



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL CASE NO. 89 OF 2014**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**PETER MUNGA NJUGUNA.....ACCUSED**

**JUDGMENT**

The accused **PETER MUNGA NJUGUNA** faces a charge of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE**. The particulars of the charge were that

***“On the 15<sup>th</sup> day of August, 2014 at Gituamba Farm Ndungiri Location Solai, in Rongai District within Nakuru County murdered STEPHEN MBUTHIA MWANIKI”.***

The accused pleaded ‘Not Guilty’ to the charge. His trial commences on 3/2/2015 before **Hon Lady Justice Abigael Mshila** who heard the evidence of the first four (4) prosecution witnesses. Following the transfer of the Hon. Judge to the Nyeri Law Courts, I took over the case and heard the remaining three (3) witnesses. A total of seven (7) witnesses testified in this case.

The brief facts of the prosecution case were that on 15/8/2014 the accused went to his shamba to farm. He heard a noise and found the deceased stealing maize from his shamba. The accused caught the deceased and called some fellow villagers. They marched the deceased with bag containing the stolen maize cobs to the chief’s camp.

**PW3 TONY KIPKURUI** was the chief of Ndungiri Location. He confirms that the accused brought the deceased to the chief’s camp alleging that the deceased had stolen maize from his (accused’s) shamba. **PW4** stated that he counselled the two whereupon the accused agreed to forgive the deceased on condition that the deceased not repeat the act. At the time **PW4** noted that deceased had some wounds on his back with traces of dried blood. The two men then left his office. Later that same day at about 6.00pm the body of the deceased was found lying near the chief’s camp. The matter was reported to the police who came and removed the body. Upon completion of police investigations the accused was arrested and charged with the offence of murder.

At the close of the prosecution case the accused was found to have a case to answer and was placed onto his defence. He gave a sworn defence in which he denied having assaulted and killed the deceased. This court must now analyze the evidence on record with a view to determining whether the charge has been proved beyond reasonable doubt.

Section 203 of the Penal Code defines the offence of murder as follows

***“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder”.***

In order therefore to prove the charge the prosecution must adduce evidence to prove

1. The fact as well as the cause of death of the deceased
2. That the deceased met his death due to an unlawful act or omission on the part of the accused
3. That said unlawful act or omission was committed with malice aforethought

Regarding the fact and cause of death there can be no controversy. **PW1 STEPHEN THUO NJINE** the Assistant chief of Ndungiri Location told the court that he found the body of the deceased lying outside his office at about 6.00pm. **PW2 JOHN KAMAU MBUTHIA** a

son to the deceased and **PW6 NAOMI MUTHONI MBUTHIA** the deceased's wife, both told the court that they went to the mortuary where they identified the body of the deceased to the doctor. All these witnesses who knew the deceased well identify him as '**Stephen Mwaniki Mbuthia**'.

Evidence regarding the cause of death was tendered by **DR. DANIEL WAINAINA PW5**, a doctor based in Nakuru County. **PW5** told the court that he conducted an autopsy examination on the body of the deceased. He noted bruises to the limbs, shoulder and head and cuts on the back. **PW5** opined that the cause of death was '**head injury following brutal blunt trauma by a heavy blunt object**'. He filled and signed the post-mortem report which was produced in court as an exhibit **P. exb 1**. I therefore find that the deceased met his untimely death due to an assault on his person using a heavy object.

Having proved the fact as well as the cause of death the prosecution must go further and prove that it was the accused who unlawfully assaulted the deceased thereby causing his death.

There is no witness who saw the accused (or any other person for that matter) attack or assault the deceased. Suspicion fell on the accused because it was he who had brought the deceased to the chief claiming to have caught the deceased in the act of stealing maize from his farm.

**PW3** was the chief who received that report. **PW3** told the court that at the time when the accused brought the deceased to his office, the deceased was able to walk and talk. **PW4** only noted some bruises on the deceased back, but he certainly did not see the grave injuries which led to the deceased's death nor did **PW3** see the accused assault the deceased in any manner. Indeed **PW3** said that he spoke to both men and the accused agreed to forgive the deceased. Both men then left his office.

