



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL CASE NO 41 OF 2009

REPUBLICPROSECUTION

VERSUS

PHILIP MUTIA KASEEACCUSED

JUDGMENT

1. **Philip Mutia Kasee**, the accused is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. Particulars of the offence are that on the 23rd day of May, 2009 at Syombuku Village, Kyanika sub-location, Nzambani location in Kitui District of the Eastern Province jointly with others not before court, murdered **David Musyoki**, hereinafter “ *the deceased*’.
2. The case as presented by the prosecution is that the deceased had a dispute with **Mumo Musyoki** one of his brothers. The matter was reported to the area chief on 22nd May 2009. The deceased though summoned did not attend the meeting which was rescheduled for 26th May, 2009.
3. On the 23rd May, 2009 the deceased was attacked by people, his house was burnt. The people who committed the felony also murdered him. The accused who was identified as one of them was arrested and charged.
4. To prove the case the prosecution called seven (7) witnesses.
5. PW1, **Mbithe Syokau Nyamu**, the mother to the deceased complained to the chief about a letter allegedly written by **Kimanzi Mumo** and **Mumo Samuel** threatening the deceased. The accused was one of the people summoned by the chief. At midnight the house of the deceased was burnt. She went out and saw the accused with three others, **Kimanzi Mumo**, **Kinyatta Kitetu** and **Mumo Samuel**. They pulled him out of the house. The accused cut him on the forehead with an object. **Kimanzi Mumo** struck him with something on legs. **Kimanzi Mumo** hit him with a brick on the head and told him in Kikamba to take his fork jembe and go to cultivate. The three tied him on the bicycle and took him to the chief. The following day she went to Kitui District Hospital where he saw **Kimanzi Mumo**. She went to the police station and learned of the deceased’s death. The accused accompanied them to the police station. He had injuries on the forehead. He claimed there had been a fight.
6. On being cross-examined, she denied knowing how the accused sustained the injury but admitted that there could be a possibility of him sustaining the injury during the attack.
7. PW2, **Mumo Musyoki** the brother to the deceased said there existed a family dispute between his wife, children and the deceased. When they went for a meeting on 27th May, 2009 the deceased did not attend. The meeting was postponed. On arrival at home he entered the house then came out. 10 minutes later he saw the deceased emerge from his house armed with a panga. He ordered him to leave or be killed. He ran to the village elder to report the threat to kill him. He returned home at 4.00pm where he found many people having crowded at the deceased’s home. The deceased was inside the house which was locked. The crowd threatened to lynch him (witness).

- He went with his neighbour **Mathenge** to call the police. On his return he saw his brother's house on fire. People had pulled him out of the house and were now beating him up. He recognised the accused, **Kinyatta Kitetu, Kimanzi Mumo** (his son) **Mumo Samuel, Mutua Musili** and **Makumbo Musyoka** among others. Those who assaulted the deceased took him to hospital. He went to the police station. The chief then ordered the accused and his (witness's) son to accompany him to the police station. It was his evidence that he saw the accused in the crowd but he did not see him assault the deceased. When cross-examined he said in fact it was the accused who took the deceased to hospital.
8. PW3, **Mwende Mumo Gladys**, a wife to PW2 said, PW1 hated them as a family and had reported them to the chief. According to her the deceased being the architect of the problem and was not present the chief could not arbitrate on the matter. When they went home the accused confronted his husband with a panga threatening to kill him. They ran to seek refuge from the village elder.
 9. The accused's noise attracted a large crowd. People threw stones at his house. He locked himself inside. The crowd opened the door and forced their way inside wanting to burn him. The deceased came out of the house through the window. He screamed as people beat him up. She later learned that he had been taken to hospital where he died.
 10. PW4, **Samuel Mutavai Mbui**, the chief stated that when he summoned the family the deceased did not honour his summons. He postponed the case. That night the deceased was taken to him while seriously injured. He was taken to Kitui District Hospital where he died. It was reported to him that the deceased had armed himself with bows and arrows. He went to his home and interrogated PW3 who told him that there had been a fight between the deceased and two (2) others. Many people joined in the fight the accused being one of them. By the time he was going to see the deceased he had passed on.
 11. PW5, **No. 230262 CIP Arnold Etyang** investigated the case and concluded that the accused had committed the offence. He charged him.
 12. PW6, **Abert Kinyatta Kitetu** said those who were fighting were **Mumo Musyoki**, his two (2) sons, **Mutinda Mumo** and **Kimanzi Mumo**. They were assaulting the deceased.
 13. PW7, **No. 232114 CIP Danson Keke** arrested the accused. He produced in evidence the post-mortem report.
 14. When put on his defence the accused said he saw the deceased being beaten by his brothers after he threatened to cut his sister-in-law with a panga. He denied having participated in the assault. The deceased pleaded with him for assistance. He called the chief. He then carried him on his bicycle to the Administration Police Camp. He took him to hospital where he was admitted and stayed with him until morning. He later died. Thereafter, he volunteered to record a statement on the incident. When cross examined he said he rescued the deceased from people who were assaulting him.
 15. In his submissions, **Mr. Konya**, counsel for the accused argued that there was bad blood between the deceased and his family members.
 16. Before the death he threatened to kill his brother with a panga.
 17. Further he stated that the police failed to use due diligence in the course of their investigations and acted on suspicion instead of opening an inquiry which would have assisted them to find people who were culpable that they would have charged.
 18. In a response thereto **Mrs Abuga**, learned counsel for the State said that PW1 saw the accused hit the deceased with a brick on the head. He took the weapon with full knowledge that it would cause death or at-least grievous harm which makes him culpable of the deceased's death.
 19. **Issues to be determined**
 - Whether the accused caused the death of the deceased.
 - Whether his act or omission was with malice afterthought.
 20. It is not in dispute that the **David Musyoki** died on the 23rd May, 2013. A post-mortem report made by **Doctor Mbithi** shows that, the deceased died on 23rd May, 2009 at about 8.30am while in hospital. From the examination he carried out, the cause of death was subdural haemorrhage seconded to blunt trauma. The external appearance of the body revealed multiple cuts and multiple bruises all over the body.
 21. The issue to be determined is whether the act that caused the death of the deceased was committed

