



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**  
**CRIMINAL CASE NO. 43 OF 2013**

REPUBLIC .....PROSECUTOR

VERSUS

HAMISI HASSAN OSMAN .....1<sup>ST</sup> ACCUSED

MOHAMED BASHIR MOHAMED.....2<sup>ND</sup> ACCUSED

**RULING**

HAMISI HASSAN OSMAN AND MOHAMED BASHAR MOHAMED are charged with the offence of MURDER contrary to section 203 as read with section 204 of the penal code.

The particulars of the offence are that;

“On the night of 3<sup>rd</sup> and 4<sup>th</sup> day of September,2013 at Majengo mapya –Makao Mema area in Likoni district within Mombasa county, the accused jointly with others not before court, murdered J A H.

The accused were first arranged in court on the 18<sup>th</sup> day of September, 2013. On 30<sup>th</sup> day of September, 2013 when the information was read out to them they took a PLEA OF NOT GUILTY. The case commenced hearing on the 4th November, 2014. The prosecution called a total of six (6) witnesses and closed their case.

The prosecution’s evidence was that on 4<sup>th</sup> September, 2013, a lady reported to Likoni police station that her daughter, had gone missing after she had left home to go and buy airtime from the shops the previous day. The OCPD, Likoni police station Galgalo Ginyo instructed Pw2, Azan Mancha to proceed to the scene, where the said daughter was said to have been left by the 2<sup>nd</sup> accused person, MOHMMED BASHIR MOHMED. Pw3 was accompanied to the scene by Sergeant SAMMY AKORI and CORPORAL driver NJERI. That at the scene, which was an incomplete building, they found the 1<sup>st</sup> accused MOHAMED HASSAN outside and he told them that the building was his. They entered the building and found three (3) holes which had been dug. On being interrogated, the 1<sup>st</sup> accused told them that he had been informed by his workers that a person had been covered into a hole. The officers searched and found the body of the deceased inside a drum. They were joined by Pw6, PC OSURI OTIENO, then at DCI, Likoni.

The scenes of crime personnel, Pw4, Sergeant MICHAEL ODUOR was called and he took photographs of the body, inside and outside the drum. (Exhibits) P1 to

They also collected swabs from the deceased' body, clothes, and her feet and a gunny bag which had stains.

Pw6 took a rough sketch plan of the scene which he produced as exhibit P 5 (a).

They arrested the two accused persons pending further investigations and recorded statements from the deceased's mother, brother cousins, uncles and the suspects.

They escorted the two accused to coast general hospital on 5.9.2013 where their blood samples, public hair and mouth swabs were taken following a court order.

And on 6.9.2013, a post mortem examination was conducted on the deceased's body by Dr. K N Mandalia , a pathologist who observed;

- 3 cut wounds on the right parieto-temporal aspects
- Multiple cuts on the scalp close to the occipital parietal area;
- Bruises of various dimensions on the right shoulder on the back, buttocks and lateral thigh which appear like scratch marks;
- Bruises on the back, and shoulders suggesting friction wounds as if the body had been moved;
- Two linear cuts just below the chin;
- The vaginal area was covered with sand.
- Moderate decomposition of the external organs.

According to Pw3, the doctor, the cause of death was due to intracranial haemorage due to cut wounds to the head, and a fracture of the left femer was suggestive of sexual assault. The doctor also took specimen of blood, vaginal swabs, pubic hair, clothes for possible dry semen and blood which were handed over to pw6 for on ward transmission to a government analyst.

Pw6 marked all the samples obtained from the deceased's body and those from the accused persons and prepared an exhibit memo form. He escorted the said samples and swabs to the government analyst for forensic analysis. Pw5, John Kimani Mungai is the government analyst who received the samples from Pw6 with a request that he examines them and determines the presence of any transfer evidence. In cross examination, Pw5 said that he did not find any trace of the DNA between the accused persons to the deceased. He did not find any evidence to connect the accused persons to the rape of the deceased.

