



**REPUBLIC OF KENYA**

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

**HCCR NO. 75 OF 2017**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**SAVI MUSINGILA ..... ACCUSED**

**RULING**

1. The accused is charged with an offence of murder Contrary to Section 203 as read with Section 204 of Penal Code.
2. Particulars being that on 16/12/2008 at Kitulu village, Makindu Location, Kibwezi District of Eastern province murdered Paul Mbithi.
3. The accused pleaded not guilty and the case proceeded to trial. The prosecution called 8 witnesses and the matter was reserved for ruling on whether the accused has a case to answer.
4. The prosecution case in brief is that PW1 a doctor was stood down as he was not familiar with the doctor who conducted the postmortem.
5. PW2 stated that on 16/12/2008 at 10.00 a.m., the accused went to where she was with deceased who was her husband and demanded Kshs. 400/= for milk he had delivered.
6. The deceased said that he had no money. They both started pulling PW2 each one hand. Then accused pulled a panga he had concealed and cut deceased using panga on the head.
7. She (PW2) ran screaming and met her cousin one Mutiso along the way. She narrated to him what happened and went to the scene. PW2 noted deceased had cut wound on the face and nape of the neck.
8. The accused was at the scene. He dropped panga and ran away. People gathered and police were called. The OCS came and collected the deceased body.
9. PW3 village elder received call and went to the scene and saw deceased body injured. He saw the injuries on the head and the face. People were saying accused is the one who did injure the deceased.
10. PW4 deceased father also visited scene and saw the injured body of his son. PW5 also went to the scene and saw deceased body after he got report from Khadija who told her accused was cutting the deceased.
11. PW6 police corporal Rodger Mukeva went to the scene and collected the body from a pool of blood .It had visible injuries. PW7 deputy OCS corroborated PW6 as he also went to the scene.
12. PW8 Dr. Nicholas Mbugua was also not familiar with the doctor who did postmortem signature thus he did not testify as to the content of the postmortem nor produce it.
13. On 10/04/2018, the prosecution closed its case.

**SUBMISSION BY DEFENCE**

14. The accused via his advocate submitted that,PW1 was not a truthful witness. On cross examination she testified that she held the accused hand and that she did not manage or rather she did not succeed in separating the two. That the accused went around the deceased and cut him.

15. This could not be possible, PW1 claims the accused sneaked on the deceased and struck him. It's not possible for her to have held the hand of the accused if the incident occurred as she claims it. She further states she was unable to separate the two and that she was not cut.
16. She claims she ran after the accused turned towards her and met the cousin one Mutiso who was not called as a witness by the prosecution. She claims she ran a few meters away, approximately two meters away and witnessed the whole incidence.
17. PW5 testified she heard someone cry at around 10.30 a.m. and upon exiting her house she saw it was PW2. Upon enquiring as to the reason, she was informed the accused was cutting the deceased. She confirms the place of incidence was far away from their home.
18. PW2 testified that she only ran slightly two (2) meters from the place of incidence when she met Mutiso. PW5 testified that the place was far so it's not true what PW2 states.
19. Further there is a discrepancy as to the time of the incidence, PW2 claims it was about 10.00 a.m., PW4 states it was at 9.00 a.m., when he received the information about the death of his son whereas PW5 claims it's at 10.30 a.m.
20. PW2 states that the deceased was wearing a blue shirt whereas PW3 states it was a green shirt. The government chemist did not testify nor produce any exhibits.
21. Mutiso who also saw the accused cut the deceased and witnessed the panga being dropped by the accused was not called to testify. It must be noted that by the time the police came to the scene, many people were around and the scene had not been secured.
22. The weapon allegedly used by the accused might have been tampered with and the government chemist did not produce a report to prove that indeed it was the same weapon that struck the deceased and if the blood if any was the deceased's.
23. Further the clothes worn by the deceased were never produced and its clear from the testimonies of PW2 and PW3 the colour of the clothes were not certain so it was prudent for the government chemist to produce them.
24. The Evidence Act, Cap 80 of the Laws of Kenya provides that;

