



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MACHAKOS

Criminal Case 27 of 2006

REPUBLIC.....PROSECUTOR

VERSUS

LEONARD MUTISYA MWANZIA.....ACCUSED

JUDGMENT

On 29th June, 2006, the accused was arraigned before **Onyancha, J** on an information charging him with murder contrary to section 203 as read with section 204 of the Penal Code. It was alleged that the accused on 31st March, 2006 at Mwanyani Village in Machakos District within the Eastern Province, murdered **Charles Mwanzia Kitivo**. The accused pleaded not guilty to the information and was soon thereafter put on trial.

PW1 **Anne Mwake Mwanzia** was the first to testify before **Lenaola, J** on 8th December, 2008. She is a sister to the accused; whereas the deceased was their father. On 31st March, 2005, in the morning, she proceeded to her place of work and came back at about 7.30p.m. She prepared supper and they all ate, that is to say, **Stephen Kitivo, Kyalo Kisavi, (their house help)** the accused and herself. She did not see her father but kept his share of the food in the kitchen. She went to bed at about 9pm but before she could sleep she heard noises from her father's room. He was breathing heavily. She went out and called her brothers and the house help. She told them to call their grandmother who came and confirmed that deceased had actually passed on. At about 10pm police officers came and arrested accused, **Stephen Kitivo** and **Kyalo Kisavi**. Otherwise the accused and deceased had a good relationship.

Cross-examined by **Mr. Konya**, learned counsel for the accused, she stated that she did not know what happened to her father in his room that night. She also did not know what caused his death.

PW2, **Agnes Mueke Kitivo** is the grandmother to the accused, PW1 and **Stephen Kitivo**. She was the mother to the deceased. She recalled that on 31st March, 2006 at about 8pm whilst in her house, **Stephen Kitivo** and **Leonard Mutisya** came calling and told her that their father had been taken ill. She went to his house and found him under the bed in a polythene paper. She pulled off him, the polythene paper and noticed that there was a string around his neck. When she untied the string, a lot of blood splashed out. His body was all bloodied and there was blood all over the floor as well. She observed the body and noted several injuries on the head and she started screaming. The deceased was not talking but was groaning. Later police came and arrested the accused, **Stephen Kitivo** and **Kyalo Kisavi**. She did not know who had attacked the deceased. She last saw the deceased alive on the same day at about 3 pm on his way home. The deceased and accused lived together and their relationship was good.

Cross-examined, the witness stated that **Stephen Kitivo** was arrested with accused as was **Kyalo Kisavi**. **Kyalo Kisavi** later went underground when released the next day.

PW3, **Grace Martha Musau** is a neighbour of the deceased. On 31st March, 2006, at about 9pm, she heard screams emanating from the deceased's home. It was PW2 who was screaming and asking "*who has done this.*" She went to the home and was unable to tell what had happened. Apparently, the accused and **Stephen Kitivo** told her that their father had been killed and put in a gunny bag and polythene paper and then hidden under his bed. The accused further revealed that two men had been seen with their father during the day and that the two were the prime suspects. Soon the police came and recovered a fork jembe and the handle from the store. It was bloodstained. **Stephen Kitivo** and the accused were then apprehended.

Cross-examined she admitted that the deceased was a heavy drinker. All the exhibits were recovered with the assistance of the house help.

PW4, **David Munyao** knew the deceased as his local Assistant Chief. On 12th April, 2006, he identified the body of the deceased to the doctor for purposes of post mortem.

PW5, **Dr. Virginia Musau** produced the postmortem report dated 12th April 2006 on behalf of **Dr Dennis Muange**. He opined the cause of death as being cerebral injury with bleeding secondary to a penetrating head injury.

PW6, **P.C. Brown Ngala** was on duty on 31st March, 2006 at Machakos Police Station when at about 10pm **I.P Kaanja** received a call from DO1 to the effect that the Assistant Chief of Mwanyani Area of Machakos District had been killed. He proceeded to the scene in the company of **I.P Karanja, P.C Wanyonyi** and **P.C. Masambia**. At the deceased home, they found 3 APs who had already arrested 2 sons of the deceased. They commenced their investigations and received information that a son of the deceased had killed him using fork jembe. The fork jembe was recovered by **A.P Sgt Sylvester**. It had blood stains and the head of the deceased had 3 holes on the forehead, middle of the head and at the back of the head. They took the body of the deceased to the Machakos District Hospital mortuary whereas the suspects among them the accused were taken to the police station. They released the other suspects after the accused allegedly confessed before a magistrate to killing the deceased.

Cross-examined, he admitted that he was the investigating officer in the case. Initially 3 suspects were arrested. The other 2 were released because upon investigations, the accused confessed to have committed the offence. The accused was held in custody for about a month. This was because they were still conducting investigations.

