



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS**

Criminal Case 18 of 1997

REPUBLICPROSECUTOR

VERSUS

MUNENE MUINDE KUMA ACCUSED

Coram: J.W. Mwera J.

Mr. Makau O. Advocate for Accused

Mrs. Ntarangwi Learned State Counsel for Republic

Court Clerk Muli

Interpretation: English/Kiswahili/Kikamba

JUDGEMENT

On 11th November 1997, the accused Munene Muinde Kuma was charged with the murder of one Ituli Kioko on 1st July 1996 at Matingani Village, Kauwi Location, Kitui. He denied the offence and on 29th June 1998 the hearing began in the presence of counsel and assessors. At the end of the trial the prosecution had called ten (10) witnesses while the accused had been heard in his defence. The evidence to be reviewed presently was followed by final submissions by counsel, summary to the assessors and the assessors' oral opinions which are incorporated in this judgement.

For what may appear, the sequential recapitulation of evidence, the evidence of Wayua Muvengei (PW1) and Anna Kalau (PW10) needs be reviewed first. They were present as eye witnesses of the attack by the accused on the deceased Ituli on the night in question. Wayua was in a kitchen in their home when Kalau called her out at about 9.00P.M. complaining that Munene, the accused had locked them in the house from outside. Kalau gave the name of the accused who was also a neighbour. When Wayua opened the door and Kalau got out they padlocked it and went to the nearby house of one Mutuo where Wayua used to stay. They reported to Muli Munyalo, Mutio's husband about what the accused had done. He in turn instructed them to wait outside and see if the accused returned. Indeed the accused reappeared passing by a nearby path some 20 - 30 paces away on the way towards Matingani. There was moonlight. The court heard that the accused then met Ituli, the deceased. They talked something these two young ladies could not follow except that when the two men were parting the deceased remarked to the effect that he was not given to taking things illegally obtained. This seemed to have caused the accused to ask Ituli as to what he meant by things illegally gotten or obtained in an irregular way. That at that point the accused hit the deceased who had a bicycle. He fell down. The accused continued to hit him asking the deceased if he

wanted to be shot. That the accused then ran to his house and returned with a piece of wood with which he continued to hit the deceased. The two girls did not scream for fear of their lives, but Wayua reported the incident to her grandfather, Muli.

In cross examination Wayua answered that although she did not have a spotlight, on that cloudless full moon night she saw clearly the incident in issue. She even noticed that the deceased wore a white shirt and black pair of trousers, while the accused wore a black coat and a black pair of trousers. That from the time the accused bolted the door, he went to his house where he lived alone. His wife had at that time, as it will feature later, gone away to her people. That the accused re-emerged an hour later to meet Ituli. This witness maintained that she positively saw and recognised the accused that night and that she heard his voice too which she knew. She saw him armed with a *rungu* and when they visited the scene the following day a broken stick with a rounded head was found there. Wayua who did not go near the two men did not know if they were drunk or not. They had started off by discussing in a friendly manner. There was no row between them. The turn of events came only when the deceased remarked as the two men were about to separate that he did not accept things irregularly obtained. After the attack, the accused took the deceased's bicycle and went to his house. When the 2 girls reported the incident to their grandfather, they came to the scene and found the deceased lying there unconscious. PW1 closed her evidence by saying that it was not a fall from the bicycle that killed the deceased or that other people may have assaulted him. She saw the accused hit the deceased.

