



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CRIMINAL APPEAL NO. 230 OF 2005**

**JOEL MUTISYA MWANZA.....APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

**(Appeal from a conviction and sentence of the High Court of Kenya at Machakos (R.V. Wendoh J.)  
dated 17<sup>th</sup> August 2005**

**in**

**H.C.CR. C. NO. 20 OF 2004)**

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**JUDGMENT OF THE COURT**

In the course of Joel Mutisya Mwanza’s trial for the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code, the prosecution applied for the adjournment on the ground that certain witnesses who had been duly bonded were not present in court. There was no explanation as to their non-attendance. By then only four witnesses had testified. The trial Judge, Wendoh J., declined an adjournment on, amongst other reasons, that the prosecution had previously been granted an adjournment for the same grounds. She concluded her ruling as follows:-

*“A police officer from another station has been sent with the police file- noted laxity and irresponsibility on the part of the investigating officer and officer in charge station (sic). They are not interested in the case though it is a very serious case where one lost his life. But the charge has not been proved against the accused. The Court will not allow any further adjournment.”*

Mr. Omirera, State counsel, was prosecuting. He did not call any further evidence. That notwithstanding he declined to close the prosecution case. Wendoh J. held that the attitude of the learned state counsel notwithstanding the prosecution case was *“automatically closed.”*

Joel Mutisya Mwanza the appellant before us was put on his defence but he elected to say nothing in his defence as he was perfectly entitled to do. He did not also call any witnesses.

The prosecution witnesses who testified were **Robert Mutua Kivimau (PW1)**, who with his 14 year old son, **Job Muoki Mutua (PW2)** testified that they witnessed the appellant cut Peter Muindi, the deceased, several times with a pangá. There was also **Alexander Kivindu, (PW3)** who came to the scene after the deceased had died, and **Titus Nzioka Muindi (PW4)** who identified the body of the deceased to

the doctor who performed the post mortem examination. The doctor did not testify. On the basis of the evidence of the above witnesses, the trial Judge found the appellant guilty of murder, convicted and sentenced him to suffer death.

In his memorandum of appeal, the appellant has raised several issues both of fact and law. When the appeal was called for hearing Mrs. Murungi, senior principal state counsel, stood up and stated that she was not supporting the appellant's conviction on three main grounds. Firstly, that although the trial started with three assessors, at some point one assessor appears to have dropped off and there is no record as to the circumstances under which he did so. In her view the trial was unsatisfactory for that reason. The second reason is that the prosecution having failed to tender in evidence the post mortem report on the deceased, there was no way of ascertaining the cause of death and for that reason it could not be said that the case against the appellant was proved to the standard required in criminal cases. The deceased's death could not be blamed on the appellant to the exclusion of all other possible causes. Thirdly, Mrs. Murungi, expressed the view that certain essential witnesses who should have testified did not testify, and in her view in absence of their evidence the case was not proved to the standard required in criminal cases.

Mr. Onalo for the appellant concurred and himself added that the manner the trial of the appellant was conducted was deficient because the record is unclear whether certain witnesses were sworn before they were allowed to testify.

We agree that the issues raised by Mrs. Murungi are fundamental, but the most fundamental reason why we think that the appellant's conviction cannot be allowed to stand is the trial Judge's ruling declining to grant the prosecution an adjournment, the relevant part of which we reproduced earlier. After she held that the charge against the appellant had not been proved, there was no proper basis for her ruling that the appellant had a case to answer. No further evidence was adduced after that ruling. In view of that it is incomprehensible and clearly preposterous for the learned Judge to draft a judgment convicting the appellant for the same offence.

In the foregoing circumstances, we allow the appellant's appeal, quash his conviction for the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code, and set aside the sentence of death imposed on him.

We have considered whether or not a retrial should be ordered and have decided against it. First the appellant's conviction, the subject matter of this appeal arose from his retrial. In the course of that retrial it was not possible to get all the essential witnesses. The trial took place in the year 2004. Since then there has been a considerable lapse of time. Hereafter it might be even more difficult to get witnesses. In the circumstances, we order that the appellant be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

**Dated and delivered this 4<sup>th</sup> day of April, 2008.**

**R.S.C. OMOLO**

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**JUDGE OF APPEAL**

**S.E.O. BOSIRE**

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**JUDGE OF APPEAL**

**J.W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

I certify that this is a  
true copy of the original.

**DEPUTY REGISTRAR**