According to Pw6, the accused persons were arrested and charged with the murder of the deceased. He said that the 1<sup>st</sup> accused person was found to be the owner of the building under construction where the deceased's body was found. The 2<sup>nd</sup> accused was said to have been the one who left with the deceased to purchase airtime on the night of 3.9.2013 at around 8.00pm but returned home alone. He was therefore the last person to be seen with the deceased by the relatives.

Pw6 produced a rough sketch plan, fair sketch plan, a pair of torn clothes, Kitenge, petticoat, black bra and a white sack a exhibit P5 (a) and (b) 6 and 7 respectively.

At the close of the prosecution's case, I find that the burden of proof in a criminal case lies on the prosecuting party, the state.

The accused persons have been charged with an offence under section 203 of the Penal Code. The aforesaid section stipulates that

***“Any person who of malice afore thought causes the death of another by unlawful act or act of omission is guilty of murder”.***

Therefore, the state is legally duty bound to prove three ingredients;

- (i) The death occurred;
- (ii) The said death was occasioned by the accused’s unlawful act or omission
- (iii) In committing the said act, the accused had malice aforethought.

It is trite law that the accused person does not have the burden of proof.

In the present case, it is not in dispute that the death of the deceased did occur. Pw1, SERGEANT SAMMY AKORI, PW2, ISSA AZAN MMANCHA and PW6, the investigating officer, OSURI OTIENO, gave evidence as to how a report of the deceased missing was reported to the OCPD, Likoni police station and a search for her led to the recovery of her body in a drum inside an incomplete building under construction. DR. K N MANDALIA who performed the post mortem examination and produced a report thereof confirming the deceased had died and cause of her death was intracranial heamorrhage due to cut wounds to the head.

The next issue to consider is whether the state adduced adequate evidence to prove out the accused were responsible for the death of the deceased.

The analysis of the evidence adduced by the prosecution’s witnesses revealed that the accused were charged based on circumstantial evidence.

According to the evidence of the prosecution witnesses, especially the investigating officer, the 1st accused HAMISI HASSAN OSMAN is the owner of the building where the deceased’s body was found on the morning after the night of 3<sup>rd</sup> September, 2013. He was the held suspect even after telling the police that he was informed of the incident by a person called IDD that there was a body in one of the pits in the construction site.

The 2<sup>nd</sup> accused on the other hand was held suspect and charged with the offence of murdering the deceased because he was the last person to be seen by their relatives having escorted the deceased to buy airtime from the nearby shops

I find no evidence directly linking the 1<sup>st</sup> and 2<sup>nd</sup> accused to the murder of the deceased. No one saw the deceased being murdered.

There is also no evidence that the accused persons knew each other or were seen together prior to the body of the deceased being recovered in the premises alleged to belong to the 1<sup>st</sup> accused.

There is evidence that the 1<sup>st</sup> accused was informed of the said body having been found in a pit in the said building by the fundis, more specifically one named IDD, but none of these fundis is alleged to have been interrogated or called to record a statement so as to testify in this case.

The mother of the deceased and other relatives did not adduce any evidence or attend the proceedings to confirm the allegations by the investing officer that the 2nd accused went to each of his uncles to inquire if the deceased had reached home without informing them that there had been an incident of two people emerging from the unfinished construction who had intercepted them.

There is further no evidence in the post mortem report (exhibit P2) and DNA report from the government chemist (exhibit P4) that links any of the accused persons to the death of the deceased.

I therefore find no direct or circumstantial evidence that the accused persons committed the offence. It is clear from the evidence adduced that the state left out most witnesses.

All in all, I find that the ingredients of the charge of murder have not been proved by the state. In that case, the issue of malice aforethought does not arise.

I thus find that the evidence adduced at the close of the prosecution case is inadequate to sustain a conviction and find the accused persons not guilty under section 306 of the Criminal Procedure Code.

Orders accordingly.

**Ruling read, signed and dated this 19<sup>th</sup> day of December, 2016.**

**D. O. CHEPKWONY**

**JUDGE**

In the presence of:

M/s Mutua for the state

Accused persons – Both present

C/Clerk- Kiarie