



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL CASE NO.41 OF 2015**

REPUBLIC.....PROSECUTOR

VERSUS

AHMED ATHUMAN ALI.....1<sup>ST</sup> ACCUSED

HAMZA THUMAN ALI.....2<sup>ND</sup> ACCUSED

BUNU ATHUMAN MUJANIDI.....3<sup>RD</sup> ACCUSED

BAKARI BINI MOHAMED.....4<sup>TH</sup> ACCUSED

MOHAMED BAKARI BIN.....5<sup>TH</sup> ACCUSED

**RULING**

1. The accused persons, **AHMED ATHUMAN ALI, HAMZA ATHUMAN ALI, BUNU ATHUMAN MUJAHIDI, BAKARI BINI MOHAMED** and **MOHAMED BAKARI BIN** are charged with the offence of murder contrary to **Section 203 as read with Section 204** of the **Penal Code, Cap 63** of the **Laws of Kenya**.

The particulars are that:-

*“On the 4<sup>th</sup> day of December, 2015, at Mwandori area in Kisauni sub-county within Mombasa County, the accused persons jointly with other not before court murdered MOHAMED BAKARI.*

2. The accused persons were arraigned in court on diverse dates in **2015**, whereby the charge against them was read over and information explained to them without requiring a response on **10<sup>th</sup> December, 2015** vide **Criminal Cases No.41 and 44, both of 2015** and **2 of 2016** on **30<sup>th</sup> December 2015**.

3. The three files were consolidated on **9<sup>th</sup> June, 2016** and the matter fixed for hearing on **7<sup>th</sup> September, 2016**. From then, the matter was adjourned severally for the reason that witnesses were not attending court, despite having been bonded. Infact, the Investigating Officer was summoned to court to explain the reason why the witnesses had not attended court and a list of exhibits furnished to the defence.

4. The said Investigating Officer, one **PC Edward Kabasha** attended court on **21<sup>st</sup> February, 2017** and explained that efforts to trace the witnesses especially the 7 members of public, (3 police officers and the Government Analyst) had been in vain. He even indicated that he had been informed they had relocated to Lamu County and he could not even reach them through the phone contacts they had provided.

5. On cross-examination, he indicated that he could not force the witnesses to attend court and that the accused persons were entitled to a fair and expeditious trial if the said witnesses cannot be traced.

6. The prosecution was directed to take action upon the said Investigating Officer by requiring him to file an Affidavit outlining the efforts he had taken to trace the witnesses in the case. Again, the case was mentioned for several occasions just for the prosecution to indicate to court the necessary action until **20<sup>th</sup> July, 2017**, when they availed two witnesses. The next one was availed on **19<sup>th</sup> March, 2018**, the 4<sup>th</sup> was availed on **7<sup>th</sup> November, 2018**, the 5<sup>th</sup> on **21<sup>st</sup> February, 2019**, the 6<sup>th</sup> one on **14<sup>th</sup> March, 2019** and 7<sup>th</sup> on **24<sup>th</sup> July 2019**, the 8<sup>th</sup>, 9<sup>th</sup> and last one on **9<sup>th</sup> October, 2019**.

7. The court then ordered the prosecution to close their case when they were seeking for another adjournment. According to the prosecution's evidence, the deceased was found dead in a house at Mwandoni with deep cut wounds on the head and other parts of the body. His body was taken to Coast General Hospital mortuary for post mortem examination.

8. **PW5, RAJAR JUMA** told court that he was repairing a friend's aerial at Mwandoni when he saw the accused persons chasing the deceased who ran and sought refuge in a house opposite to the one whose aerial he was repairing. That the accused persons were all armed with pangas and spears. He saw them knock on the door of the house until it was opened, and the accused persons entered the house, and attacked the deceased. He said that the 4<sup>th</sup> accused person remained outside while the rest went inside but he kept piercing the deceased from the window. He also said that he could not see what the ones who were inside the house were doing.

9. The police were called and PW2, **Corporal Moses Nyongesa, PC Njoka** and Deputy OCS, **Mr. Kiplangat** went to the scene at KCB area – Mwandoni upon receiving a report that someone had been murdered there by unknown persons. They entered a house where they found a lady who appeared shocked. That on inquiring from her what had happened, she told them that the man had ran into her house for refuge but had been cut by people who had pursued him there. They saw the body which was covered with sheets and on uncovering it, saw it had multiple cuts on the head, fingers. They called the Scenes of Crime personnel who came and photographed the body and scene, which photographs were produced by **PC Kinyanjui** as **Exhibits P4 and 5**. The body was then removed to the mortuary. The post mortem was conducted by PW4, after the body was identified by PW1. He confirmed that the cause of deceased's death was severe brain injury secondary to assault. He produced the post mortem report as **Exhibit P3**.

