



**REPUBLIC OF KENYA**

**HIGH COURT OF KENYA AT MOMBASA**

**CRIMINAL CASE NO.24 OF 2011**

**REPUBLIC .....PROSECUTOR**

**VERSUS**

**MWARINGA CHULA MWARINGA .....ACCUSED**

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

1. Maringa Chula Mwaringa (“**The Accused**”) faces a charge of Murder contrary to Section 203 as read with Section 204 of The Penal Code. It is alleged that on 10<sup>th</sup> July 2011 at Kazameni village, Mwawesa location in Rabai District within Kilifi County he murdered Shauri Gundi (**the Deceased**).
2. In a bid to prove its case the prosecution called 10 witnesses. Having heard them I formed the view that there was sufficient evidence to require the accused to make a Defence to the charge he faced. The accused opted to make a sworn statement.
3. Maskati Saha (PW4) is the stepbrother of the Deceased. PW4 told Court that on 10<sup>th</sup> July 2011 at about 1.30p.m he met the Deceased who told him that he was from the home of the accused. Later at about 9.00p.m he received information from his nephew that the Deceased was lying in a nearby bush in critical condition.
4. When PW4 saw the Deceased he had a swollen face. He was alive and breathing but he needed urgent help. PW4 told Mathias Mware Mtana (PW 5) and Justus Dena Bashsihi (PW 7) about his brother’s condition. PW5 is the Assistant Chief of Bwagamoyo sub location where the Deceased was a resident while PW7 was a village elder.
5. PW5’s testimony was that on receiving news from the area Councillor about a fight that had taken place in his sub location he instructed PW7 to visit the area. Later at about 1.00a.m, PW4 and PW7 came to his house and informed him that the Deceased was in a critical condition. They made an effort to get a vehicle to take the Deceased to hospital.
6. One of the people whose help PW7 sought in assisting the Deceased was said to be Said Kombo (PW8) a farmer in the area. He is the one who was able to secure the vehicle that took the Deceased to the Coast General Hospital.
7. On that very night PW4 informed the Deceased’s wife Eunice Mwenda Ziro (PW 1) that the Deceased had been badly injured. PW1 also went to the scene. He found the Deceased lying in critical condition and unable to talk. The scene was about 200 metres away from their home. The Deceased was taken to Mariakani Sub-District Hospital and later to Coast General Hospital where he met his death on 15/07/2011.
8. Eunice Mkudzi (PW 2) who is a resident of Kazameni told Court how she was at home on 11<sup>th</sup> July 2011 when at about 7.00p.m she had someone groan near the road. She never went there. In the early hours of the following day she saw a matatu come to where the noises were and take the Deceased.
9. Felister Munyasi Dzuya (PW3) told Court that a person by the name Wekavuna told her that some

- people were fighting near her house. This was on 10<sup>th</sup> July 2011 at about 7.00p.m. PW3 went to where the fight was but only found the Deceased. The other person had left.
10. After the death of the Deceased Dr Lucy Wahome (PW 6) was asked to conduct a postmortem on his body. PW 6 holds a Bachelor of Medicine & Surgery from the University of Nairobi. She performed the post-mortem on 20<sup>th</sup> July 2012. She noted that the body had bruises covering the head and face. Internally, the Deceased brain was covered in blood but had no fracture. The rest of the body was normal. The Doctor formed the opinion that the cause of death was a head injury. Whilst testifying she added that the possible weapon used was a blunt object.
  11. The Police officer who investigated the death was Joseph Ndirangu (PW 10). On 15<sup>th</sup> July 2011, PW4 and PW5 reported the death of the Deceased to him. PW5 told him that the Deceased had on 10/07/2011 fought with the accused after a disagreement. Together they visited the scene of the fight which was a small bush on the side of a road. There he recovered what he thought was the weapon of attack, a metal rod (P Exhibit 2). He also told Court that on 14<sup>th</sup> July 2011 the accused had made a report to the Police under OB 9/14/7/2011 that the Deceased had injured him.
  12. In cross-examination, he narrated the frustration he encountered in investigating the case. None of the witnesses who co-operated were eye witnesses. One person who is said to have witnessed the fight between the Deceased and the accused is an elderly lady called Kavuna. PW3 had testified that Kavuna told her this. The fight is said to have taken place at the farm of Ndune Munga (Mzee Devera). The frustration of the investigation officer is that he was unable to find Kavuna and Munga.
  13. It was PW10's further evidence that the Deceased mentioned the name of the accused as his assailant. The witness also maintained that the accused himself said that he had fought with the accused.
  14. In his sworn statement, the accused denied killing the Deceased. That he never left his home at Rabai at all on 11<sup>th</sup> July 2011. While on 14<sup>th</sup> July 2011 he visited Mukakuni to buy uniform for his children. He denied visiting Kaloleni Police Station. He does not even know where it is.
  15. At about 4.00 p.m. on 15<sup>th</sup> July 2011 the village elder, a subchief and some Police officers visited him at his house. Asked to accompany them to the Police Station, he obliged. He was questioned about the Deceased and later forced to sign a certain document whose contents he did not understand. He claims to be illiterate.
  16. That he remained in the cells up to 12/11/2011 when at about 4.00p.m. he was taken to a place not known to him. There PW10 showed him an iron rod (P Exhibit 2) and forced him to hold it with his hands.
  17. The accused also spoke of an injury he sustained to his left hand on 14<sup>th</sup> June 2011 whilst working in his farm. That was one month before the date when it is alleged that the accused was involved in a fight. He says that by that time he had received treatment for his injured finger.
  18. The investigating officer (PW10) lamented that this was a difficult case to investigate because the crucial witnesses were not cooperative at all. And this Court notes that save for the evidence of PW10 none of the other witnesses gave evidence that implicated the Accused.
  19. On his part PW10 stated that on 14<sup>th</sup> July 2011 the Accused made a report that he had been injured by the Deceased. That report is said to have been captured in OB entry No.9/14/07/2011 and in the Investigation Diary. The accused in his Defence denied visiting the Police Station on that day. So there is an assertion and a denial! For some reason PW10 did not find it necessary to produce either the OB or the Investigation Diary. This was the very Officer who was complaining about the non-cooperation of witnesses yet he himself was failing the Prosecution case by not producing critical evidence. The Officer made an assertion which he did not prove.
  20. PW10's other evidence was that the Deceased mentioned the name of the accused as the assailant. But PW10 never gave details of when and where this happened. In addition he never testified on the circumstances under which the Deceased mentioned the accused and the exact words spoken. A Dying Declaration needed to be cogently proved as it is a statement that cannot be subjected to cross-examination.
  21. Another piece of evidence by PW10 is that the Accused himself whilst at the Police Station, said that he had fought with the Deceased. That, if true, would amount to a confession in terms of Section 25 of The Evidence Act which provides,

**“A confession comprises words or conduct, or a combination of words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence.”**

But, that alleged confession was not made in accordance with The Evidence (Out of Court confessions) Rules, 2009. For that reason the alleged statement is inadmissible and counts for nothing.

22. In the totality of the evidence by the Prosecution case, the charge against the accused person is not proved as required by the law. The Court acquits the accused person of the offence which he faces. He is free to go unless detained for some other lawful reason.

**F. TUIYOTT**

**J U D G E**

**COUNTERSIGNED, DATED AND DELIVERED THIS 28<sup>TH</sup> DAY OF FEBRUARY, 2014.**

**J U D G E**

**IN THE PRESENCE OF:**