



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL CASE NO.72 OF 2009

REPUBLIC.....PROSECUTOR

VERSUS

MUTINDA KULA.....ACCUSED

RULING

1. **Mutinda Kula**, hereinafter “*the accused*” is charged with the offence of **murder** contrary to **Section 203** as read with **204** of the Penal Code. Particulars of the charge being that on the 11th day of December, 2009 at **Kiruini Village, Kalitine Location, Mui** Division, in **Mwingi** District within **Eastern** Province, murdered **Makau Musili**.
2. Facts of the case are that the deceased left home on the 11th December, 2009 going to graze his father’s animals. He never returned home. His decomposing body was found on the 13th December, 2009 on his uncle’s (accused) farm. The accused was arrested and consequently charged.
3. To prove the case the prosecution called eight (8) witnesses. **PW1, Munuve Musembi**, a member of the community Policing learnt that the body of the deceased had been on the accused’s farm. He notified the Assistant Chief and reported the matter to the police. He went to the scene and found the decomposing body. He remained within the vicinity guarding the body from a distance. He saw the accused going to the farm. He allegedly clapped his hands saying he would “*finish them.*” He then plucked cowpeas (vegetables) put them in the basket and left. He (PW1) rang **Muthama** using his cellphone. **Muthama** who was in company of **Kitonga** joined him. They arrested the accused. They searched his pockets and recovered some dry plant material suspected to be cannabis from his coat pockets.
4. PW2, **Kitonga Malonza** a nephew of the accused stated that he lives 10 metres away from the accused. On the 13/12/2009 he heard the accused say that he would kill somebody but he did not see him. On the 14th December, 2009 he was called by PW1. They went and held the accused who carried a machette. They took him to his farm and sought to know if he had killed the child but he denied. On cross-examination he stated that the accused had a dispute with his brother over the family land.
5. **PW3, Ngina Musili**, the mother of the deceased stated that there existed a land dispute between the accused and her husband. The deceased left going to graze animals on the disputed land whereafter he died.
6. PW4, **Musili Kula**, the father of the deceased stated that his son (Deceased) left on 11th December, 2009 going to graze animals but never returned home. The following day they went in search for him and found the goats at **Kwokungu Hill**. On the 13th December, 2009 he returned home to find the body of the deceased having been found on the accused’s farm. It was removed

- from the scene the following day. On cross-examination he stated that he could not tell who killed his son.
7. PW5, No. 2130544 Assistant Superintendent of Police, **Jonathan Wafula** moved to the scene in company of PW6 No. 81503 P.C. **Kennedy Wekesa**. They found the body of the deceased that was decomposing. His head had been severed. The accused had been arrested. They recovered some plant material suspected to be cannabis from him. They removed the body to the mortuary. On cross-examination it was established that they could not tell who killed the deceased but they did establish that there was a long standing dispute between the accused and PW4 over their ancestral land. However, they could not tell which portion of land belonged to the accused and that of PW4.
 8. PW7, **Dr. Catherine Kagio** produced the post-mortem report. At the time of examination the body was decomposed. The covering of the heart was the only one seen. The head was decapitated. The skull was separate from the body. It was opined that the cause of death was cardiorespiratory arrest secondary to the decapitated head.
 9. In order for the accused to be guilty of murder the prosecution had a duty of proving that he caused the death of the deceased by an unlawful act or omission. This was to be accompanied with malice aforethought. (*see Section 23 of the Penal Code*).
 10. In this case the fact of death is established. Witnesses found the body of the deceased decomposing after he went missing. An autopsy done by a medical doctor confirmed the death.

The issue to be determined is therefore, whether the accused did cause the death of the deceased?

11. At the close of the prosecution's case there was no direct evidence as to who caused the death of the deceased. It was stated by the investigation officer, PW5 that although there was no witness who saw the accused kill the deceased, circumstantial evidence gathered pointed to the accused.
12. In order for this court to deduce/logically infer the fact of who caused the death of the deceased from facts that were established, those facts must be proven. Principles to be applied in order to test circumstantial evidence were stated in the case of ***Abanga alias Onyango versus Republic - Criminal Appeal No. 32 of 1990(UR)***. The Court of Appeal 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 guilty 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 a human probability the crime was committed by the accused and no one-else”***

13. There was a long standing dispute between the accused and the father of the deceased, his brother over the ancestral land. PW2, a nephew to the accused said that on the 13th December, 2009 at about 9.00pm while 10 metres away inside his house, he heard the accused uttering abuses and saying he would kill somebody. The deceased died on the 11th December 2009. Being a nephew he could have recognized his voice but this perse was not evidence that he killed the deceased. PW1 was also a relative of both the accused and the family of the deceased. He stated that there were mango trees where the body lay. Apparently, the accused and PW4 share a boundary according to him. The body was said to be on the farm of the accused while there were mangoes in a green paper-bag at the fence of PW4's farm some approximately 10 metres away from where the body lay. He saw him while 10 metres away from where the body lay. He got excited clapped his hands and said ***“I will finish them”***. He proceeded to pluck cowpeas (vegetables) which he put in a basket and left. The fact that the accused went to the farm with a basket in which he put the vegetables is evidence that he went to the farm with an intention of collecting vegetables. This was a person who was also found in possession of cannabis sativa whereby he was charged with

the offence.

The question could be whether he could have been under the influence of the substance?

14. According to PW6, the body lay some 20 meters away from the farm of the accused person. There was a sign of struggle some 20 meters away from the house of the accused. The accused person's house was stated to be 10 metres away from that of PW2. This means that the person who was struggling with the deceased could have been from elsewhere. Having purportedly rejoiced following the event as alleged may not suggest that the accused committed the act that caused the death of the deceased.
15. The accused was suspected to have committed the offence because of the disagreement he had with the family of the deceased. It was a strong suspicion, but as it has been held, suspicion, however, strong cannot provide the basis for inferring guilty which must be proved beyond reasonable doubt by evidence. (see *Sawe versus Republic (2003) KLR 364*).
16. Having considered evidence in its entirety, at the conclusion of the prosecution's case there was no cogent evidence that the accused committed the offence. Consequently he is not guilty and I proceed to acquit him under **Section 306(1)** of the **Criminal Procedure Code**. He will be released forthwith unless otherwise lawfully held.

DATED, SIGNED and DELIVERED at MACHAKOS this 7TH day of MAY 2015.

L.N. MUTENDE

JUDGE