



No. 386/14

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL CASE NO. 3 OF 2010

NDUNGU MUTUNGA .....ACCUSED

VERSUS

REPUBLIC .....RESPONDENT

RULING

1. **Ndungu Mutunga** (*accused*) is charged with murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. Particulars of the offence being that on **26<sup>th</sup> day of December, 2009** at around **3.00am** at **Zawani Shopping Centre, Maluma sub-location, Nzambani Location** in **Nzambani District** of the **Western Province** murdered **Mwanzia Savi**.
2. Briefly the facts of the case were that the deceased, the accused and other young men were at **Rombo Bar** where some disco was being played. At about **3.00am** the accused became chaotic. He harassed people. In the process the deceased was injured badly. He was rushed to hospital. He died while undergoing treatment. The events culminated into the arrest of the accused who was charged.
3. At the close of the prosecution's case, the State had called four (4) witnesses. PW1, **Wambua Humphrey Savi**, a brother to the deceased stated that on the **25<sup>th</sup> December, 2009** at about **3.00am** the accused was ejected from the bar but he attempted to force his way back inside. In the process the accused grabbed him (PW1). His brother (deceased) intervened. The accused turned onto the deceased and pulled his shirt removing it. Two (2) other people intervened urging the accused to return the shirt. The deceased went to retrieve his shirt. A torch was flashed on his brother's face. He protested. Shortly thereafter the deceased collapsed and was bleeding. He notified his father and uncle who were inside the bar. They took the deceased to hospital. However, he was, not able to tell what injured the deceased.
4. PW2, **Tito Mbuku** who was at the bar said the accused started pushing him and Wambua. When the deceased intervened the accused hit him. When eventually he took the deceased's shirt he challenged him to go for it. When he stretched his hand to take it he cut him with an object and he fell down. He bled. He screamed and people chased after the accused who ran and disappeared.
5. **PW3, Mutinda Kimanzi** who went to the disco with the accused testified that he got drunk and started beating up people. At **3.00am** he became violent such that the bar owner had to order him out. He tried to go back to the bar only to be deterred by **Mwanzia Savi**, a bouncer at the bar. The accused managed to remove his shirt and ran off with it. He went back to the bar. Moments later he heard the deceased screaming. He ran back to find the deceased bleeding. On cross-examination he said the accused was so drunk.
6. PW4, **No. 218186 C.I Moses Thuku Maina** received the report of the incident and caused the accused to be arrested and charged.
7. The accused herein was arraigned in court on the **14/1/10**. The case dragged on for **four (4) years**. On the **8/4/2014** the State was granted a last adjournment. When the case came up for hearing, no effort had been made to call the remaining witness. Consequently at the close of the prosecution's case the Doctor who performed a postmortem on the body of the deceased had not testified. The deceased died six (6) days later. Without evidence of a postmortem report, the cause of death could not be established.
8. To prove the instant case, the duty was upon the prosecution to prove that it was the accused who caused the serious bodily injury that eventually resulted into the death of the deceased and that he

did it with malice aforethought. Without proof of the cause of death a *prima facie* case warranting the accused being put on his defence is not established. Without such evidence the accused has no case to answer. Accordingly he is found not guilty pursuant to the provisions of **Section 306 (1)** of the **Criminal Procedure Code**. He is therefore set free unless otherwise lawfully held.

**DATED, SIGNED and DELIVERED at MACHAKOS this 15<sup>TH</sup> day of SEPTEMBER, 2014.**

**L.N. MUTENDE**

**JUDGE**