Kalau (PW10) told the court that she lived in the home of Matano as a maid. On 1st July 1996 the accused came to the house where she used to sleep. She knew him for long. It was at about 9.00 P.M. He knocked at the door and called out to a boy in that home. Kalau recognised his voice and also saw him through a window. It was a brightly moonlit night. The occupants of the house kept quiet and that made the accused to lock the house door from outside with a promise to return. Kalau then called Wayua (PW1) to come and open for them. When Wayua opened for them, they ran out of the house and locked it. The young girls went to Muli Munyao's (PW2) house and stood outside. The accused then left his house which was some 100m. away and walked towards Muli's house. He met Ituli, the deceased pushing a bicycle. PW10 then saw the accused hit the deceased who fell down. He asked him if he wanted to be shot. Accused then ran to his house and came armed with a stick. He hit the deceased again. He took a stone and threw it at a nearby house. The 2 girls ran away and went to report to Muli what they had seen. When they all came back to the scene Ituli had sustained injuries on the legs. There was much blood. He was taken to hospital where he later died. Muli Munyao, Sande's father sent one Kitili to go and report the matter to the local assistant chief. By this time Munene, the accused was not at the scene.

PW10 knew the accused well but she was unable to say why he had come to wake them up that night. He worked as a watchman at night, at the premises of one Kathangu Muthangya. The deceased Ituli did not hit the accused with his bicycle. So PW10 did not know why the accused attacked him. The two men had talked rather normally before the attack, when the accused said something to which the deceased responded that he did not accept illegally obtained money. That the accused had had a bow and arrow at some stage but he ran to his house and returned with a stick with which he beat the deceased further on the head and everywhere. That the deceased *did* not fight back. PW10 seemed to know the deceased's bluish (in colour) bicycle. She did not see it at the scene when they came there now in company of Muli Munyao. Both men had not appeared drunk.

Muli Munyao (PW2) lived in the same village as the deceased and the accused. On the night in issue the two girls PW1 and 10 who used to work in his home came at 10.00 P.M. and told him that the accused had locked the house in which Anna Kalau Nzola (PW10) slept from outside and that Wayua PW1 had gone and opened it. They told him that they had reported that incident to their grandmother, Muli's wife. That later the accused had come back but he met Ituli on the path that passed near their home. That the two men had talked briefly and then the accused had hit the deceased who fell down. It was a brightly moonlit night. PW2 then accompanied the 2 girls to the scene of the attack and there they found Ituli laying on the ground unconscious. So PW2 sent the report to the local assistant chief. Apparently he feared that the accused would cause trouble to him so PW2 kept to his house. Seemingly Ituli remained there overnight. He was still breathing. PW2 sent for his wife and he was taken to hospital. In the meantime the assistant chief dispatched some young men to look for the accused. They found him. They could even have killed

him.

In cross examination PW2 told the court that his house and that of the accused lie opposite each other across the road. But the scene of the attack was closer to the accused's house. The deceased had been beaten with a stick that lay near him, broken. But then this witness spoke of the assault weapon being fetched from the accused's house in the presence of one Kamuzu. And the deceased's bicycle which he usually used was not at the scene.

The evidence of Francis Nzalu (PW3) was that during the day on 1st July 1996 he drunk quite a lot with the accused. That the accused talked of going to kill somebody. That he had even picked a quarrel with another person at the drinking place. As the two fought Nzalu left. He learnt on 2nd July 1996 that Ituli had been murdered at the gate of the accused and that the accused killed Ituli. PW3 who held the opinion that his cousin, the accused was a man of bad character, testified that he worked as a watchman at a canteen (or shop) owned by a teacher at a local trading centre. Nzalu found the deceased at the scene unconscious and he picked up the broken club - the murder weapon. It had blood stains.(Exh.P2a).

That the accused whose wife had run away to her parents, at the time of this incident was a married man.

When Regina Ndunyu Ituli (PW4) was summoned to the scene where the attack took place on her husband she went there and found him unconscious. This was at about 6.00 A.M. on 2nd July 1996. She was told that Ituli was beaten by Munene, the accused. They took him to hospital but he died before admission. The deceased was delivered to the mortuary and the party drove back to the scene. On the way they met the assistant chief having arrested the accused. They were taking him to the police station on an ox-cart. The accused could not walk, probably due to manhandling he got from the irate villagers who went to look for him in the bush.

PW4 too had seen the broken club stained with blood at the point where Ituli lay injured. Regina told the court that on 1st July 1996 Ituli had left home with cash Sh. 6,000/- to go and buy merchandise. As at the time she delivered him to the mortuary, he had no cash in his pockets.

