



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

**CRIMINAL CASE NO 18 OF 2014**

**REPUBLIC**

**VERSUS**

**MJOMBA JASON MWAMBILI**

**JUDGMENT**

**INTRODUCTION**

1. The Accused person and Shariffa Abdi (hereinafter referred to as “PW 1”) were both charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code Cap 63 (Laws of Kenya). The particulars of the charge were as follows:-

**“On the 1<sup>st</sup> day of December 2014 at Voi Town in Voi Sub County within Taita Taveta County, jointly murdered RAMADAN MWAKIO.”**

2. Charges against PW 1 were dropped on 6<sup>th</sup> May 2015 before Muya J. On 16<sup>th</sup> February 2016, the Prosecution closed its case after calling seven (7) Prosecution witnesses.
3. The court directed that counsel for both the State and the Accused person to file their respective Written Submissions on the question of whether or not the Accused person had a case to answer, which they duly did. The Accused person’s Written Submissions were dated 29<sup>th</sup> February 2016 and filed on 1<sup>st</sup> March 2016 while those of the State were dated and filed on 15<sup>th</sup> March 2016.

**THE PROSECUTION’S CASE**

4. The Prosecution urged this court to analyse and determine the case herein purely on circumstantial evidence as it admitted that there was no direct evidence showing that the Accused person had killed, Ramadan Mwakio (hereinafter after referred to as “the Deceased”).
5. The Prosecution submitted that the case it had submitted before the court satisfied the following requirements:-
  - a. **The circumstances from which an inference of guilt was sought to be drawn had been cogently and firmly established;**
  - b. **Those circumstances were of a definite tendency unerringly pointing towards the guilt of the Accused person herein;**
  - c. **The circumstances taken cumulatively had formed a chain so complete that there was no escape from the conclusion that within all human probability, the crime was committed by the Accused person and no one else.**
6. It was the Prosecution’s submission that PW 1, Beatrice Kina, Aziza Anagwe, Josephat Mwale Kilusha and Haji Msagha Mwakio (hereinafter referred to as “PW 2”, “PW 3”, “PW 4” and “PW

- 5" respectively) had all testified that the deceased was at PW 1's house at Shake Building and was found lying dead in the said building's compound.
7. It was its averment that the injury suffered on the forehead by the Deceased was the cause of his death and that no one saw him falling down the stairs and consequently, the chain of events pointed to the Accused person as the doer of the unlawful act that cause the Deceased's death.
  8. It was therefore the Prosecution's submission that the Accused person was duty bound to explain what happened at PW 1's house by being placed on his defence and that it was immaterial whether or not he had motive which made him carry out his unlawful actions as there is no requirement in law that a motive must be proven by the prosecution.
  9. It argued that the establishment of motive could assist to explain the reason for an act of murder but that the absence of the same did not negate a charge of murder and therefore urged the court to put the Accused on his defence.

### **THE ACCUSED PERSON'S CASE**

10. The Accused person reiterated the Prosecution's position that its case was purely based on circumstantial evidence. He submitted that there were several variances in the evidence of Prosecution witnesses regarding the weather conditions on the material date and who the Deceased actually fought with and that in any event, no one saw him fight with the Deceased.
11. He argued that the injuries the Deceased sustained could have been caused following a fall due to a slippery surface or hitting himself against the wall, floor or edges of the staircase.
12. It was therefore his submission that as none of the Prosecution witnesses showed that he killed the Deceased, he had nothing to answer to the court.