It is pertinent to note that when **PW3** saw accused and the deceased together it was about 9.00am. It was not until much later the same day at 4.00pm that the body of the deceased was found lying outside the chief's camp. When the deceased left the office of **PW3** he was alive and well. **PW3** under cross examination states

***"Between the time of release of deceased till the time I got report (of his death) I don't know what could have happened"***.

There is no evidence to prove what happened to deceased or where he went after he left the office of **PW3**. There is no evidence that the accused remained in the company of the deceased until 4.00pm when his dead body was found. There was no witness called who was able to explain what happened to the deceased between 9.00am when left the chief's office and 4.00pm when his body was found.

**PW1 STEPHEN THUO NJINE** was the Assistant Chief of Ndugiri Location. He told the court that on the material day at about 11.00am he found the deceased lying on the road. **PW1** thought the deceased was drunk and attempted to wake him up. The deceased told **PW1** to leave him alone. **PW1** did not notice any injuries on the deceased and the deceased made no complaint to **PW1**. The deceased only requested **PW1** to pass him his red cap which was lying nearby. **PW1** did as requested and proceeded on his way to his office.

Later the same day at 4.00pm Administration Police called **PW1** and told him that a man was lying dead outside his office. **PW1** went out to check and found that it was the deceased who was lying there dead. **PW1** did not see anyone beat or assault the deceased. More specifically **PW1** made no mention of having seen the accused anywhere near the deceased either in the morning when he met the deceased lying on the road or later where the body of the deceased was found.

There being no eyewitness to the assault on the person of the deceased, the prosecution seeks to rely on circumstantial evidence as a basis to implicate the accused in the murder. In the case of **JUDITH ACHIENG Vs REPUBLIC [2009] e KLR**, the Court of Appeal held that

***"It is settled law that when a case rests entirely upon circumstantial evidence, such evidence must satisfy three tests***

***i. The circumstances from which the inference of guilt is sought to be drawn must be cogently and firmly established.***

***ii. Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused***

***iii. The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusions that within all human probability the crime was committed by the accused and none else"***.

In this case the prosecution relies on the fact that the accused may have had a motive to kill the deceased, given that he found the deceased in the very act of stealing his maize. However if the accused was so minded to take the law into his own hands, he would have done so immediately upon finding the deceased in the shamba stealing maize. Instead the accused took the deceased to the chief's office where he reported the theft. This is not the behavior of one who was minded to kill.

Further from the evidence of **PW3** the accused forgave the deceased for the theft and the two went their own ways. I hardly think that the accused would forgive the deceased in one moment only to violently attack him later. The prosecution is unable to offer any logical explanation for the time lapse between 9.30am when **PW3** released deceased and accused from his office until 4.30pm when the deceased was found dead. Where was deceased and what happened to him in this interval? **PW1** who found deceased lying on the ground at 11.00am did not see the accused anywhere nearby. The very real possibility that some other person or persons could have assaulted the deceased has not been ruled out.

It is claimed that the accused admitted to **PW4** having hit the deceased with a jembe. Such an admission if made would amount to a confession and as such is only admissible if made in line with Section 25A of the Evidence Act. No written confession was made by accused to an Inspector of Police. Further **PW1** told the court that he only saw the jembe on 16<sup>th</sup>/8/2014 *ie* the day after the incident whilst it was

alleged that it was accused who delivered the jembe to the chief. **PW1** says that some other '*mzee*' brought the jembe. There is lack of clarity and consensus between the witnesses as to where this jembe came from.

All in all the prosecution case lacks cogency. The accused was arrested and charged on the basis of suspicion. It is trite law that suspicion alone cannot be the basis for a conviction. Several crucial questions remain unanswered. The involvement of third parties in the murder of the accused cannot be entirely ruled out. Indeed **PW1** stated under cross-examination that

***“Accused is being framed to protect the askaris who beat the deceased”***

This statement was made by an Assistant Chief of the area. As a local administrator, who could be taken to have knowledge of what had occurred. The evidence on record does not prove the guilt of the accused beyond reasonable doubt. I therefore enter a verdict of '**Not Guilty**' and I acquit the accused on this charge of murder. The accused is to be set at liberty forthwith unless he is otherwise lawfully held.

**Dated and delivered in Nakuru this 2<sup>nd</sup> day of June, 2017**

Mr. Ikuu for accused

Mr. Motende for DPP

**Maureen A. Odera**

**Judge**