



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL CASE NO. 8 OF 2018

REPUBLIC/STATE

.....**PROSECUTOR**

VERSUS

MARTIN MUTUNGA NDINDA**1ST**
ACCUSED

JOSEPH WAMBUA MANYOLE**2ND**
ACCUSED

JAMES NZAU KITAVI alias KITOKI**3RD**
ACCUSED

RULING

1. The accused persons are charged with the offence of murder contrary to **Section 203 as read with Section 204 of the Penal Code.**
2. The particulars of the information are that on the night of 12th and 13th February 2018 at Kituluni Trading Center in Matungulu Sub-County within Machakos County, they jointly with others not before court murdered **Nicholas Mwendwa Muteti.**

3. The accused pleaded not guilty to the charge whereupon the prosecution called seven (7) witnesses to prove its case.
4. Briefly, the prosecution's case is that on the material night, deceased's body was found lying beside the road at Kituluni Trading Center with a 4x6 building block beside it. He was unrecognizable as his face had been crushed with the building block. The deceased's father Julius Muteti Kiketi (PW2) testified that he could not merely by looking at the deceased's, tell that that was his son; that he was only able to identify him because he recognized the clothes which he, (the deceased) was wearing. He also stated that while he was at the scene, police officers arrived and removed the body to the mortuary.
5. A post mortem performed on the body of the deceased a few days later revealed that the cause of death was craniocerebral injury due to blunt force trauma. Dr. Peter Ndegwa (PW6) observation on the external appearance of the body was that the head was flattened on the front with obvious skull fractures (see the post mortem form produced as (Exhibit P.2).
6. Upon removal of the body from the scene, police officers from Matungulu Police Station instituted investigations which culminated in the arrest of the three accused persons herein. According to Corporal Jacinta Mwongeli (Pw7), the lead investigator in the case, members of the public first implicated the 1st accused and when officers went to his house they found a

green t-shirt, a long sleeved green t-shirt and a pair of trousers which were all stained with blood. He was therefore arrested and taken into custody. Thereafter, members of the public also implicated the 2nd and 3rd accused persons and they were also arrested. The 3 accused persons were subsequently arraigned in this court.

7. The court heard that the stone found at the scene and the items recovered from the 1st accused's house were submitted to the Government Chemist together with a blood sample and nail clippings collected from the body of the deceased and upon analysis it was found that the t-shirt and trouser were slightly stained with blood of human origin and that the same matched the blood and nails of the deceased (see Analyst report Exhibit P.1)
8. The 1st accused and 2nd accused were the first to be arraigned before this court but after the 3rd accused was arrested their cases were consolidated.

Analysis and determination

9. From the evidence adduced, there is no doubt as concerns the fact of death of the deceased. There is also no doubt that the death was by dint of an unlawful act. There was a stone beside his body and the post mortem confirmed he had extensive injuries on his head: his face was crushed to the extent that he was unrecognizable.

10. **Section 306 (1) of the Criminal Procedure Code** enjoins this court to, once the prosecution has closed its case, consider the prosecution's case and any arguments by the State and defence before placing the accused persons on their defence. The court is required to put the accused persons on their defence only once it is satisfied that there is evidence that they are the ones who committed the offence. Should the court find no evidence that the accused committed the offence, then it must acquit them at that stage.
11. The court received written arguments from Counsel for the accused persons Martin Mutunga Ndinda (1st accused) and James Nzau Kitavi alias Kitoko (3rd Accused) and Joseph Wambua Manyole (2nd accused) but not from the Prosecution despite that both sides were given equal time to file written submissions. Counsel for the accused persons have persuaded this court to find that the prosecution has not established a prima facie case against the accused persons sufficiently to warrant them to be put on their defence.
12. I have considered the evidence and arguments on record carefully and my findings are, firstly; that there is no evidence at all to link the 2nd and 3rd accused persons to the death of the deceased. The investigating officer (Pw7) was candid that they were charged merely for reason that they were implicated by members of the public. She did not disclose who those members of the public were and neither were they called to testify. These

two are therefore here based on hearsay. Hearsay cannot form the basis of a conviction and for that reason they shall be acquitted at this stage.

13. For the 1st accused, there was no direct evidence tending to his guilt; none of the seven witnesses alluded to have seen him commit the offence. Even the three civilian witnesses who included the father of the deceased (Pw2) testified that they did not witness the crime. They went to the scene after the fact. Circumstantial evidence was however adduced to the effect that certain items of clothing were recovered from his house. Evidence was also led that the same had blood which when later examined it matched that of the deceased person. It is trite that for a conviction to be sustained on circumstantial evidence “**the incriminating facts must be incompatible with the innocence of the accused, the guilt of any other person and incapable of explanation upon any other hypothesis than that of guilt**” – see the case of **James Mwangi -v- Republic [1983] KLR 327.**

14. The question therefore is whether the circumstantial evidence herein is sufficient to prove that the 1st accused killed the deceased. It is my finding that the evidence falls short to prove a case against the 1st accused and this is for reasons that: firstly; no inventory was taken of the items recovered from the house of the 1st accused person, secondly, the officers who allegedly recovered those items were never called to give

evidence, so in the absence of an inventory signed by the accused, there is no evidence upon which this court can safely find that the items were in fact recovered from his house. Moreover, whereas the prosecution did lead evidence that the exhibits had blood which matched that of the deceased, the clothes were not availed to the Government Analyst (PW6), to identify them as the clothes upon which he conducted the examination. So in addition to the prosecution not proving beyond reasonable doubt that the clothes were in fact recovered from the house of the 1st accused, there was no evidence to connect those clothes to the ones examined by the Government Analyst. To put the accused person on his defence would be tantamount to asking him to fill the gaps in the case for the prosecution and in the premises, I agree with his Advocate that no prima facie case has been made out against him sufficiently to warrant him to be put on his defence. In other words there is no evidence to prove that he committed the offence.

15. In the upshot this court finds that the prosecution has not proved the guilt of the accused persons for the offence charged. I accordingly enter a finding of not guilty and acquit them under **Section 306(2) of the Criminal Procedure Code** and direct they should be released forthwith unless otherwise lawfully held.

It is so ordered.

Ruling signed, dated and delivered virtually on this 19th day of March, 2026.

E. N. Maina
Judge

In the presence of:

Mr. Mutinda H/B Mugula for 1st and 3rd accused

Mrs Wanjau for 2nd accused

Mr. Motende for the State

Mary- Court Assistant/Interpreter

All 3 accused persons

ORIGINAL