### **LEGAL ANALYSIS**

13. PW 1's evidence was the most important in this case as she was the only direct witness, having been present when both the Accused person, who had been her boyfriend for about a month, and the Deceased were in her house on 3<sup>rd</sup> Floor of Shake Building at the same time. It was her evidence that she had wanted to break up with the Accused person as he was too possessive.
14. She testified that the Accused person came to her house at about 6.30 pm with a bottle of alcohol and food. She was with her friend, one Defence, at the time. She stated that the Accused person left after about twenty (20)- thirty (30) minutes after she insisted that he leave.
15. She said that he left but that he came back to her house at her house at about 7.30 pm and found her in her house together with the Deceased. He had knocked on her door politely but after she took time to open, the knocks on her door became rougher. She stated that the Accused person had gone to her house to find out why she had not been picking his telephone calls. By this time, Defence had left to check on her father who had been admitted to hospital.
16. When she opened the door, the Accused person pushed her and she fell on the couch. He then fell on the Deceased who was seating on another couch. The Accused person's back was on her face so she did not see what happened. She said that she pulled the Accused person's shirt which gave the Deceased an opportunity to escape from the house. She said that the altercation was very fast, at most two (2) minutes but was, however, emphatic that the Accused person never hit the Deceased and that the two (2) of them never fought. She reiterated this fact during her cross-examination.
17. It was her testimony that no one went after the Deceased but that he left running. The Accused person locked her door and they continued arguing for about two (2) hours. She said that she only knew that the Deceased died when the police came to her house at about 11.00 pm.
18. PW 2 said that she was a Clinical Officer at Mount View Nursing and Maternity and that she resided at Shake Building at the material time. She stated that she was standing near the gate with one of her colleagues, called Martin at around 7.05 pm, when they saw a man running down the stairs towards the main gate holding the right side of his forehead with his right hand. She averred that she did not see anyone chasing him. She spoke to Martin for about twenty (20) minutes.
19. After she finished with Martin, she went to her house. When she got to 1<sup>st</sup> Floor, Martin called her to come downstairs as there was a man lying near the gate. It was her evidence that at the time, they did not know that it the same man they had just seen running down the stairs. They saw he

- had a small swelling on his forehead and he was holding on the gate with his right hand. They checked his condition and found him to have been unconscious with a weak pulse. The man was thereafter taken to the hospital.
20. During her cross-examination, she said that it was raining heavily on that day and that the surface area was very slippery. She also said that there was no sufficient light in the staircase. She said that the staircase was not wet but that if someone ran carelessly, he could fall.
  21. PW 3 and PW 4 confirmed the fact that the Accused person was lying near the gate and was holding it with his right hand. They also confirmed that it was raining heavily and that there had been a blackout on that date. PW 4 said that he was in his friend's house to watch News when lights went off at about 7.30pm. At that time, he could hear people talking loudly and pushing each other in PW 1's house. He left after about five (5) minutes. He said that the staircase was not wet.
  22. It was when he reached downstairs with Benson when they met some ladies who informed them that there was a man who had come down the stairs running and he fell at the gate. He said that the man was unconscious and they took him to Moi Hospital where he was pronounced dead after a nurse examined him. They then went and recorded their statements at Voi Police Station.
  23. PW 5 who was the Deceased's father confirmed having identified the body at the Moi Hospital Mortuary and being present during the postmortem examination. He said that he saw a dent on the Deceased's forehead which Dr Walid Marei Ahmed (hereinafter referred to as "PW 7) confirmed in his Post Mortem Report. PW 7 referred to this as a depressed skull fracture of the frontal lobe. There was also haematoma on the frontal scalp. He identified the said injury as having been the cause of the Deceased's death and that there was no need to open the skull or do any internal examination as the injury was obvious.
  24. On his part, No 44341 PC Stanley Kirui (hereinafter referred to as "PW 6), the Investigation Officer in this matter, reiterated the evidence of PW 1, PW 2, PW3 and PW 4. He added that on that day it had rained heavily between 5.00pm and 7.00 pm and there had been no lights on that day and further that there was water in the corridors in the Shake Building when they went to PW 1's house. He said that the stairs were steep.
  25. Evidently, PW 7 did not adduce evidence to demonstrate the chain he relied upon to find that the Accused person was liable for the Deceased's death and hence charge him with the offence herein. He further stated that PW 1 had told him that the Accused person had fought the Deceased, a fact that PW 1 was categorical never happened.
  26. There was consistent evidence showing that it had rained heavily on the material date and that there were no lights at Shake Building. PW 1 was emphatic that there was no fight between the Accused person and the Deceased. The Accused person raised the possibility of the Deceased having hit himself after he left PW 1's house. This was not far-fetched bearing in mind the weather conditions and the amount of visibility in the staircase area.
  27. PW 4 was clear that lights went off at 7.30 pm and that there had been lights between 7.00 and 7.30 pm when he was watching News at Benson's place and that he had the commotion in PW 1's house a few minutes after 7.30 pm. He said he was downstairs between 7.30 pm-7.40 pm.
  28. PW 1 had said that the Accused person came at about 7.30 pm and the commotion in her house did not last more than two (2) minutes. It does appear to this court that the Deceased was in the stair case area after 7.30 pm when there were no lights.
  29. Against the backdrop of PW 1's evidence that she never saw the Accused person hit the Deceased when they were in her house and that the Accused person never left her house for the next two (2) hours bringing the time to about 9.30 pm, doubts are created in the mind of this court as to what exactly caused the injury on the Deceased's forehead.
  30. Could there have been a possibility of the Deceased having hit himself against the wall, the stair case railings or falling as he ran down the staircase in the darkness on a rainy and wet day as had been hypothesised by the Accused person? The answer is in the affirmative and cannot be ruled out.
  31. The Accused person was not duty bound to explain to the court what happened at PW 1's house after he fell on the Deceased for the reason that PW 1 did in fact tell the court that the Accused person did not hit the Deceased. As no other person saw the Accused person hit the Deceased so as to cause the injury on his forehead, it would be purely speculative to say for a fact that the said injury was caused by the Accused person.

