



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 13 OF 2014**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**1. SIMON MUNYAO**

**2. MUTIO MUOKI.....ACCUSED**

**JUDGEMENT**

1. The accused persons face the charge of murder contrary to section 203 as read with 204 of the Penal Code. The particulars were that the accused persons on 13<sup>th</sup> February, 2014 at 1900 hours at Katine Village, Katine Sub-location of Matungulu District within Machakos County murdered Peter Mwanzia Kimatu.

2. They both pleaded not guilty and were put to trial. The facts on the record were that Kiseli John Kisoi (PW1) was at 7.30 pm in company of the deceased and Daniel Muoki (PW2) when they met the accused persons. The 2<sup>nd</sup> accused confronted the deceased questioning him why he went around mentioning her buttocks. The accused persons then held the deceased and started pushing him around. The deceased was after sometime released and he complained to PW1 that he had been injured and was feeling pain all over his body. The deceased went to Matungulu Hospital where he got admitted and later taken to Kangundo Hospital where he was admitted and passed on. Daniel Muoki (PW2) was on the material day in company of PW1 and the deceased but was left behind talking to one Muinde. He later heard some noise and went to check and saw the deceased and the 2<sup>nd</sup> accused holding each other. He separated them and heard no one complain of any injuries. Ruth Kimanthi (PW3) heard people making noise at about 8.00 pm. She went to the scene and found the 2<sup>nd</sup> accused telling the deceased to set him free. She did not see anyone injured. Lydia Mukonyo Ngwala (PW4) heard her grandson Samson calling her at about 9.00 pm on the said date. He told her that the deceased was home but he looked injured at the arm. She also heard PW3 saying that she would kill the deceased and the 2<sup>nd</sup> accused told her that the deceased was a little person whom he will overcome. She later learnt that the deceased died at the hospital. Samuel Kivindu Kithuka (PW5) was present during the autopsy and Mary Kavata Mutuku (PW6) recounted that she was informed by one Kanini of the deceased's death. Dr. Emmy Akim (PW7) a Medical Officer at Kangundo District Hospital produced the post-mortem report (P. Exhibit 1) by Dr. Macharia whose signature and handwriting she was familiar with having worked with him. Police Constable James Kipsang (PW8) confirmed receiving a report of assault of the deceased. He was able to secure a note containing an Occurrence Book number 27 of 13<sup>th</sup> February, 2014. He later recorded statements, proceeded to Katine village where he carried out inquiries and gathered that the accused persons had a fight with the deceased.

3. The accused persons were put on their defence and gave evidence as follows. Simon Muisyo Muia (DW1) denied knowing anything about the alleged incident. He stated that he was on the material day at his house and only knows of having been attacked by an unknown person on 17<sup>th</sup> February, 2014. On cross examination, he stated that he had recorded a statement that he had met one of the witnesses but contended that he had been forced to write. He later on agreed that he met with someone on the material day and that neighbours came and assisted the injured person to sit up. That he was unconscious then but could hear voices.

4. Mutio Muoki (DW2) stated that he did not know the cause of the deceased's death. That he was with the 1<sup>st</sup> accused person when someone accosted them and attacked the 1<sup>st</sup> accused person and he raised alarm. Members of the public came and assisted the 1<sup>st</sup> accused person.

5. It was the prosecution submission that the evidence of PW1 and 2 confirm that there was confrontation between the deceased and the accused persons and that he died of the injuries he sustained from the fight. Citing Section 206 of the Penal Code, it was submitted that the injuries said to have been sustained by the deceased reveal malice and that the ingredients of murder were satisfied by the prosecution.

6. The accused persons learned Counsel on the other hand submitted that PW1, 2, 3 and 4 all testified that they saw the deceased leave the scene in good form after the altercation and that none of them witnessed the accused persons killing the deceased. It was further argued that the prosecution case was marred with inconsistencies and was never corroborated. That since PW1 was intoxicated and PW8 relied solely on his evidence, the same is marred with doubt since he was under the influence of alcohol. That PW3 only saw confrontation and never saw the deceased being attacked.

7. I have analyzed the evidence on record. It emerges from the evidence of PW1 and PW2 that the accused persons confronted and got into a fight with the deceased. It is after that fight that the deceased complained of injuries as stated by PW1 and went for treatment and thereafter died of the injuries sustained therein. As to whether or not the accused persons were at the scene at the material time, I find the prosecution case to be more weighty since the accused persons deny and later acknowledge being present but deny that they inflicted injuries to the deceased. The evidence left no doubt that the accused persons were the last persons in company with the deceased and definitely the assailants.

8. Although the accused persons contend the evidence of the prosecution was inconsistent, it is worth noting that the inconsistencies do not go to the material facts like the fact that they attacked the deceased and that it is from the **injuries sustained therein that the deceased died.**

9. **Section 206 of the Penal Code** provides that “malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances-

*a) An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;*

*b) Knowledge that the act or omission causing death will probably cause death of or grievous harm to some person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by wish that it may not be caused;*

*c) An intent to commit a felony;*

*d) An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony”*

10. The evidence revealed that there was bad blood between the 1<sup>st</sup> accused and the deceased which had to do with an alleged love affair between 1<sup>st</sup> and 2<sup>nd</sup> accused which had been questioned by the deceased. I find this was the motive behind the accused persons attacking the deceased who subsequently died from the injuries. Indeed the accused persons had confronted the deceased after the deceased had made some derogatory description of the 2<sup>nd</sup> accused’s buttocks. The accused persons attacked him and therefore they had an intention of inflicting injuries or grievous harm on him which later led to his death. The post mortem report indicated that there was a blunt force on the skull and therefore suggesting that the same could only have been intended to cause grievous harm which led to the death. I find the accused persons had malice aforethought and wanted to kill the deceased who had attempted to interfere with their relationship. The allegation by accused persons that one of them (1<sup>st</sup> accused) had been attacked by strangers is not believable because the 1<sup>st</sup> accused did not even lodge a report with the police. This was only meant to hoodwink the police and the public that the persons who injured deceased were faceless persons when in fact they are the ones who had attacked him on the material date as they were walking along a footpath.

11. Having found that the accused persons caused the deceased’s injury that occasioned death, coupled with the provisions of Section 206 of the Penal Code, I find the accused guilty of the offence of Murder as charged and are convicted accordingly.

Orders accordingly.

Dated and delivered at Machakos this 2<sup>nd</sup> day of **May, 2018.**

**D. K. KEMEI**

**JUDGE**

**In the presence of:**

Saoli for the State

Kavita - for the 1<sup>st</sup> and 2<sup>nd</sup> accused

Kituva - Court Assistant