



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CRIMINAL DIVISION**

**HIGH COURT CRIMINAL CASE NO. 61 OF 2014**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**BBOSA GIANT.....ACCUSED**

**JUDGMENT**

**INTRODUCTION**

1. The accused **BBOSA GIANT** was charged with the offence of murder Contrary to **Section 203** as read together with **Section 204** of the **Penal code**, the particulars of which were that on the 14<sup>th</sup> day of July, 2014 at **MUTHURWA ESTATE** within Nairobi County murdered **PAUL BAGANY ABDU**.

2. On 30/7/2014, he took his plea before Muchemi, J, when a plea of not guilty was recorded in his favour and the following orders made:-

“a) The accused to be escorted to Kenyatta National Hospital for treatment of internal injuries to the chest.

b) A passport, identity card and flash disk taken after arrest by the police to be returned to the accused if they are not exhibits.”

I shall refer to this order in the judgment herein as regards the orders made on the production of the passport as an exhibit.

2. By a ruling dated 31/1/2017, the court declined to release the accused on bond and therefore the same has been in custody during the period of his trial which commenced before me on 21/6/2017, wherein, to prove its case, in prosecution called and examined six (6) prosecution witnesses. When put on his defence, the accused gave a sworn statement of defence without calling any witness.

**PROSECUTION CASE**

4. The accused and the deceased were both citizens of the Republic of Uganda living together at Muthurwa in Nairobi. According to the evidence of **PW1 DAVID METHU KANDU**, on 14/7/2014 while working at Muthurwa Estate, they heard someone shouting that he was being killed and when they responded to the alarm, they found the door locked from inside. They requested the person who was inside to open but he told them that he was looking for the key. He then decided to call a police officer by the name Naibei whose number he had. Shortly thereafter neighbours responded to the alarm who then broke into the house, where they found the body of the deceased under the table.

5. **PW2 ASHA NGOIRI MOHAMED** identified the body of the deceased at City Mortuary. **PW3 PC SAMMY NAIBEI**'s testimony, was that he received a cell phone call from a residence of the area and proceeded to the scene, where he found the accused already arrested and deceased body oozing with blood from the neck. He then rearrested the accused and took him to the police post. It was his evidence under cross examination that the accused had just come from Uganda on the said day. **PW3 CORP. DORIS MADIBE** was instructed to carry out investigations on the matter, and proceeded to the scene where she found two police officers. They conducted a search and recovered a kitchen knife with blood stains under the mattress; the room was in a mess, confirming that there was a commotion. She interrogated the accused who denied stabbing the deceased.

6. She collected exhibits and later on recorded statements from witnesses including PW1, who told her that they were repairing electric fault at the said building, when they heard some-one calling for help. He stated that when they knocked at the door, the person who was inside,

told them that he had been dreaming and when they forced the door open, they found the deceased and the accused inside. She thereafter forwarded the exhibits collected at the scene to the Government Chemist for analysis.

7. **PW5 HENRY KIPTOO SANG** examined the exhibits forwarded to the Government Laboratory by the Investigation Officer and confirmed that the bed sheet, was heavily stained with human blood, the knife slightly stained while the jacket was moderately stained. The DNA profile generated from the blood on the bed sheet and the jacket matched that of the deceased, while he was unable to generate DNA profile from the knife due to poor storage. **PW6 DR. CHARLES MUTURI** conducted post-mortem on the body of the deceased and observed the following injuries thereon:-

- a. Multiple stab wounds on the right side of the head.
- b. Small stab wound on the chin.
- c. Stabbed wound on the right side of the neck.
- d. Bruises on the forehead.
- e. Bleeding into the right side of the chest.
- f. Severed neck vessels.

As a result of the examination, he formed an opinion that the cause of death was due to penetrating stab wound on the neck. In cross examination he confirmed that the original report had disappeared and therefore produced certified copy of the same.

#### **DEFENCE CASE**

8. When put on his defence, the accused stated that he came to Kenya in 2014 through the assistance of the deceased. It was his evidence that he found him staying with a friend called Omar. In the month of July, he secured a job at a garage and since he did not have a tool box, he decided to go back to Uganda for one. He thereafter left Uganda and got to Kenya on 14/7/2014 – at night. When he got to the house, he found several people at their doors which was opened and the house full of blood with the deceased lying on the bed. It was his evidence that the people who were there, pushed him down and spoke to him in Kiswahili language, which he did not understand. They then started to rob him of his things before the police rescued him. He denied killing the deceased.