32. This was not circumstantial evidence as had been contended by the Prosecution. Circumstantial evidence can be accepted when an accused person's guilt can be inferred based on the evidence adduced by the prosecution in which case it can only be displaced by an accused person giving his side of the story. The chain of events in a case based on circumstantial evidence must be so connected that an accused person would find it difficult, if not impossible, to extricate himself or herself from the unlawful act he is being accused of.
33. Indeed, an accused person ought not to be put on his defence if at the close of the prosecution's case, inference of his guilt cannot be remotely inferred. There was no evidence that was adduced by the Prosecution to demonstrate that there was malice aforethought on the part of the Accused person as it had contended. The Prosecution did not adduce evidence that would satisfy the ingredients of malice aforethought as defined in Section 206 of the Penal Code.
34. The cases of **GMI vs Republic [2013] eKLR, Republic vs Kipkering Arap Koske & Another 16 EACA 153, Musoke vs Republic [1958] EA 715 and Teper vs Republic [1952] AL 480** it relied upon by the Prosecution would thus not assist it at all in proving that it was able to demonstrate that a *prima facie* had been established against the Accused person to warrant him being put on his defence. It would be prejudicial to put the Accused person on his defence based on speculative evidence or unproven facts.
35. From the circumstances of the case herein, it is indeed unfortunate that no one will ever know exactly what happened to the Deceased. The Prosecution failed to present to this court, a cogent and believable case.
36. Putting the Accused person on his defence to fill the gaps of the Prosecution case or as the Prosecution opined so that he can tell the court what exactly happened would be shifting the burden on him to show that he did not cause the death of the Deceased. Section 111 of the Evidence Act Cap 80 (Laws of Kenya) that the Prosecution relied upon would not be applicable herein.
37. This would be against the tenets of rules of natural justice that a person is presumed innocent until proven guilty based on evidence that has been presented before a court by a prosecutor.
38. Accordingly, having carefully considered the evidence by the Prosecution witnesses and the Written Submissions by both the counsel for the State and the Accused person and the case law, the court came to the firm conclusion that *noprima facie* case had been established to warrant the Accused person to be put on his Defence.

**DISPOSITION**

39. In the circumstances foregoing, the upshot of this court's decision is that the Accused person is hereby acquitted under Section 210 of the Criminal Procedure Code as the Prosecution failed to prove its case beyond reasonable doubt.
40. The Surety in this case is hereby discharged from any further obligations to this court in respect of the Accused person herein.
41. It is so ordered.

**DATED and DELIVERED at VOI this 31<sup>st</sup> day of March 2016**

**J. KAMAU**

**JUDGE**

In the presence of:-

..... for State

.....for Accused person

Simon Tsehlo– Court Clerk