



No. 428/2014

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL CASE NO. 16 OF 2007

REPUBLICPROSECUTOR

VERSUS

JONES MAKAU NDOLO.....1ST ACCUSED

KITUKU KINYILI.....2ND ACCUSED

JOSEPH SILA MUNYANYA.....3RD ACCUSED

WILBERFORCE KITAVI MUNGUTI.....4TH ACCUSED

RULING

1. **Jones Makau Ndolo, Kituku Kinyili, Joseph Sila Munyanya and Wilberforce Kitavi Munguti**, hereinafter, “the accused persons” are charged with two counts of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. Particulars of the offence being that on the **14th January, 2006** at **Kibwezi Police Station** cells in **Makueni District** within **Eastern Province**, jointly with others not before court murdered **Kimeu Kitungu** and **George Musangi** in count 1 and 2 respectively.
2. The facts of the case are that on the **14th January, 2006**, there were 110 prisoners at **Kibwezi Police Station**. They were remanded in different cells depending on the capacity. In particular cell ‘B’ had 49 prisoners. Prisoners were provided with water to shower at about 5.30pm – 6.30pm. They were duly provided with meals. At about 11.00 pm prisoners raised a distress call. When the police went to their rescue nine of them were unconscious. They were rushed to hospital. Two (2) of them, the deceased persons herein were pronounced dead on arrival. Investigations were carried out which culminated into the accused being charged with the offence.
3. At the close of the prosecution’s case the prosecution called seven (7) witnesses. **PW.1 No. 51740 P.C. Thomas Mwamba** was at the report office when remandees started complaining about the heat that was unbearable inside cells. He moved to the cells and saw accused 1 with others who told him that they were feeling hot. He told them that the issue could only be addressed by the officer in charge of the station. He notified the officer in charge, **Corporal Mahinda** who did not take action. At about 11.00pm, some of the prisoners had fainted. They were taken to hospital as they seemed injured. Two of them died.
4. PW2, **Joseph Kithema** a brother to the deceased, **George Musangi** identified his body to the Doctor who performed the post mortem.

5. PW3, **David Ndeti Mbanda** a suspect who was locked up in cell “B” said that prisoners from Manyani Prison who were twelve in number touched them and made advances at them. On resisting they assaulted them. He passed out and regained consciousness the following day. He denied having seen the accused persons.
6. PW4, **Patrick Kyalo Mutiso** identified the body of the deceased, **Kimeu Kitungu** to the Doctor who conducted a postmortem on his body.
7. PW5, **John Makau Mwanzia** having been arrested was remanded in cell “B” where other prisoners were. To find a place to sit he had to pay Kshs. 100/=. The witness was stepped down following an application by the prosecution for his evidence was of no value.
8. PW6, **No. 217964 CI Peter Njehia** the OCS said that there was congestion at the prison as capital remandees had been remanded at the station. When he received information that prisoners were suffocating in cells he went to the station and found eight (8) prisoners outside the cells who appeared unconscious. He took two (2) of them to Makindu District Hospital who were pronounced dead on arrival.
9. PW7, **No. 75293 PC (w) Wairimu Mary Muhoro** who was at the report office stated that the prisoners who became unconscious were assisted. First aid was administered unto them. The two (2) who were rushed to hospital however died
10. This is a case that dragged on in court for seven (7) years. The prosecution was given ample opportunity to avail witnesses but failed to do so, therefore was compelled to close their case.
11. According to **Section 203** of the **Penal Code** a person can only be guilty of murder if he causes the death of another with malice aforethought. Malice aforethought is deemed to be established if evidence is adduced proving any one of the circumstances set out in **Section 206** of the **Penal Code** which provides thus:-

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances –

- a. ***an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;***
 - b. ***knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;***
 - c. ***an intent to commit a felony;***
 - d. ***an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”***
12. Evidence adduced was that prisoners suffocated. They had overcrowded in cells. The Doctor who performed the postmortem having not testified there was no evidence adduced as to the cause of death. None of the witnesses who testified identified the accused persons as having acted unlawfully or omitted to act such that their action resulted into the death of the deceased.
 13. From the foregoing there is no *iota* of evidence to suggest that the accused persons committed the offence. I therefore find them not guilty. Accordingly, they are acquitted pursuant to the provisions of **Section 306(1)** of the **Criminal Procedure Code**.
 14. It is so ordered.

DATED, SIGNED and DELIVERED at MACHAKOS this 4TH day of NOVEMBER 2014.

L.N. MUTENDE

JUDGE