9. In cross examination, he confirmed living together with the deceased and one Omar. He stated further that when he came from Uganda, he found many people at the door and passed them and entered into the house without asking them of what had happened. He confirmed that he was arrested by the police from the house.

10. **PW4 CORP. DORIS MALABE** was recalled and she produced the passport of the accused which had been in her possession, having been handed over to her by the arresting office. She confirmed that it had entry and exit stamp at Busia on 14/7/2014. In cross examination she stated that the accused arrived at Busia on 14/7/2014 and was at the scene on the material day.

#### **SUBMISSION**

11. It was submitted by Mr. Okeyo, that on 14/7/2014 the accused was in Kenya as confirmed through his passport. He submitted that the accused was placed at the scene and is the one who committed the offence. Mr. Masara submitted that the accused arrived at the scene when the offence had been committed and was only arrested because he was found at the scene.

#### **ADMISSION OF ADDITIONAL EVIDENCE**

12. After the close of the defence case Mr. Masara for accused applied to Court for the recall of the Investigating Officer, so that she may produce the accused's passport which had been retained by the police but not produced in evidence. He moved the court under the provisions of **Section 150** of the **Criminal Procedure Code** so as to enable the accused confirm that he had arrived in Nairobi on the date of the alleged murder of the deceased. Mr. Okeyo for the prosecution objected to the said production on the ground that the accused had not laid the basis for the said production and what prejudice the same shall suffer if the passport is not produced.

13. By a ruling of the court, I allowed the recall of the said witness who produced the accused passport and indicated that the reason for the said decision shall form part of this judgment as follows:- **Article 50(2)** of the Constitution of Kenya 2010 provides for right to fair trial which right includes the right to adduce and challenge evidence. The prosecution is under a legal duty to produce before the court all the evidence in their possession including those that may be adverse to their case. **Section 150** of the Criminal Procedure Code, gives the court the power at any stage in the trial or proceedings to summon or examine any person or to recall and re-examine any such person, if his evidence appears to be essential to the just decision of the case.

14. This position was stated in the case of **The state of Jharkhand Vs Sanjay Mondal & others Cr. Application. No. 201 of 2013** as follows:-

**‘In light of the aforesaid provision the trial court has powers to summon any person to give evidence, if his/her evidence is essential for just decision of the case and under Section 391 of the Code of Criminal Procedure this court also has powers to take further evidence or direct it to be taken, if the evidence is necessary to secure the ends of justice.**

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**It is common experience in Criminal Trial courts that defence counsel would raise objections wherein courts exercise powers under Section 311 of the Code or Section 165 of the Evidence Act 1872 by saying that the court could not “fill the lacuna in the prosecution case” A lacuna in the prosecution case is not to be equated with the fallout of an oversight committed by a public prosecutor during trial, either in producing relevant material or in eliciting relevant answers from witnesses. The adage ‘to err is human’ is the recognition of the possibility of making mistakes to which humans are prone. A corollary of any such laches or mistakes during the conducting of a case cannot be understood as a lacuna which a court cannot fill up. Lacuna in the prosecution must be understood as the inherent weakness or a lateral wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be foreclosed from correcting errors. If proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified. After all, functions of the criminal court is administration of criminal justice and not to correct errors committed by the parties or to find out and declare who among the parties performed better.”**

15. It is on the basis of the above stated legal principles upon which I allowed the investigating officer to produce the accused’s passport, which had been in their possession and which he had sought for purposes of supporting his defence but which the prosecution did not produce in evidence.

#### **ANALYSIS AND DETERMINATION**

16. The fact and the cause of death of the deceased was not in dispute throughout the period of this trial. PW1 who was working at a house next to where the deceased was heard someone asking for assistance lest he is killed, He sought help from the police from the nearby police post who came and when they entered the house, the body of the deceased was found under a table with a cut on his neck. **PW2 ASHA NGOIRI MOHAMMED** who used to work with the same, identified his body for purposes of post-mortem examination, having been told that he had been stabbed with a knife. **PW3 PC SAMMY NAIBEI** went to the scene where he saw the body of the deceased with blood oozing from the neck. The accused in his defence confirmed the fact of the death of the deceased.

17. The cause of death was proved through the evidence of **PW6 DR. CHARLES MUTURI**, who conducted post-mortem examination on the body which had multiple stab wounds and as a result of his examination formed an opinion that the cause of death was penetrating stab wound on the neck. He produced the post-mortem report to support his findings.

