

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 117 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

LUKE NZIOKA MALONZA alias LUKA.....ACCUSED

RULING

The accused Luke Nzioka Malonza alias Luka is charged with murder contrary to section 203 as read with section 204 of the Penal Code. It is alleged that on the 10th day of September 2013 at Umoja Estate within Nairobi County jointly with another not before the court murdered Robert Waithaka Macharia. The accused has pleaded not guilty to the charge and the state called ten (10) witnesses in support of its case. At the close of prosecution case both the prosecution and the defence filed written submissions. It is now the duty of this court to consider the evidence by the prosecution and the rival submissions and determine whether the evidence establishes a prima facie case to warrant the calling upon of the accused person to tender evidence in his defence.

The body of the deceased was examined on 1st October 2013 by Dr. Dorothy Njeru, PW10. She found the deceased's lower jaw (mandible) wired together, torn left diaphragm, bleeding in the abdominal cavity, a tear of the stomach, bleeding in the substance of the brain on the right side and features of intracranial pressure. The cause of death was due to a combination of head injuries due to blunt trauma with ascertained chest and abdominal injuries. With this evidence from the doctor, this court has no doubt that the death of the deceased occurred. This court has no doubt that the death of the deceased was unlawful.

According to the evidence of James Thuge Njuguna, PW1, Javis Munoru Kariuki, PW2 and Duncan Muchiri, PW4, the accused in the company of one Kamau and another person identified as a tailor assaulting the deceased. This was at Umoja on Moi Drive. Evidence shows that the three were using kicks, blows and stones. The accused was known to these witnesses before this incident. The deceased was taken to hospital where he was treated and released. He continued feeling unwell and was returned to hospital on 26th September 2013 where he died while waiting for treatment.

At the close of the prosecution case Ms Macharia for the prosecution submitted that the accused was positively identified by PW1, PW2 and PW4; that the three had known the accused before the incident; that the deceased had informed his mother PW6 that the accused and one Kamau had assaulted him; that the accused went into hiding after the assault and was arrested on 18th December 2013, three months after. Ms Macharia submitted that the prosecution has established a prima facie case against the accused and urged the court to place the accused on his defence.

On the other hand Mr. Mutitu counsel for the defence submitted that the accused did not assault the deceased; that the accused was only aiding Kamau to arrest the deceased for stealing Kamau's phone; that police failed to investigate this case; that PW2 told the court that the accused did not assault the deceased but was standing by as Kamau assaulted the deceased and that prosecution has not proved malice aforethought on the part of the accused. Mr. Mutitu urged the court to acquit the accused. He relied on **Republic v. Albert Tirimba Ogata [2014] eKLR** and **Republic v. Daniel Musyoka Muasya & 2 others [2014] eKLR**. In both cases the accused persons were acquitted after the close of the prosecution case.

I have considered the evidence before the court and the submissions of both parties. I have also read the

two authorities cited by the defence. It is my view that no two cases are similar in circumstances and that each case must be considered on its own unique circumstances. In this case I am persuaded that the accused was positively identified by three witnesses who knew him prior to the incident giving rise to this case as one of the people who assaulted the accused. It is true as submitted by the defence that one Kamau was also involved in assaulting the deceased but was released by the police in unclear circumstances. That notwithstanding, I am convinced that Kamau was not alone in assaulting the deceased but was in the company of the accused. As to whether the accused possessed malice aforethought or not, this issue will be adequately addressed at the time of writing the judgement.

Taking into account all the circumstances of this case, it is my finding that the accused person has a case to answer and shall be placed on his defence. He is hereby informed of his rights under section 306 (2) of the Criminal Procedure Code. It is so ordered.

Dated, signed and delivered this 9th November 2016.

S. N. Mutuku

Judge

In the presence of:

Ms Matiru for the prosecution

Mr. Mutitu for the accused

Mr. Luke Nzioka Malonza alias Luka, the accused

Mr. Daniel Ngumbi, court clerk