- by the accused herein and whether he did it with intent to either cause his death or grievous harm.
22. According to the brief history given to the medical officer/pathologist who did the post-mortem, the deceased was beaten by some members of his family and members of public.
 23. PW7, the investigating officer's evidence was that he established the deceased had a family feud and the matter had been reported to the chief. After gathering evidence he concluded that the accused committed the offence.
 24. PW8 on the other hand who also investigated the case formed the opinion that the accused took part in assaulting the deceased.
 25. They did not tell the court the basis upon which they reached the conclusion. This kind of evidence does not help the court in reaching a just conclusion; therefore the court must revert to evidence adduced by eye witnesses.
 26. PW1 said she saw four people that night – **Kimanzi Mumo, Kinyatta Kitetu, Mumo Samuel** and the accused. She alluded to have been in company of **Mwende Mumo** and **Mutinda Mumo**, her daughter-in-law and grandson respectively. She stated that she saw them pull the deceased out of the house and the accused cut him on the head with an object.
 27. Further, it was her evidence that there was grass/hay that had been set ablaze. The house was also on fire. This would suggest that there was no possibility of mistaken identity as people mentioned were well known to her.
 28. In the case of *Anjononi and Others versus Republic [1980] 59*, it was held that recognition of assailant is more satisfactory, assuring and reliable because it depends on personal knowledge.
 29. However, in this case there were other eyewitnesses, PW6, said those who were assaulting the deceased were **Mumo Musyoki**, his two (2) sons, **Mutinda Mumo** and **Kimanzi Mumo**.
 30. PW2 said when the deceased was pulled out of the house, there were many people. He however did not say what exactly the accused did. When cross examined he said he did not see the accused assaulting the deceased.
 31. PW3, **Mwende Mumo** said after the deceased threatened her and her family, the crowd that gathered flashed him out of the house, he was beaten.
 32. The evidence of the other eyewitnesses as to whether the accused assaulted the deceased contradicts the evidence of PW1. It is proved that indeed the deceased was assaulted by his family members and other people who were not related to them. Whether or not the accused is the one who struck the blow that killed the deceased is a matter that had to be proved beyond reasonable doubt.
 33. PW1 said he cut him with a panga on the head. **Kimanzi Mumo** supposedly hit him with a brick on the head. Looking at the cause of death, the cause was subdural haemorrhage caused by blunt trauma. This is a suggestion that the weapon used was blunt. This was not consistent with using a sharp object that would occasion a cut wound. This therefore absolves the accused from blame as imputed by PW1.
 34. Witnesses who contradicted the evidence of PW1 as to whether the accused actually assaulted the deceased were called by the prosecution and they were not treated as hostile witnesses. Their evidence cast doubt to the prosecution's case.
 35. In his defence the accused said he found the deceased being assaulted by his brothers, **Mumo Musyoki, Kimanzi Musyoki** and his nephews after he had threatened to cut his sister. He pleaded for his assistance and he assisted him as he was already seriously injured. He carried him on his bicycle to hospital. The role he played thereafter is confirmed by prosecution witnesses.
 36. Investigation officers got all these facts having interrogated witnesses but did not either interrogate or arrest the brothers and nephews of the deceased and family members who had a dispute with him that required arbitration by the chief.
 37. PW4, the chief said on arrival at the scene, he interrogated those present. He was told that the fight was between the deceased and his nephews. The accused was not a nephew to the deceased.
 38. That notwithstanding, it is important to interrogate whether the accused could have had an intent to cause the deceased some harm.
 39. According to PW1 who is illiterate, a letter was read to her by **Mumo Musyoki** her son, who allegedly told her that **Kimanzi Mumo** and **Mumo Samuel** had threatened to kill the deceased. The allegations prompted the Chief to summon those implicated according to her. The deceased however, failed to honour summons. The issue to be resolved involved family members.
 40. Although the chief did not allude to a letter with death threats he said on receipt of the complaint

he summoned **Mumo Musyoki, Mutinda Mumo** and **Kimanzi Mumo** then some other three youths including the accused. These other youths had been summoned because they had seen **Mumo Musyoki's** two (2) sons assault **Kimanzi Musyoki** using stones. Therefore, the accused having been summoned as a witness, it is unlikely that he had some ill will that would have made him have intent to cause harm to the deceased.

41. PW1 having come up with allegations that were not confirmed by the chief or other prosecution witnesses; the circumstances in which the offence was committed must also be considered. PW1 was woken up by the noise. At the point of seeing the assailants there was a big crowd. Many people were assaulting the deceased. It may not have been possible for her to tell at what point the accused acted by intervening. She may have not been able to tell whether he was assisting the deceased or if he was assaulting him.
42. Circumstances did not favour correct identification. The circumstances that prevailed would not make this court to draw a reasonable conclusion that the accused herein is the one who caused the death of the deceased. Without such proof beyond reasonable doubt, the element of the charge of murder has not been proved against the accused.
43. Consequently, the case against him fails. Accordingly, he is acquitted of the offence of murder. He shall be released forthwith unless otherwise lawfully held.

DATED, SIGNED and DELIVERED at MACHAKOS this 6TH day of NOVEMBER.

L.N. MUTENDE

JUDGE