18. At the time of this judgment, there was no evidence to show that the deceased made “Jesus or Lazarus Act” by rising from the dead. I therefore find and hold that the fact and cause of death was proved beyond reasonable doubt.

19. The only issue for determination is whether the said death was caused by unlawful act of omission or commission on the part of the accused person. Both the accused and the deceased according to the evidence before court were Uganda Nationals residing in Kenya in the same single roomed house. The accused in his defence put himself at the scene but stated that when he got to the scene from Uganda, as supported by his passport, the deceased was already dead.

20. I have contrasted the accused defence with the evidence of PW1 who stated that those who were in the house refused to open the door for them forcing members of the public to break down the door. It was therefore not possible for the accused to had gained entry into the said house from outside as he stated in his defence since the door was locked from inside. Further, I find it unbelievable that the accused would have come from outside, bypassed the crowd that had gathered there as per the evidence of PW1 without being noticed only for them to turn against him. **PW3 PC SAMMY NAIBAI** went to the scene upon being called by PW1 and found the accused having been arrested at the scene, who he took to Muthurwa police post. It was his evidence that the accused came out of the house where the body of the deceased was.

21. This evidence was corroborated by that of **PW4 CORP. DORIS MADIBE**, the investigating officer, who collected from the scene a jacket which belonged to the accused and which was forwarded to the Government Chemist for analysis by **PW5 HENRY KIPTOO SANG** whose evidence was that the DNA generated from the jacket belonging to the accused matched the blood sample of the deceased thereby putting the accused and the deceased together. The accused did not deny ownership of the said jacket and I see no reason why he should have been framed for the death of the deceased.

22. I am therefore satisfied that the accused was positively identified and placed at the scene by prosecution witnesses and having warned myself on the danger of convicting the accused based on the evidence of PW3 and PW4 who were the only witnesses who placed him at the scene as corroborated by that of PW5 who provided the circumstantial evidence linking the same as was stated in the case of **KIILU & ANOTHER v REPUBLIC [2005]1 KLR 174**, and having looked at the accused account of how he was arrested, it logically follows that the accused’s identification was not mistaken. His evidence that the deceased was living together with one Omar, whom he had left with him while going to Uganda did not dislodge the prosecution case on how he was arrested.

23. I have taken note that the prosecution did not call as witnesses the arresting officers, but I am satisfied that the nature of their evidence was covered by PW1 who was the first civilian at the scene and PW3 who re-arrested the accused from the scene and was informed that he had been removed from the house where the body of the deceased was and where the murder knife was recovered.

24. On whether the accused had the necessary malice aforethought in committing the offence here, it must be noted that the accused and the deceased were put together in their one roomed house. According to the evidence of PW3, the state of the house showed that there had been commotion therein. Having been put together it was upon the accused to give an account on how the deceased met his death as provided for under **Section 111 and 119 of the Evidence Act**. The accused in his defence was silent on this account. Whereas the same through his Advocate had submitted that the accused had no reason to kill the deceased who was his friend, I would agree with the submission by the prosecution that the fact that the accused locked the door from inside showed that he had the necessary malice aforethought.

25. I have further looked at the nature of the injuries inflicted upon the deceased as per the evidence of **PW6 DR CHARLES MUTURI**, stabbed wound on the hand, chin and neck with neck vessels severed and found that malice aforethought as defined in **Section 206** of the Penal Code and as was stated in the case of **TUBERE S/O OCHEN v REPUBLIC EA (1945) 12 EACA 63** that malice can be established by considering the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used and the conduct of the accused before, during and after the attack. In this case the accused locked the door from inside and refused to open to those who responded to the deceased cry for help. He further told the people that he was dreaming by the time when he raised alarm. I am therefore satisfied that malice aforethought was proved beyond any reasonable doubt.

26. I have taken into account the accused defence that he had just come from Uganda on the said night as confirmed through his passport, which was produced in court and that there was a Mr. Omar who was living with them, whose whereabouts had not been accounted for and having admitted that he was arrested at the scene, when looked at against the prosecution case, I have come to the conclusion that the defence did not raise doubt in the prosecution case and is hereby dismissed.

27. In the final conclusion, I find and hold that the prosecution case against the accused was proved beyond reasonable doubt and accordingly find the accused guilty of murder as charged and convict the same thereof.

**Dated, signed and delivered at Nairobi this 10<sup>th</sup> day of March, 2020**

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**J. WAKIAGA**

**JUDGE**

**In the Presence of:-**

Mr. Okeyo for the state

Mwesigwa for Masara for the accused

Court clerk: Karwitha

Accused present