



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MALINDI**

**CRIMINAL CASE (MURDER) NO. 8 OF 2013**

**REPUBLIC.....PROSECUTOR**

**-VERSUS-**

**PETER MBITHI MASILA.....1<sup>ST</sup> ACCUSED**

**MOHAMMED PAOLO MSIKA NGALA.....2<sup>ND</sup> ACCUSED**

**DISMAS NGUTA NTHENGE.....3<sup>RD</sup> ACCUSED**

**J U D G M E N T**

1. The three accused are jointly charged with the Murder Contrary to Section 203 as read with 204 of the Penal Code, of **Tom Samuel Bozo** between 13<sup>th</sup> January and 15<sup>th</sup> January 2013. The accused denied the charges.
2. The prosecution case was that the deceased operated a boda boda business. He left home on the evening of 13/1/2013 allegedly to pick up a customer from Bore Singwaya but never returned home. By 7.00pm his phone was off. After 3 days of searching his body was found at a place called Msitu wa Paolo.
3. It is the prosecution case that on the night of 13/1/2013 the deceased in the company of the 2<sup>nd</sup> and 3<sup>rd</sup> accused were seen together by some witnesses. Later the 2<sup>nd</sup> accused was allegedly seen riding in the motorcycle of the deceased, alone.
4. Before this, other witnesses had allegedly seen the deceased in the company of the 1<sup>st</sup> accused. They said that the deceased said he was taking the 1<sup>st</sup> accused to Bore Singwaya. Later that night the 1<sup>st</sup> accused who allegedly appeared disheveled and soiled with mud arrived, shirt-less and spent the night at the home of **Samuel Mwangangi Komu** PW6 at Bore Singwaya. According to the post mortem form, the deceased died from asphyxia due to strangulation.
5. The 1<sup>st</sup> accused in his unsworn defence stated that he went to Bore Singwaya on 13/1/2013 and spent the night at his grandfather's home leaving the next day. He said he hired the deceased's services to go to his grandfather's home.
6. The 2<sup>nd</sup> accused said that on 13/1/2013 he closed his business and took a motorcycle, a *boda boda*, home. He spent the night there but on the next day while shopping in Malindi he was accosted by a large ground of people including PW4 who questioned him concerning the motor cyclist who took him home. He said he did not know the cyclist who took him home. He denied committing the offence and said that PW4 who implicated him owed him money which he refused

to pay and threatened him as an “outsider” trading in Marafa

7. The 3<sup>rd</sup> accused testified that he was a *tuk tuk* driver in Mombasa but his home is in Bore Singwaya. That he went to Bore Singwaya on 13/1/2013 where he witnessed a large group of people shouting that “Wabara” (upcountry) people must leave the area. He went home quickly but on the next day he witnessed a similar outburst from one **Joseph Kombe Nzai** (PW4) who later led a group of people to his home saying: **“This is a man who used the motorcycle yesterday”**.
8. He was allegedly saved by one person who intervened and had him escorted to the police station. He said PW4 is a neighbour with whom he had an extended land dispute. He later learned that houses owned by his Kamba tribesmen were razed by the local Giriama people.
9. Regarding the deceased’s cause of death, there is no dispute that he did not die of natural causes. The post mortem report indicates that he died of strangulation. In addition his right eyeball was gouged out and he had multiple punch marks on the skin on all the limbs, an indication of pricking by poisonous substance prior to his death. The person or persons who occasioned these injuries clearly intended to kill him.
10. There is no dispute that the deceased was a boda boda cyclist operating in Marafa and that on the material date he was seen in the company of the 1<sup>st</sup> and 2<sup>nd</sup> accused. The two accused who admit to have hired his services at different times, the 1<sup>st</sup> accused allegedly at 4.00pm to go to the home of his grandfather **Samuel Mwangangi Komu** (PW6), and the 2<sup>nd</sup> accused to go home after work. The court must determine whether the three accused persons jointly murdered the deceased.
11. The key witnesses whose evidence tended to connect the accused with the offence include **Fredrick Bozo Baya** (PW2) a relative of the deceased. In the initial stages this witness made inquiries alongside **Esther Samuel Mbotso** (PW1) the deceased’s mother. PW2, 4, 5 claimed to have heard the confessions allegedly made by the 2<sup>nd</sup> and 3<sup>rd</sup> accused while PW7 and 8 allegedly met the deceased with the 1<sup>st</sup> accused on the evening of 13/1/2013 at 6.00pm. Finally, PW4 who testified that he last saw the 2<sup>nd</sup> and 3<sup>rd</sup> accused with the deceased at 8.00pm on the day he disappeared.
12. Although it is difficult to ascertain the timings of the various sightings by witnesses of the deceased in the company of the accused, it does seem that the deceased was indeed seen at different times of the material evening with the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> accused. They were the first suspects when the deceased went missing and it would appear that following their arrest the body of the deceased was traced.
13. The prosecution relied on evidence by PW2, 4 and 5 among other villagers who took the initial investigatory steps. Although PW5 the area assistant chief testified that the 3 men confessed to the murder, it seems from PW2’s evidence that such confession was made after the first suspects- the 2<sup>nd</sup> and 3<sup>rd</sup> accused confessed to the police or after they were placed in police custody. These confessions cannot form the basis of a conviction in light of Section 25A (1) of the Evidence Act which states:-

**“A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court by a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of Police, and a third party of the person’s choice”**.

14. Equally, evidence that the 1<sup>st</sup> accused appeared in a disheveled state in the material night at PW3’s home does not help the prosecution case. The stolen motor cycle was not recovered, hence the evidence by CPL Ogola (PW12) that the 2<sup>nd</sup> and 3<sup>rd</sup> accused led him to a certain place in

pursuit of the purchaser does not advance the prosecution case.

15. The police, despite receiving early reports on the disappearance of the deceased from his mother decided not to take action, instead advising her to make inquiries. This action thrust the burden of the initial inquiries upon the said witness PW1, her relative PW2 and the local Assistant Chief (PW5). Useful leads and information was mishandled by these villagers as well as the police at Administration Police Camp, and ultimately the investigators who seemed content to merely string together sometimes discordant witnesses.
16. The accused have given an explanation regarding their involvement with the deceased on the material evening. The explanations may or may not be true. There is only a strong suspicion cast upon the accused in regard to the murder. But there is no credible evidence to prove that after using the deceased's services, they strangled him in order to steal his motorcycle. The little credible circumstantial evidence mounted against them leaves too many loose ends.
17. In the result I find that the prosecution has failed to prove its case against the accused to the required standard. I will therefore acquit them accordingly.

Written and signed at Naivasha this 30<sup>th</sup> January, 2015.

**C. W. MEOLI**

**JUDGE**

Delivered and signed at Malindi this 26<sup>th</sup> day of February, 2015

**SAID J. CHITEMBWE**

**JUDGE**