Benjamin Kikuu (PW5), the local assistant chief of the area where this death took place was woken up at 4.00 A.M. on 2nd July 1996 and told of Ituli's attack. The reporters involved the accused in the incident. PW5 went to the scene in the morning and found many villagers. He learnt of Ituli's serious injuries. They pursued the accused towards a market called Katutu. They learnt that the accused had taken a bush route to Matingani Market. There the group caught up with him. He tried to escape but he was apprehended and roughed up. He was then conveyed to the police station on an ox cart. On the way the group met with a police van dispatched to investigate the death of Ituli. The 2 groups went back to the scene and police took measurements. When PW5 got the accused arrested he found him with Sh.310/- which was returned to him in court.

It transpired in cross examination that PW5 had an impression of the accused as a problem citizen in the village. The accused was arrested at about 8.00 A.M. on 2nd July 1996. He had not been at home. He was not at his mother's house at Matingani and his mother was not there either. When the question of the bicycle was put to this witness he answered that after the arrest and on the way to the police station, the assistant chiefs group met the police whom the accused told of the whereabouts of the same. He led them to a village called Katutu near a place called Kyengi. The accused explained that he had been proceeding to the home of his wife. The bicycle was not there. Then he led them via a bush path and ultimately the team got to the home of one Mwanzia Kilonzi (PW6). The accused told the team that he had fallen down on a poor road and damaged the bicycle. Apparently he terminated his journey there and abandoned the bicycle. Regina (PW4) the late Ituli's wife later identified this bicycle RAJA, when it was produced in court (Exh.P2b). Besides other evidence that he gave, I.P. Musili (PW7) gave similar evidence regarding how the accused led them to the point where he left the bicycle and its subsequent recovery at the home of Kilonzi (PW6). At about 7.00 AM. on 2nd July 1996 Kilonzi had found this bicycle on the road near his home. He did not see anybody with it. So he took it and went to report to the village elder. The latter advised him to keep it until further inquiries revealed its owner. It had a twisted front wheel.

LP. Musili, took up the case. At the scene, he made a sketch plan (Place). He took possession of the club (broken) and on his way to the scene he met members of the public bringing the accused to the police station. He re-arrested him and the rest followed including being led by the accused to a far off village, this court heard, variously called Kalutu or Katitu. At the scene this witness had seen much blood. With all that LP. Musili had found, recovered and recorded from witnesses he got the accused charged for murder.

Dr. Sore (PW8) testified by producing a post mortem report in which he formed the opinion that the deceased died of injuries inflicted by a blunt object on the forearms and head (Exh.P3),

Apparently in order to deal with the alibi the accused raised and the Learned State Counsel was notified of as the trial progressed, she called Jemimah Kathangu (PW9) at whose shop the accused worked as a night watchman. She told the court that he reported on duty at about 7.00 P.M. She had paid him that day. She left for home. When she returned to open the following day at 7.30 A.M., the accused was not there. To her, as the practice was, he had left even before she came. But later she heard that the accused was involved in the murder of Ituli. PW9 did not supervise the accused at his post during the night. So she could not say whether or not he was on duty at the shop all the night of 1st July 1996. That closed the prosecution case. The defence one opened.

The accused on oath told this court that he came to the shop of PW9 on duty at 7.00 P.M. on 1st July 1996. He had not drunk at any time of day and he remained at his post until the following morning when he went home even before the arrival of his employer. He passed via his mother's house and went to sleep. He did not murder Ituli. The accused said that his wife came from Mukuyuni village Kwa Mulunga Location some 15 km. from his home. He had woken up at about 10.00 A.M. on 2nd July 1996 when he espied strangers approaching his house as he was at his mothers house. They included their local assistant chief whom he eventually recognised. Asked whether he knew of the death of somebody on a nearby road, the accused denied. However that group that came seized and beat him up. He did not try to fly and he did not lead the group in which the assistant chief and LP. Musili were to any spot to recover the deceased's bicycle. The accused denied being at Sande Muli son of Muli Munyao's home on the night of 1st July 1996. He was at his place of work that night and so he did not assault the deceased. He knew PW1 and 10 though and he denied their evidence of seeing him that night of 1st July 1996 attacking the deceased.

