



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL CASE NO. 24 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

SAMSON SIMON MUTHOKA.....ACCUSED

RULING

1. **Samson Simon Muthoka**, 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 **14th October, 2016** at **Mathima Location** in **Mutomo Sub-county** within **Kitui County** murdered **Daniel Mwaniki Ivuti (Deceased)**.

2. Facts of the case are that the deceased was assaulted and he died while undergoing treatment. To prove the case, the prosecution called ten (10) witnesses.

3. PW1 **Elizabeth Kalunda Makuthu** stated that on the **26th August, 2016** she was going to fetch water when she saw the Accused slapping the deceased. Three (3) days later, she heard that he had passed on. On cross examination she stated that he saw the Accused hit the deceased twice on the cheek and abdomen and he fell down. Upon re-examination, she stated that she found the two (2) fighting.

4. PW2, **Mary Nzuki** testified that while 50 metres away, she saw the Accused slapping the deceased as she entered the house. The incident was on the **26th day of August 2016** and the deceased died a **month** later.

5. PW3 **Ann Mutheu Mwaniki**, the wife of the deceased stated that he returned home on the **26th day of August 2016** and complained of having been assaulted by the Accused. He sought treatment at **Mutomo Hospital** where he was admitted. He was operated on. Ultimately he died on **14th October 2017**. On cross examination, she stated that the Accused and deceased, cousins, were good friends, would drink together but only disagreed over a parcel of land that was sold by their uncle. That on the material date the deceased was a bit drunk. She admitted that the Accused demanded to have the Kamba Kithitu Oath administered which could result into the death of the guilty person but the clan refused.

6. PW 4 **Japeth Mwaniki Mwikya** learnt of the deceased having been admitted in hospital. On **24.09.2016** they met with a view of raising the hospital bill. He sought to know why no report had been made to the police. His query resulted into the report being made and they found witnesses who went to record statements. On cross examination, he stated that it was within his knowledge that the Accused had written a letter to the chief complaining that his father (PW4) and uncle **Kinyuli** sold land that belonged to him (**Accused**). He confirmed that the accused person's parents are dead and he does not own any land. That the deceased was hospitalized following abdominal problems due to drinking of traditional liquor and that prior to going to hospital, the deceased had not alleged that he was ailing as a result of an assault but when he went to visit him in hospital he found him with his wife and it was alleged that he had been assaulted by **Simon**.

7. **PW5 Jeremiah Musyimi Mbithuka** went to report the matter to the police with PW4. According to him, they were given names of witnesses by the Chairman of the clan, **Musila Kilonzo**. On cross examination he denied the allegation that they caused the Accused to be arrested so as to take away his land but he admitted that the land the Accused was entitled to was disposed off while he was in prison.

8. PW6 **Esther Mumo** stated that she saw the Accused slapping the deceased on **26.08.2016** and at that particular time she saw the wife of the Accused but did not see any other person.

9. PW7 **Dr. Edward Kiatu** performed the postmortem on the body of the deceased. PW8 **Mathano Mungutu** and PW9 **Paul Mue Ngotele** took the deceased to Mutomo District Hospital.

10. PW10 **No. 81932 Corporal David Kortong Uka** investigated the case and established that the Accused and deceased who were indulging in illicit brew fought and the deceased got injured. He was taken to Hospital, treated and returned home. Thereafter his condition became worse and he was taken back to hospital but died. He caused the Accused to be charged.

11. This being a case of murder, the prosecution was duty bound to prove:

(i) The fact of death

(ii) The Cause of death; and that

(iii) The Accused was the perpetrator of the act/omission that resulted into the death of the deceased.

12. **PW7** conducted an autopsy on the body of the deceased and confirmed the fact of death.

13. It was alleged with contradiction that the deceased was assaulted and/or fought the Accused on the **26th** day of **August 2016**. He was taken to hospital that night. No report of the assault was made to the Police on the material date. A report to the Police was made, a month later per the entry in **OB 13/27/9/2016**. The investigation officer investigated and established that there was an altercation between the Accused and the deceased, cousins, and good friends, who were drunk after the deceased was given Kshs. 20 by the wife of the Accused.

14. **PW7** on his part examined the body after the deceased had undergone the (2) operations. He opined that the cause of death was sepsis due to perforated gut. Other than the two(2) surgical incisions that were obvious, the body also had bed sores on the back and lower limb and there were features of fungal infection. The small gut was perforated and gut material had leaked into the abdomen. On cross examination, he stated that perforated gut can be caused by many things that include ulcers, acid intake and even a stab wound. He did not rule on a cut causing an infection in the stomach and agreed that alcohol may cause perforation.

15. The deceased had imbibed illicit brew. None of the witnesses can attest to the hygienic circumstances in which the same was prepared. When the deceased fell sick, he was taken to hospital. The finding of the Clinical Officer who attended to him was not investigated other than the evidence of the Doctor who performed the autopsy, no evidence of the treatment notes and/or what he was being treated for was adduced for the court to establish why he was rushed to hospital on the material night. Therefore, even if there may have been an altercation between him and the Accused, there is no proof that the Accused is the one who committed the act and/or omission that caused his death.

16. In the case of **Bhatt Versus Republic (1957) EA 332** it was stated thus:

“It is not 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”

To call upon the Accused to defend himself, the prosecution must have established a Prima facie case against him. Evidence on record falls short of the same. Therefore at the conclusion of the prosecution case there is no evidence to prove that it is the Accused who caused the death of the deceased.

17. Consequently, I find him not guilty and proceed to acquit him of the charge of murder, pursuant to the provisions of **Section 306 (1) of the Criminal procedure Code**.

18. It is so ordered.

Dated, Signed and Delivered at Kitui this 11th Day September of 2019

L.N. MUTENDE

JUDGE