#### **Section 107**

- (1) *Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*
- (2) *When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.*

#### **Section 109**

*The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.*

25. It is now cast in stone as established in the *Lucus classicus*; **Woolmington –Vs- DPP (1935) AC 462**, that; Lord Sankey in the celebrated “Golden thread; speech;

***“Throughout the web of the English Criminal Law one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner’s guilt subject to..... The defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner.....the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.”***

26. Black’s Law Dictionary 9<sup>th</sup> edition while quoting **Commonwealth –Vs- Webster, 59 Mass. (5 Cush) 295,320 (1850)** (Per Lemuel Shaw. J. ) defines reasonable doubt means;

***“....it is the state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of Jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.”***

27. The prosecution’s case leaves a glaring gap of doubt. It is inconsistent with the guilt of the accused. From the narration given in evidence by the prosecution there are issues as to what time the incidence occurred, what exactly transpired, what the deceased was wearing, the weapon that was used among other things.

28. In the case of **Pius Arap Maina –Vs- Republic [2013] eKLR (Criminal Appeal No. 247 of 2011)**, court noted that;

***“It is gainsaid that the prosecution must prove a criminal charge beyond reasonable doubt. As a corollary, any evidential gaps in the prosecution’s case raising material doubts must be in favour of the accused.”***

29. From the onset, it was submitted that there are too many glaring contradictions in the prosecution case and this casts doubt as to whether the accused person committed the alleged offence or indeed whether the said offence was committed at all.

30. In the case of **Tekerali S/O Korongozi, (2) Maluwo S/O Kayani, (3) Michael S/O Kilidingi, (4) Muiluli S/O Mreanja, (5) Kimanguti S/O Mobeki –vs- Reginal Vol XIX (1952) E.A.C.A 259**, the court of appeal held that;

*“Evidence of first complaints to persons in authority are important as they provide a good test by which the truth and accuracy of subsequent statements may be gauged and provide a safeguard against later embellishment or made up case.”*

31. The ingredients in murder are that one causes the death of another with malice aforethought.

32. Section 203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.

33. Section 204. Any person convicted of murder shall be sentenced to death.

34. In the instant matter the accused was seen cutting the deceased with a panga, he died on the spot and the body was collected from a pool of blood.

35. Circumstantial evidence can establish a murder even where there is no body recovered or medial evidence produced.

36. In **Ndungu-vs- Republic [1985]KLR 497**, the appellant was convicted by the High Court without the benefit of any medical evidence. On appeal, the Court of Appeal held that;

*“Though there are cases in which death can be established without medical evidence relating to its cause, as where there are obvious and grave injures medical evidence should still be adduced in such cases of the effect of such injuries as opinion expert evidence and as evidence supporting the cause of death alleged by the prosecution.”*

37. In the Tanzanian case of **Republic –vs – Cheya &Another [1973] EA 500** in which it was held that the cause of death can be proved by some other evidence. Our courts have relied on that decision in appropriate circumstances.

38. In an article **JIAFM, 2006 : 28 (4) ISSN : 0971.0973**

**Evidence of Doctor in Rape Cases not mandatory: Supreme Court**

**Dr. O. P. Aggarwal**

**Professor**

**Department of Forensic Medicine, M.M. Medical College, Mullana, Arnbala.** It is opined;

*“The courts have to do justice to the society and to the victim on one hand and to the offenders on the other. The proper balanced view must be taken. The legislative wisdom reflected by the statutes has to be respected by the courts and the permitted departure there from made only for compelling and convincing reasons. But that is not to say that medical evidence is unnecessary or irrelevant. Even where medical evidence is absent the court has to arrive at a Conclusion on an appreciation of all the relevant circumstances.”*

39. Thus the instant case the court finds accused has a case to answer and he is thus put on his defence.

**SIGNED, DATED AND DELIVERED THIS 10<sup>TH</sup> DAY OF JULY 2018, IN OPEN COURT.**

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**C KARIUKI**

**JUDGE**