



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CRIMINAL CASE NO. 45 OF 2009**

REPUBLIC.....PROSECUTION

VERSUS

CHRISTOPHER MUSEMBI NGELA.....ACCUSED

**RULING**

The accused **CHRISTOPHER MUSEMBI NGELA** faces a charge of **MURDER CONTRARY TO SECTION 203 OF THE PENAL CODE**. The particulars of the charge were that

**“On the 29<sup>th</sup> day of October, 2009 at Tabia village, Majimboni sub-location, Msambweni District within Coast Province murdered RAPHAEL MWANGI KAMAU.”**

The accused entered a plea of ‘*Not Guilty*’ to the charge and his trial commenced before me on 23<sup>rd</sup> June, 2011. The prosecution led by **MR. ONSERIO** state counsel called a total of FIVE (5) witnesses in support of their case. **MS. KAYATA** Advocate appeared for the accused.

The brief facts of the case as narrated by **PW1 JOHN KAMAU MWANGI** who was the father of the deceased (a child aged 2 ½ years old) is that on 29<sup>th</sup> October, 2009 at 9.30 a.m. he was at Ukunda shopping centre. He received a call from one **OMAR TSUMA** who was doing a job in his home informing him that the deceased had been hit on the head with a rungu. **PW1** rushed home immediately and found his son lying dead with injuries to the head. The said ‘*Omar*’ named accused who was a neighbour as the man who had hit and killed the child. The accused was arrested by community policing officers and taken to the police station. He was eventually charged.

At this stage the court is required to rule whether the evidence on record has established a *prima facie* case to warrant the accused being put on his defence. In any charge of murder the prosecution must tender concrete proof of the following three ingredients.

1. The facts and the cause of death of the deceased.
2. Proof that the accused by the commission of an unlawful act or omission caused the death of the deceased.
3. Proof that said unlawful act or omission was committed with malice aforethought.

In this case the fact of the death of the child is not in any

doubt. Aside from **PW1** who was the child’s father several other

witnesses testified that they saw the body of the deceased child lying on the ground in his father's compound. All these witnesses who are fellow witnesses are able to identify the deceased whom they knew well as 'Raphael Mwangi Kamau'. Thus there is no doubt at all about the fact of the death of the deceased.

Proof of the **fact** of death alone is not sufficient to prove a charge of murder. The prosecution must go further and adduce evidence to prove the cause of death of the deceased. In this case it is alleged that the deceased was hit over the head with a rungu. Although witnesses claimed that a rungu was recovered at the scene, the same was **not** produced as an exhibit in this case. The best evidence to prove the cause of death would be an autopsy report prepared by a qualified medical practitioner. No such post mortem report was produced in this case and no medical doctor testified with respect to the cause of death. Even if the court were to accept that indeed the deceased was hit over the head with a rungu, medical evidence would be necessary to prove the effect that such a blow would have had on the deceased and how such blow caused to his death. Failure to call a medical expert as a witness means that the cause of death remains unproven in this case.

Even if the court were to proceed on the assumption that the cause of death has been sufficiently proved (which is **not** the case here), the prosecution is obliged to adduce evidence to prove that it was the accused who inflicted the fatal blow to the deceased. **PW1** the child's father did not witness the incident. The other neighbours who rushed to the scene also did not witness the incident. They all testify that one '**MEJUMAA**' the househelp named the accused as the one who hit the deceased. **PW2 SWALLEH MUDIRINI** a neighbour in his evidence states as follows:

**"I asked who had beaten the child. I was told Christopher Musembi (the accused) had beaten the child and had run away. The househelp told me this. Her name is Mejumaa....."**

The said househelp **MEJUMAA SWALLEH** testified as **PW5** in the case. Surprisingly she states that she did not herself witness the attack upon the deceased. **PW5** explained that she was not present when the incident occurred. She had left the homestead to go to the shamba and she left the children with one 'Omar'. It is only the shouts from this 'Omar' which alerted her of the incident. Under cross-examination by defence counsel **PW5** clearly states

**"Omar told me that accused hit the child. I did not witness the incident ....."**

Therefore it appears that the only eyewitness to the incident was

'Omar' who was not called as a prosecution witness. The evidence

of **PW5** stating what 'Omar' told her is hearsay evidence and cannot form the basis for a conviction. No reason is given by the prosecution as to why this 'Omar' was not called to testify. He was a crucial witness and failure to call him is fatal to the prosecution case. As it is there is no direct evidence to link the accused to the attack upon the deceased. The '*actus reus*' of the offence of murder has not been sufficiently proved as against the accused.

Even if this court were to proceed on the assumption that the *actus reus* has been proved (which is not the case) the prosecution would be obliged to prove that the accused was possessed of the requisite *mens rea* for the offence of murder being malice aforethought. It came to light from the evidence and became apparent during the trial that the accused suffered from a severe mental ailment. On several occasions this trial has to be postponed because the accused was not in a fit mental state to follow the proceedings. Ms. Kayata defence counsel complained that she was unable to get proper instructions and on several instances I myself noted that the accused was delusional and clearly would not comprehend the proceedings. All this contributed to delay in concluding the prosecution case as the accused had to undergo lengthy therapy before he was found to have recovered sufficiently to follow the trial. Given these circumstances clear doubt exists as to whether the accused would have been capable of formulating the required *mens rea* for the charge of murder. This doubt was never addressed much less dispelled by

the prosecution. If anything the Government psychiatrist did appear in court on 18<sup>th</sup> March, 2013 and confirmed that the accused suffers from chronic schizophrenia which renders him delusional and paranoid. The psychiatrist further confirmed that the accused has been under treatment for this mental illness for a long period. In those circumstances I cannot find that the *mens rea* for murder has been proved to exist.

Based on the foregoing I find that none of the ingredients of the offence of murder have been sufficiently established in this case. I find that no *prima facie case* has been made out by the prosecution. I therefore enter a verdict of '*Not Guilty*' and I acquit the accused under section 306(1) of the Criminal Procedure Code. The accused is to be set at liberty forthwith unless he is otherwise lawfully held.

**Dated and delivered in Mombasa this 19<sup>th</sup> day of March, 2014.**

**M. ODERO**

**JUDGE**

In the presence of:

Mr. Egunza h/b Ms. Kayata for Accused

Mr. Kiprop for State

Court Clerk Mutisya