



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KITUI**  
**CRIMINAL CASE NO. 2 OF 2016**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**NICHOLAS MUTUKU MWANZA.....ACCUSED**

**RULING**

1. **NICHOLAS MUTUKU MWANZA**, “the Accused” is charged with the offence of **Murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code (Cap. 63), Laws of Kenya**. Particulars of the offence are that on the **26<sup>th</sup>** day of **February, 2011** at **Kithini Market, Katelembo Sub-location, Kathekakai Location, Machakos District** within **Masaku County** he murdered **Mutua Maweu** (Deceased).

2. Facts of the case as presented by the Prosecution are that on the **26<sup>th</sup> February, 2011** the Deceased was found at a public place having sustained a stab wound on the abdomen. He held onto the Accused person’s leg. He was rushed to hospital where surgical intervention was undertaken. However, he succumbed to injuries sustained, hence this case.

3. In his defence the Accused stated that while on his way home on the fateful date he encountered two (2) people who accosted him, twisted his arm and strangled him. Threatening him with a knife, they robbed him of his wallet which contained money, personal documents and a cell phone. They pushed him onto the ground and ran away. He raised an alarm. Members of public answered his call and caught one of his attackers. They beat him up. He was rescued by elders who came later on and ‘bodaboda’ operators who knew him. They took him to hospital. On being lifted up the person was bleeding and beside him was a knife. It turned out to be a person who lived 1½ kilometers away from the market, known as **Mutua**. His relatives were called and he (Accused) narrated what transpired and assisted in taking the Deceased to Machakos Police Station where he was detained and subsequently charged.

4. Issues to be determined are;

- Whether death occurred.
- Whether it was caused by an unlawful act or omission.
- Whether the death was caused by the Accused.

5. It is not in dispute that the Deceased was injured and he succumbed to injuries sustained two (2) days later. A post mortem report produced in evidence by PW4 **Dr. Fredrick Otieno Okinyi** who did the autopsy showed that the cause of death was penetrating abdominal injury. This was proof of death.

6. Looking at the nature of injury sustained, the digestive system of the Deceased had a penetrating

abdominal injury. The object that caused the injury was sharp. This was evidence that the person who used the object to cause the injury that was sustained by the Deceased should have at least intended to cause grievous harm to his person. The act must have been done with malice aforethought (**See Section 206 of the Penal Code**).

7. None of the witnesses who testified on behalf of the Prosecution witnessed what transpired prior to the Deceased sustaining the injury. Evidence adduced is circumstantial.

8. The principles to be applied in testing circumstantial evidence were set out in the case of **Abanga alias Onyango vs. Republic Criminal Case No. 32 of 1990** where the court stated thus:

*“It is settled law that when 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. PW1 **Joshua Ngui Maweu** a brother of the Deceased found him on the ground screaming and holding onto the Accused’s leg. On the ground where his brother lay was a knife. On cross examination he stated that he did not hear the Accused say that he had been attacked.

10. PW2 **Nicholas Sila Maweu** also went to the scene after the Deceased was injured. PW3 **Paul Kivondo Ngao** testified that as he walked home he saw people having gathered alongside the road. He saw two (2) people on the ground. A person was being beaten. He heard the voice of PW2 who told him that his brother had been stabbed with a knife. On cross examination he stated that he took the pocket knife and preserved it as evidence. He could not tell if the brothers of the Deceased had attacked and robbed the Accused. On re-examination he stated that although he found the Deceased being beaten he could not identify the people who were beating the Accused.

11. PW5 **No. 86380 P C Adan Wario** managed to speak to the Deceased prior to his demise. It was his evidence that he told him that his assailant was arrested at the scene but he did not give him his name. On cross examination he stated that his investigations established that the Accused was accosted while going home by the Deceased and his accomplices who robbed him, an act that prompted him to retaliate by stabbing him with a knife. He was of the view that the Accused should have been charged with manslaughter.

12. This being a Criminal Case, the Prosecution had a duty of proving the case beyond any reasonable doubt. The allegations put forth by the Investigation Officer were not supported by evidence adduced by witnesses who were called by the Prosecution. The evidence adduced by the defence as to how the Deceased who robbed of the Accused his items in company of others was beaten by members of public and injured was not disapproved. The knife which was a murder weapon was subjected to analysis. The DNA profile generated from it did not match that of the Accused therefore there is no proof that the Accused had a knife prior to it being used to occasion the injury on the person of the Deceased that he subsequently succumbed to.

13. Consequently, circumstances that prevailed do not unerringly point to the Accused as the person who stabbed the Deceased. There is a possibility of the Deceased having been stabbed by any other person among the members of public who beat him up.

14. In the premises, the Prosecution has not proved the case against the Accused beyond doubt. He benefits from the doubt established and is acquitted of the charge of murder.

15. It is so ordered.

**Dated, Signed and Delivered at Kitui this 12<sup>th</sup> day of May, 2016.**

**L. N. MUTENDE**

**JUDGE**