Soon after taking the testimony of this witness **Lenaola, J** left the station on transfer. The task of concluding the case then fell on me. Having set out to the accused his rights under section 200 as read with section 201 of the Criminal Procedure Code, the accused elected to proceed with the case from where **Lenaola, J** had stopped. He also did not want the witnesses who had already testified recalled.

PW7, **Stephen Kitivo Mwanzia**, an elder brother to the accused testified that on 31st March, 2006, his father was killed by people he did not know. On that day at about 7pm he came home and found the accused, his sister (PW1) and the house help. Supper was served and as he took some to his father, he came across blood stains leading into his bedroom. He called the accused and their sister and they both entered the house. On seeing the blood stains, they proceeded to their grandmother's house and alerted her. Together they came back with their uncle. The uncle pulled out the paper bag and it was then that they saw their father's body. They all started screaming. When neighbours came they suspected them for killing their father. Police were summoned to the scene and arrested them as suspects. After 14 days, he was released from police custody. He did not understand why the accused was charged since he also came home late that night just like him. There was no bad blood between the accused and the deceased. He did not know how their father met his death.

PW8, **Kyalo Kisuve**, was the house help. On 31st March, 2006, supper was prepared by PW1 and they ate. PW1 then took to the deceased his supper but found him dead and she screamed. People came and called the police. The police ended up arresting him, the accused and PW7 on suspicion of having killed the deceased. After recording his statement, he was later released.

Cross-examined, he stated that on the day that the deceased was killed, he had not seen him during the day as he was on duty. He did not also see him during the night as he was in his house. He had not witnessed any bad blood between the deceased and his children. This then marked the close of the prosecution case.

On 15th February, 2012, I ruled that the accused had a case to answer. The accused elected to give a sworn statement of defence but called no witness. He testified that the deceased was his biological father. He died on 31st March, 2006. Prior to his death he had no wife as their mother had passed on in 2005. He last spoke with the deceased at about 6.30am on 31st March, 2006. He then had his breakfast and left for college. He came back home at about 5.45pm and found PW1 and PW7 at home. He did not see the deceased then. At about 7.30pm, PW1 took food to the deceased. By then he was in the kitchen. Suddenly PW1 screamed. He rushed to the main house only to be confronted with sight of blood all over the room. They called him out but could not respond. They rushed to their grandmother's (PW2) house and came back with their grandmother, **Titus Kitivo**, grandfather and they entered the house. It was then that they saw the body of the deceased. The uncle called the police who proceeded to arrest him, PW6 and PW7 and left with them to the Police Station. He spent 3 months in police custody before he was arraigned in court. Prior to the death of the deceased, their relationship was cordial. He never killed the deceased and did not know who had done it. With that, the accused closed his defence.

Both the Prosecution and Counsel for the accused elected to file and exchange final written submissions. This was subsequently done. I have carefully read and considered them alongside cited authorities.

In this case the accused **Leonard Mutisya Mwanzia** was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code to which he pleaded not guilty. The ingredients of the charge and which the prosecution should prove with cogent evidence are that, the deceased was killed, he was so killed with malice aforethought and that he was killed by the accused. The fact of the deceased being killed has not been discounted. There is the post mortem report. Indeed all the witnesses, who testified, attest to the fact that the deceased passed on.

However, was the death of the deceased murder or accidental death or death by natural causes? From the way his body was discovered whoever inflicted those injuries intended to kill the deceased. Besides the deep and penetrating injuries on the head, he had a rope tied around his neck. Clearly this was the work of another person(s). Infact from the foregoing malice aforethought can clearly be assumed. From the weapon used and the part of the body where the injuries were inflicted, the intention of whoever inflicted them is clear, death. This was therefore a case of murder pure and simple in terms of section 206 of the Penal Code.

Whoever inflicted those injuries intended the death of the deceased, or to cause grievous harm and indeed he knew he was committing a felony. Malice aforethought is thereby established. Who then murdered the deceased?

The prosecution called a total of 8 witnesses in support of their case that it is the accused who murdered his father. The 1st one to take stand was **Anne Mwake Mwanzia**. Her evidence is that the deceased was her father whereas was a brother. Their mother died in the year 2005 leaving her, accused and PW7, **sStephen Kitivo**. On the day of the alleged murder, i.e 31st March, 2006, she arrived home from work at 7.30pm. She prepared supper and ate with the accused, PW7 and PW8. She left some food for the deceased who was not present. She retired to bed at about 9.00 pm. Before sleeping she heard noises coming from deceased's bedroom. She never bothered to check on him. Instead she called accused, PW7 and PW8 who had retired to sleep. This piece of evidence is sketchy and of no value at all.

