



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CRIMINAL CASE NO. 80 OF 2008

REPUBLIC RESPONDENT

VERSUS

JACKSON MUTUKU MUTISO ACCUSED

J U D G M E N T

1. The accused, **Jackson Mutuku Mutiso**, was charged with the offence of **murder** contrary to **section 203 and 204** of the **Penal Code**.

The particulars of the offence were that on the 21st day of December 2006 at **Nzaikoni Trading Centre** in **Machakos District** within the Eastern province murdered **Lawrence Mbuvi**.

2. The prosecution called a total of seven (7) witnesses in support of their case. The case for the prosecution is that on the material day at about 5.30 p.m, the deceased **Lawrence Mbuvi** who worked at a food kiosk at **Nzaikoni Market** went to demand payment from the accused for a cup of tea he had taken in the morning on credit. The accused did not pay immediately and a fight almost broke out between the two. The deceased left but returned a few minutes later with a piece of wood and hit the accused on the head with the same and the two fought. Both the deceased and the Appellant sustained injuries during the fight. They were taken to hospital but the deceased passed away two days later. The matter was investigated and the accused charged.
3. In his defence, the accused gave sworn evidence. The accused stated that he had no grudge with the deceased and that they had never disagreed. That on the material day in the morning hours, he had taken some tea at the kiosk where the deceased worked. At about 5.30 p.m. the deceased went to the accused's business premises to demand payment. A quarrel ensued but the other people in the market intervened and the deceased left. That shortly thereafter the deceased returned with a piece of wood and hit the accused on the head with the same.
4. That the accused came to while undergoing treatment at a nearby dispensary but accused's head injury was later stitched at a clinic in **Kathiani market**. The accused was questioned later by the Assistant Chief and by the police then he was arrested and subsequently charged with the present offence. The accused denied having fought with the deceased or having assaulted him and stated that he did not know what happened to the deceased because he (accused) fell unconscious after he was hit by the deceased.
5. The only prosecution witness who was at the scene at the material time was PW1 **Jane Ndulu Muake**. The evidence of the said witness establishes that there was an exchange of words between the deceased and the Appellant over the payment of money for the cup of tea. According to PW1, the deceased left then returned shortly thereafter with a piece of wood and hit the accused with the same and on the head and the accused fell down. According to PW1, she then went away to make a call to the wife of the accused. Thus the evidence of PW1 does not reveal any fight between the deceased and the accused nor does it reflect any assault on the deceased by the

- accused.
6. The dying declaration made by the deceased to his brother PW5 is that the deceased and the Appellant fought and one **Jackson Mutuku Mutuo** held the deceased and the accused beat the deceased who then fell down. Since the evidence of PW1 is that she left the scene and when she came back she found both the deceased and the accused on the ground, the dying declaration fills in the missing link on what transpired.
 7. The evidence of PW4 **Kaveke David** who was the deceased's employer confirms that she sent the deceased to collect Kshs.25/= from the accused for tea taken at her kiosk. The evidence of the area Chief, PW3 **Joshua Musyoki Kimotho** and the Investigating Officer PW6 **P.C. Caleb Lutome** gave evidence that shows that the investigations carried out revealed that there was a fight between the deceased and the accused which resulted in injuries to both of them.
 8. The body of the deceased was identified by his father, PW2 **William Mbuvi** to PW7 **Dr. John Mutunga** who performed the postmortem on the body of the deceased. The deceased died due to a severe head injury. The evidence by the doctor is consistent with the rest of the prosecution evidence on the cause of death.
 9. The defence by the accused that they only quarreled with the deceased then later the deceased hit him on the head with a piece of wood is not plausible in view of the prosecution evidence which establishes that the deceased and the accused fought. The deceased had no reason to frame up the Appellant. It is clear from the defence that the two had no grudge.
 10. Having established that there was a fight between the deceased and the accused, it was wrong for the prosecution to charge the accused with the offence of murder. There was no *mens rea* on the part of the accused. Consequently, under **section 179** of the **Criminal Procedure Code**, I find the accused guilty for the offence of manslaughter and convict him accordingly.

.....

B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 6th day of February 2014.

.....

B. THURANIRA JADEN

JUDGE