



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NO. 96 OF 2010

REPUBLIC.....PROSECUTOR

VERSUS

CHARLES RUKWARO MWANGI alias MUSUNGU FAKE.....ACCUSED

JUDGMENT

The accused **CHARLES RUKWARO MWANGI alias MUSUNGU FAKE** 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 11th day of April, 2010 at Kenya Nut Farm Morendat in Naivasha District within the Rift Valley Province, jointly with others not before court murdered CLEMENT MUGUIMI”.

The accused pleaded ‘**Not Guilty**’ to the charge. The prosecution called a total of five (5) witnesses in support of their case.

PW1 WILSON AKILI LUPUA and **PW2 PAUL MUAMLU NJENGA** were both security officers with Kenya Mount Company. **PW3 EMMANUEL IKATHARI OMUGHELI**, was a security guard at Morendat Farm. All three witnesses state that on 11/4/2010 at about 6.00pm they reported on duty. At 7.30pm a group of 15 men came to attack them. The guards managed to repulse the attackers.

Later at 8.30pm a larger group of 50 people came and began to throw stones and chase the guards. Some of the attackers caught hold of the deceased ‘**Mugambi**’ and began to beat him. As **PW1**, **PW2** and **PW3** tried to intervene in order to rescue their colleague some of the attackers including the accused kept them away. After thoroughly assaulting the deceased the attackers ran away. The accused was rushed to a nearby hospital in Naivasha where he was admitted. He later died whilst undergoing treatment.

The matter was reported to police who commenced investigations leading to the arrest and charging of the accused.

At the close of the prosecution case the accused was found to have a case to answer and was placed onto his defence. The accused gave an unsworn defence in which he denied the charge of murder.

This court must now analyze the evidence on record with a view to determining whether this charge of murder has been proved beyond reasonable doubt.

The fact of death of the deceased is not in any doubt. **PW1**, **PW2** and **PW3** all testify that they witnessed the deceased being assaulted by a mob of about 50 people. After the incident the deceased was rushed to hospital where he died whilst undergoing treatment.

PW4 JANE WAMBUI MUGUIMI the wife of the deceased and **PW5 GEORGE KAMAU NJENGA** a brother to the deceased both testify that they saw the body of the deceased and both identified the same to the pathologist for purposes of the autopsy. All the prosecution witnesses who knew the deceased person well identify him as ‘**Clement Muguimi**’.

Having proved the cause of death the prosecution must tender evidence to prove what caused the death of the deceased. Cause of death is an integral and critical element of any murder charge because it must be proved that the deceased died due to a homicidal act and not as the result of any accidental or natural causes.

In the case of **NDUNGU Vs REPUBLIC [1985] KLR 48** the Court of Appeal held thus

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

In this case if there existed any such obvious and grave injuries on the body of the deceased, there were not brought to the attention of the court, as no photographs were taken of the body, and produced in court as exhibits. The established and accepted manner of proving the cause of death in murder trials is by way of a production of a post-mortem report by the doctor who performed the autopsy on the body. In the same **Ndungu** Case the Court held as follows

“Where the body is available and the body has been examined, a post-mortem report must be produced....”

In this case the body of the deceased was available. **PW4** and **PW5** saw it. Both witnesses confirm that an autopsy was conducted which autopsy they attended.

This was a hearing which commenced on 3/11/2011. From that day to 28/7/2016 when the prosecution closed their case (a period of five (5) years) no doctor had been availed as a witness. The court takes judicial notice of the fact that there is a Government pathologist based at PGH – Nakuru and the pathologist regularly attends court to testify in Criminal Cases. Failure to call this pathologist is a serious omission in the prosecution case. In the case of **CHENGO NICKSON KALAMA Vs REPUBLIC [2015]eKLR**, the Court of Appeal sitting in Malindi held as follows

“The position then appears to be that save in very exceptional cases stated above, it is absolutely necessary that death and the cause thereof be proved beyond reasonable doubt and that can only be achieved by production of medical evidence and in particular, a post mortem examination report of the deceased. To the extent that the same was not done in this case, though available, death and its cause was therefore not proved beyond reasonable doubt”.

That ruling applies squarely to the present case. An autopsy was conducted on the body of the deceased. No reason has been given for failure to avail the doctor as a witness. The prosecution did not allude to any specific difficulty they faced in availing the pathologist as a witness. I find that this omission was fatal as the cause of death of the deceased has not been proved beyond reasonable doubt.

Therefore notwithstanding the strength of any other available evidence, failure to prove the cause of death renders this charge unproven. For this reason I enter a verdict of **‘Not Guilty’** and I acquit the accused of the charge of murder. Accused is to be set at liberty unless he is otherwise lawfully held.

Dated and delivered in Nakuru this 2nd day of June, 2017

Mr. Maragia for Accused

Mr. Motende for DPP

Maureen A. Odero

Judge