Does not state how the deceased whom she had left alive in the morning was found injured lying under

his bed. PW2, **Agnes Mueke Kitivo**, stated that the accused was her grandson. On the fateful day at about 8.00pm while at home she received information from accused and PW7 – **Stephen Kitivo** that their father had been killed. Her evidence stops there and does not go further to implicate anyone with the death of the deceased who was her son. Both PW1 and 2 confirm in their testimonies that the deceased and accused lived together as son and father and had no bad blood. PW3, **Grace M. Musau** a neighbour as well as a sister in law to the deceased was in her house on the 31st March 2006 when she heard screams at about 9.00pm. The screams came from the deceased's home. She rushed there and after seeing the deceased, she spoke to the accused and PW7, **Stephen Kitivo**. The two told her that their father had been killed by two unknown people, placed in gunny bag and polythene paper and hidden under his bed. But could not say who did so. They suspected 2 men who had earlier been seen with deceased. This evidence of PW3 is also of no assistance to either prosecution. Before leaving the scene, she witnessed police officer (unnamed) removing a pair of shorts and long trousers from the toilet. Further that police recovered the fork jembe believed to be murder weapon from the store. But she does not state the clues that led them to recover the same. In addition that police recovered a tattered gunny bag which was bloody from the store. But she fails to state the clues that led to that recovery as well. She adds that at the time all these things were being recovered, accused and PW7, **Stephen Kitivo** and **Kyalo Kisavi** had been arrested and whisked away by police. She and PW1 and 2 do not say that the accused or PW7 assisted police to recover the same. In any event this police officer was never called to testify. The basis of the alleged recoveries aforesaid was therefore never

PW6, No. 53659 **P.C. Brown Ngala** stated that on the night of 31st March 2006 at 9.00 pm he was at the station on crime stand by duties when he was informed through telephone a call that an Assistant Chief for Mwanyani area had been killed. In the company of **I.P Karanja, P.C. Wanyonyi** and driver **Masamba** they proceeded to the scene. They found accused and his brother PW7 already arrested by 3 Administration Police Officers namely, **A.P Hassan** and **A.P Sgt Sylvester**. For reasons best known to prosecution the two were never called as witnesses to explain the basis of their initial arrests aforesaid.

Another disturbing aspect of PW6's testimony is about the purported two confessions made extra judicially to him on the 19th April, 2006 and another one on 29th April 2006 before the learned magistrate **Mr. Karani** who was then stationed here at Machakos Law Courts by the accused nor was the alleged confession statement adduced in evidence. The said magistrate however, failed to attend court and give account as to what transpired between him and the accused. In addition PW6's assertion that the accused confessed to him about killing his father is inadmissible. He was a police officer of the rank of a constable and not a officer of chief inspector's rank or above, neither was he a magistrate or judge who could in law take a confession.

PW7 testified that the accused maintained cordial relationship with the deceased. That he was arrested for nothing whereas PW8's evidence does not point an accusing finger at the accused as having been involved in the killing of his father. He further testified that for 1½ months he stayed with the two he did not experience any bad blood between them.

In my view however, if indeed it is true that this is the witness who assisted the police to retrieve some items that could have had some connection with the death of the deceased, he should have been treated as a major suspect. How was he able to know where the items were and lead the police there? Further his conduct after his release leaves a lot to be desired. He immediately went underground. If indeed he was innocent why would he then go underground? All said and done, there is no cogent, watertight, credible and or material evidence to show that the accused planned and executed the killing of his father.

No doubt the prosecution case was basically based on circumstantial evidence. We have constantly been reminded that circumstantial evidence can only be relied upon to find a conviction when inculpatory facts are incompatible with the innocence of the accused, and incapable of explanation upon any other hypothesis, than that of his guilt and the burden of proving facts which justify the drawing of this in reference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused. See **Kipkering Arap vs Koskei & another vs Republic 16 EACA 135**. In this case, there were 4 people in the compound on the material day **viz** accused, his sister, brother and the house help. All these people had opportunity to jointly or singularly commit the heinous

act. It is also possible that the deceased could have been attacked by intruders who may have come to the main house as these other people were in the kitchen. In these circumstances one cannot confidently say that the circumstantial evidence irresistibly point to the accused as the author of this mischap.

Further the evidence as tendered by prosecution is nothing but based merely on suspicion that the accused must have been the one who killed the father. Two other suspects were arrested along with the accused. These were PW7 and 8 mere suspicion perse is not good ground or basis for convicting an accused. As stated in the case of **Salim Menza Mganda vs Republic- C.A Criminal Appeal No. 16/997** - at best some suspicion could be cast on the appellant as a possible perpetrator of the crime but suspicion alone, cannot form the basis for the conviction of an accused person. This is what has happened in the circumstances of this case.

Finally, I dismiss the charge preferred against the accused as the prosecution has failed in its noble duty to establish a case against the accused beyond reasonable doubt. Accordingly, I acquit him of the information. He should be set at liberty forthwith unless otherwise lawfully held.

JUDGMENT, DATED, SIGNED and DELIVERED at MACHAKOS this 6TH day of JULY, 2012.

ASIKE-MAKHANDIA
JUDGE