the **18th May, 2008** the Deceased went to hospital. PW1 got information from a **Mrs. Coniaba** whom he described as a cousin of the Deceased regarding the Deceased having fallen. He went to hospital on **20th May, 2008** to find him having passed on.

4. At the close of the Prosecution's case the Prosecution had called five (5) witnesses. PW1 was the father of the Deceased who did not witness the act that resulted into the Deceased being injured but he was told by the Deceased that he had been assaulted by the Accused.

5. PW2, **John Ngandi**, the father of the Accused got information that his son was involved in a fight with the Deceased. Three (3) days later they visited the home of the Deceased where they found him with elastoplast on both hands and the head. They discussed and agreed to settle the issue amicably.

6. PW3 **Grace Nzansi Mutunga**, the mother of the Accused accompanied those who went to the home of the Deceased. She testified that they paid the hospital bill and slaughtered a goat as compensation. On hearing about his death on **21st May, 2008** she did not know the cause. On cross-examination she said that at the outset, they went three days later and they were advised to let him heal prior to compensating him. A week later after he healed they went and compensated him and on the material date they found him ploughing with oxen.

7. PW4 **Alice Makaa**, heard noise but on going to check he found people having dispersed.

8. PW5, **Stephen Makuthu Mane** took the Deceased to hospital on the **19th May, 2008**. PW6 **Mwendwa Moke** took the Deceased to hospital on **27th March, 2008**.

9. The Prosecution was duty bound to prove:

(i) The fact of death.

(ii) That the death occurred as a result of an unlawful act or omission that was perpetrated by the Accused.

(iii) And it was done with malice aforethought.

10. At the close of the Prosecution's case evidence adduced by the Prosecution witnesses that the Deceased passed on was tendered by his relatives. The Prosecution failed to call the Doctor who attended to the Deceased at the hospital when he sought treatment or the one who conducted the post-mortem.

11. This is a matter where the Prosecution was not able to adduce a post-mortem report in evidence because it had not been signed. The Doctor who intended to produce it on behalf of the one who had filled it could not do so for that reason.

12. I must also point out that families of the Deceased and the Accused were negotiating following the Kamba belief. The Accused intended to plead to a lesser charge of manslaughter by virtue of having fought with the Deceased two (2) months prior to his demise. However, when the Court perused the post-mortem report, the cause of death had not been ascertained therefore the case proceeded to full trial.

13. In the case of **Bhatt vs. Republic (1957) EA 332** it was stated that:

“Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if, at the close of the prosecution, the case is merely one which on full consideration might possibly be thought sufficient to sustain a conviction. This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case. Nor can we agree that the question whether there is a case to answer depends only on whether, there is some evidence, irrespective of its credibility or weight, sufficient to put accused on his defence. A mere scintilla of evidence can never be enough, nor can any amount of worthless discredited evidence. It is may not be easy to define what is meant by a prima facie case “but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.”

14. Without proof of the cause of death, it cannot be insinuated that the fight the Accused had with the Deceased is what resulted into his death. In the premises the Prosecution has failed to establish a *prima facie* case against the Accused that would require him to defend himself. In the result he is acquitted pursuant to the provision of **Section 306(1)** of the **Criminal Procedure Code**.

15. It is so ordered.

Dated, Signed and Delivered at Kitui this 3rd day of July, 2019.

L. N. MUTENDE

JUDGE