



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KITUI**  
**CRIMINAL CASE NO. 68 OF 2015**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**PAUL MUTEMI MUSYONA.....ACCUSED**

**J U D G M E N T**

1. **Paul Mutemi Musyona**, the Accused, is charged with the offence of **Murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code**. Particulars of the offence are that on the **1<sup>st</sup> day of January, 2011** at **Kavaini Mbauso, Kavaini Sub-location, Thitani Location** in **Migwani District** within the **Kitui County**, murdered **Mbulo Masaa** (Deceased).
2. The facts as presented by the Prosecution are that on the night of **1<sup>st</sup> January, 2011**, PW1 **Jemimah Kangu Musiola**, the mother of the Accused and grandmother of the Deceased respectively, was asleep in her house with PW4 **Jacinta Katunge Ndambu** and PW6 **Anastacia Njoka Mutua** when she heard voices she identified as for the Accused, Deceased and **Ndulu** (PW2). She heard a knock on the door but declined to open, as she realized they were drunk. She escaped by passing through a rear window and went to PW5, **Bernard Musyoka Musyona's** place.
3. In the meantime PW2 **Ndulu Geoffrey Masaa** who found the Accused and Deceased quarrelling went to PW5's house to inform him. He returned to find the Deceased injured and he was with the Accused. He ran back to PW5's place with an intention of getting means of transport to take him to hospital. He found PW1 there. He went back to the scene to find the Accused having gone to his house. With the assistance of his cousin they took the Deceased to hospital where he succumbed to injuries sustained. PW8 **No. 57409 P C Barnabas Kigen** found the Accused inside his house sleeping. He recovered an axe that was stained with blood.
4. In his defence the Accused denied having committed the offence in question. He stated that he started drinking alcohol at **2.00 p.m.** The Deceased, his nephew joined him at **5.00 p.m.** They drank alcohol until **8.30 p.m.** when PW2 joined them, they continued drinking and eventually left at **9.00 p.m.** On arrival at PW1's home she was asleep. He therefore went to his house to sleep as the Deceased and PW2 went to PW5's home. The following day at **7.00 a.m.** he was woken by PW1 and **Kangu Musyona** who informed him that the Deceased was injured. He was assigned duties of grazing animals. He returned home at **1.00 p.m.** He was arrested by a plain clothes police officer. He was arraigned in court the following day. He denied having seen any axe that was purportedly removed from his house.
5. In his submissions Counsel for Accused, **Mr. Mwalimu** argued that the axe that was recovered was not dusted for fingerprints to confirm if indeed it was handled by the Accused. Therefore the circumstantial evidence tendered was weak which did not rule out the possibility of the Deceased having been bludgeoned by a hit man on his way home after he parted with the Accused.
6. This being a murder case, the Prosecution had a duty to prove beyond reasonable doubt;

- i. The death of the person.
  - ii. That the Accused caused the death of the Deceased through an unlawful act or omission.
  - iii. That he did it with malice aforethought.
7. The fact of death of the Deceased was proved by evidence of a postmortem report following an autopsy done by **Dr. Mungai**. The report that was adduced in evidence by PW10 **Dr. Christopher Wahinya**. Per the report, the cause of death was the head injury resulting from extradural and subdural haematoma. The injury was stated to have been as a result of blunt force on the skull. This was proof beyond doubt that the Deceased passed on.
  8. Indeed there was no direct evidence as to who attacked the Deceased inflicting upon him the injuries that he sustained and later succumbed to. Evidence adduced against him is circumstantial. Principles to be satisfied in relying on circumstantial evidence have been stated in many cases. In the case of **Abanga alias Onyango vs. Republic, Criminal Appeal No. 32 of 1990** it was stated thus:

*“It is settled law that a case rests entirely on circumstantial evidence, such evidence must satisfy three tests*

- i. *The circumstances from which an 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 guilt of the accused,*
  - iii. *The circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”*
9. It is not in doubt that the Accused was away from home on the material date. According to him they were drinking at a local bar with the Deceased and PW2. Ultimately they ended up at the house of PW1 where they knocked at the door. The three of them asked her to open the door. Having listened to the way they talked she could tell they were intoxicated. She decided to leave through the window. Although PW1 denied having heard the Accused and the Deceased quarrelling, PW2 who saw them physically heard them quarrelling. The Deceased lived with PW1 his grandmother. The Accused his uncle wanted him to leave the homestead. The Deceased in resistance declared that he would not move away. PW4 and PW6 fled from the house following the heated argument they were hearing.
  10. Their heated argument prompted PW2 to run to PW5’s home to seek his assistance. He wanted him to intervene and resolve the conflict between the Accused and Deceased. Having not found PW5 at the first instance he returned to where he left them and found them still quarrelling an act that made him return to PW5’s house who asked him to go ahead as he followed. He returned only to find the Deceased injured. He was not talking. The Accused was nowhere to be seen.
  11. The incident happened between **7.20 p.m.** and **8.00 p.m.** It was within the same homestead. Witnesses were relatives. There was no suggestion that there was a public path that passed through the homestead which could be accessed by a hit man.
  12. The Deceased sustained a cut wound on the scalp and had a depressed skull fracture and other cut wounds on the brinks of the body. PW8 the Arresting Officer found the Accused sleeping inside his house. He arrested him and on checking behind the door was an axe that had blood stains. The blood sample of the Deceased was submitted to the Government Chemist for analysis together with the axe that was stained by blood. PW11 **Lawrence Kinyua Muthuri**, The Government Chemist who did the analysis found the DNA Profile generated from the blood stains on the axe matching the DNA Profile generated from the blood sample of the Deceased.
  13. Although the Accused denied having seen the axe being removed from his house, the people who led the police to his house were his mother and brother. The Police Officer did not know him before. No evidence was led of bad blood having existed between him and his relatives that would have prompted them to stand and watch an injustice being done to him. I therefore disregard the defence put up and uphold evidence adduced by the Prosecution.
  14. The axe recovered having been stained by blood stains that matched blood sample of the

Deceased, and further the Accused having quarreled bitterly with the Deceased and remarked that he no longer wanted him at the homestead, circumstances that prevailed unerringly pointed at him as the person who committed the act that resulted into the death of the Deceased.

15. This brings us to the issue whether he acted with malice aforethought. **Section 206** of the **Penal Code** defines malice aforethought as:

*“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 the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a 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.”*

The Accused person’s behavior made Prosecution witnesses believe that he was drunk.

16. In his defence the Accused stated that he started drinking from **2.00 p.m.** to **8.30 p.m.** However, he did not state the amount of alcohol that he had consumed. In any case he did not raise a defence of insanity as a result of intoxication. He narrated the events of the day as they unfolded according to him. According to him when his mother declined to give them food for dinner he went to sleep as the Deceased and PW2 went to the house of PW5.

17. Having recollected what happened he was able to form an opinion. Therefore by using an axe to hit the Deceased he was seized of knowledge that he would at least cause him grievous harm. In the premises he acted with malice aforethought.

18. Having considered evidence on record, I find the Prosecution having proved the case against him beyond any reasonable doubt. He is guilty and convicted of the offence of murder.

**Dated, Signed and Delivered at Kitui this 2<sup>nd</sup> day of March, 2016.**

**L. N. MUTENDE**

**JUDGE**