10. There were blood swabs which were collected by **PC Kabacia** (PW6) from the main door walls and bedroom door of the house where the deceased was found dead. There were also blood samples taken from **Bunu Athman** (the 2<sup>nd</sup> accused person herein). These samples and swabs were escorted to the Government Chemist for a DNA analysis. According to PW3, **LAWRENCE OGUDA**, the Government Analyst, the receipt of the Exhibit Memo dated **11<sup>th</sup> December, 2015** and the blood swabs marked **1<sup>ST</sup> A, 1<sup>ST</sup> B, 1<sup>ST</sup> C, main door 1, main door wall 11, bedroom door 3, Bunu Athman TT1, Bunu Athman 11** was confirmed. He stated that he analyzed the exhibits marked main door wall 11, bedroom 3 and found they matched the DNA profile generated from **Exhibit Bunu Athman TT**. He also found that all the exhibits were from a single source.

11. PW8, **DR. KHERI** testified to confirm that on **4<sup>th</sup> December, 2019**, **BUNU ATHMAN**, the 2<sup>nd</sup> accused person was referred to MEWA HOSPITAL for surgery by him. He produced treatment notes to confirm that the 2<sup>nd</sup> accused person was admitted to the said hospital for treatment of these deep cut wounds on the left hand.

12. PW6, **PC KABACIA** also testified that there was **Motor Vehicle Registration No.KBN 210 Toyota IST** which had been spotted at the scene of crime and was later abandoned at Bondeni area with blood stains on its handle and seat.

13. The prosecution closed their case and submitted that all the accused persons were placed at the scene of crime, hence have a duty to explain how the deceased met his death.

14. At this point, for determination by this court is whether the prosecution has established a *prima facie* case against the accused persons to warrant them being placed on defence.

15. A *prima facie* case was defined as a case where a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence (See the case of **RAMANLAL TRAMBAKLAL BHATT – VS- R [1957] E.A 332 AT 334 AND 335**).

16. In establishing a *prima facie* case, the prosecution is required to prove these ingredients:-

**a) That the deceased died;**

**b) That his death was unlawfully caused;**

**c) That the accused persons caused the unlawful death of the deceased;**

**d) That in causing the death of the deceased, the accused had motive aforethought.**

17. I have carefully read through the evidence of the nine (9) prosecution's witnesses to determine whether the prosecution has established a *prima facie* case in line with the four ingredients of the offence of murder outlined above.

18. I find that there is no dispute that the deceased died on 4<sup>th</sup> December, 2015 and the cause of his death was unlawful. This was clearly brought out in the evidence of PW1, deceased's brother who witnesses the post mortem examination, PW2, **PC Nyongesa** who attended to the scene of murder, saw the deceased's body and caused it to be escorted to Coast General Hospital, PW4 **DR. HAKIN** who conducted the post mortem examination and produced the report thereof as Exhibit P1, PW5 **Rajab JUMA** who stated that he witnessed the incident happen and PW6 and PW7 who collected the blood samples and took photographs of the body and scene which were produced as Exhibits P4 and 6.

19. What remains in issue is whether the accused persons caused the deceased's death and if so, whether there was malice aforethought in their action.

20. From the evidence adduced, it is only PW5, **RAJAB JUMA** who gave evidence that placed the accused persons at the scene of murder

(crime). He stated that he had seen them pursue the deceased, who ran and sought refuge in a house opposite the one he was repairing an aerial on the roof. His evidence was that he saw the 4<sup>th</sup> accused person who was armed with a spear remain outside as the rest went inside the house and was piercing the deceased through the bedroom window. He also stated that he knew the accused persons prior to this incident.

21. However, I find that no other witness testified that they saw the accused persons cause the deceased's death. But the 3<sup>rd</sup> accused person, **BUNU ATHMAN** was traced to the scene of murder by the evidence of PW3, the Government Analyst who conducted an analysis of the said accused person's blood and blood swabs from the scene of crime and a vehicle that had been abandoned at the scene and found that the DNA profile generated therefrom matched. Also PW7, **DR. KHERI** testified to confirm that on 4<sup>th</sup> December, 2015, he referred the 3<sup>rd</sup> accused to MEWA HOSPITAL for treatment and surgery because of the deep cut wounds on his left hand.

22. From that evidence, I find that the prosecution has established a prima facie case against the 3<sup>rd</sup> accused person to warrant him being placed on his defence as provided for under **Section 306(1)** of the **Criminal Procedure Code**.

23. However, the Prosecution has failed to establish a *prima facie* case against the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> accused persons and hence proceed to find that they have no case to answer and acquit them respectively under Section **210** of the **Criminal Procedure Code**.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 23<sup>RD</sup> DAY OF SEPTEMBER, 2021.**

**D. O. CHEPKWONY**

**JUDGE**

**IN THE PRESENCE OF:**

**M/S VALERIE COUNSEL FOR THE STATE**

**MR. MUGANDA FOR THE ACCUSED PERSONS**

**ACCUSED 1 – 5: PRESENT**

**ACCUSED 2, 3 AND 4: ABSENT**

**COURT ASSISTANT – WINNIE**