After due submissions with Mr. Makau dwelling on night identification and other aspects of the evidence, the Learned State Counsel was of the view that the accused was seen that night assaulting the deceased and that his conduct after his arrest was a clear manifestation that he committed the offence.

The three assessors rose and considered the case. They came back each giving an opinion that the accused was guilty as charged. They formed their respective views with regard especially to the evidence of PW1 and 10 the eyewitness.

Looking at all the foregoing this court is of the view that the accused herein Munene Muinde Kuma murdered the deceased Ituli. He was seen doing it by 2 people who knew him Wayua and Kalau (PW1 & 10). It was at night yes. It was a brightly moonlit night though. Night identification has usually caused real hurdles in criminal cases when probability of mistaken identity is high especially without other light like lamp, torch or street lighting. But in this case this court accepts the evidence that the 2 eye witnesses knew the accused before - a neighbour. They were some distance from where the assault took place, yes, but they also recognised his voice. He had locked Kalau in a house from outside and promised to return to the house. The 2 girls had heard him ask the deceased if he wanted to be shot after the first assault. They saw him run to his house and reappear with a club with which he further assaulted Ituli, Out of fear they did not scream. But as the deceased left, the two girls went to inform Muli Munyao (PW2) of the whole incident. Muli returned to the scene with them and found Ituli beaten unconscious. It was Munene who

first and all the time assaulted the deceased. There had been no row between the two men who initially spoke in a friendly manner until the deceased said that he did not take illegally obtained goods or money. At no time did the deceased hit the accused. The two men did not appear or sound drunk as they met and talked. This court was left with the impression that even if the offence took place at night, the accused was properly identified by PW1&10.

The accused denied the offence completely and insisted that he was at his place of work all the night. He indicated that to the State who called Jemimah (PW9) her employer. She said that she left him at the shop at 7,00 P.M. and returned at 7,30 A.M. the following day, She hadnot supervised him on his duty at all. He had gone away. There was however no impression left in this court's mind that the accused, even if he reported on duty at 7.00 P.M. on 1st July 1996, he stayed at it all night and he did not go away to assault Ituli. He assaulted Ituli who later died. The accused took Ituli's bicycle and rode towards the home of his wife. He got involved in an accident and abandoned both the bicycle and the journey at a point near Kilonzi's home. This was some 15km. from the scene of the offence. Listening to PW5, the assistant chief and IP. Musili (PW7) this court was convinced that it was the accused who led that team after his arrest to where the bicycle was recovered. There can be no fabrication of this part of evidence on the part of PW5 and 7. They acted on the same day and this court is satisfied that on the initiative of the accused he led them there. Such a conduct could only mean that the accused knew where he left the bicycle, When it was recovered the following morning it was found to be the deceased Ituli's RAJA. Ituli had been attacked while he had that bicycle. When he fell down unconscious the accused took the bicycle (see PW1). The nexus is clear and no denying makes a difference. It is not even suggested or shown that the 2 men quarreled or differed before the assault. For whatever reason the accused assaulted Ituli. Ituli fell down. Then he ran to his house and fetched a rungu with which he hit Ituli more.

The claim that PW5, the assistant chief did not speak well of the accused did not create a view that for the grudges between the two he had framed up the accused. All evidence put together leads to the conclusion that the accused murdered the deceased.

He is thus found guilty of the charge under S.203 Penal Code as read with S.204 Penal Code and this court so states.

The sentence of death is mandatory and it is accordingly pronounced.

Right of appeal explained.

Judgment accordingly.

Delivered on 12th October 1998.

J.W. MWERA

JUDGE