



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL CASE NO. 11 OF 2007

REPUBLIC.....PROSECUTION

VERSUS

NGOME MRIWA MWAMKUNGU.....ACCUSED

JUDGMENT

The accused **NGOME MRIWA MWAMKUNGU** faces a charge of **MURDER CONTRARY TO SECTION 203 OF THE PENAL CODE**. The particulars of the charge were that

“On the night of 9th day of May 2007 at about 8.00 p.m. at Mwololo village Kwale District within Coast Province jointly with another not before court murdered HAROLD NYAE MBETSA.”

The accused entered a plea of ‘*Not Guilty*’ to the charge and his trial commenced on 27th November, 2007. The prosecution led by the learned state counsel called a total of twelve (12) witnesses in support of their case. **MR. GATHUKU** learned counsel appeared for the accused.

PW1 DISMAS MBETSA a son to the deceased told the court that on 9th May, 2007 at 8.00 p.m. he was seated with the deceased outside the house waiting to take their evening meal. Suddenly two men armed with pangas walked into the compound. They greeted the two men and then launched an unprovoked attack on them. They attacked and cut up the deceased. One of the men went to the house where the wife of the deceased **CHIDZI RAI PW6** was hiding. He also attacked her and cut her on the left eye. **PW1** managed to escape. He ran to call other relatives. When they returned to the scene the attackers had fled. They found the deceased lying in the cowshed barely alive. Efforts were made to rush him to hospital but unfortunately the deceased died before he reached the hospital. The incident was reported to Mwangulu police post. Upon completion of police investigations the accused, who was known to have publicly disagreed with the deceased over claims that he (the accused) had alleged that the deceased was having an adulterous affair with his (the accused’s) wife, was arrested and charged.

Upon the conclusion of the prosecution case, the accused was found to have a case to answer and was placed on his defence. The accused elected to make a sworn defence in which he denied any and all involvement in the death of the deceased. This court now has a duty to analyze the evidence on record to determine whether the charge of murder has been proved beyond a reasonable doubt.

The Penal Code of Kenya defines the offence of murder in section 203 which provides as follows:

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

This definition gives rise to three crucial ingredients required to prove the offence of murder.

1. Proof of the fact and cause of death of the deceased.
2. Proof that the death of the deceased was the result of an unlawful act or omission on the part of the accused.
3. Proof that said unlawful act or omission was committed with malice aforethought.

On the fact and cause of death of the deceased there can be no controversy. **PW1** a son to the deceased and **PW6** his wife both testify that the deceased was attacked by two men wielding pangas who cut him up. The two witnesses and others who knew the deceased well all saw the body and identified the deceased as ‘*Nyae Mbetsa*’ a teacher in the village. **PW12 SERGEANT ERNEST MUA** who was the investigating officer produced as exhibits photographs taken at the scene **Pexb3**. They show the badly mutilated body of an adult male lying on the ground. The cut wounds are visible in the photographs. Conclusive proof on the cause of death is provided by the evidence of **PW11 DR. ANDERSON KAHINDI** who produced the post mortem report **Pexb2**. Upon an autopsy examination the body was found to have deep cut wounds to the hands, buttocks and head leading to the exposure of brain material. The cause of death was found to be “*massive bleeding due to multiple cut wounds*”. This was expert medical evidence which was neither challenged nor controverted by the defence. As such I am satisfied that both the fact as well as the cause of death of the deceased has been sufficiently proved.

The prosecution is required to tender sufficient evidence to prove that it was the accused who by an unlawful act or omission cause the death of the deceased. Evidence has been adduced from several witnesses who include amongst others **PW4 KASSIM NGOME TSUMA** a brother to the deceased and **PW5 NZALAMBI KIBARUA** that prior to this incident there existed bad blood between he accused and the deceased. It was said that the accused had claimed that the deceased was sleeping with his (the accused’s) wife. Both **PW4** and **PW6** stated that as a result of this bad blood the accused had made threats against the life of the deceased. In his sworn defence the accused tried to deny any such enmity. However, there is overwhelming evidence from **PW2 MNYIKA BATI KAMZA** and **PW3 WERO KALIMBO** who both participated in talks to reconcile the two. **PW2** and **PW3** testify that the matter had even been reported to Mwangulu police station. The elders held a round table discussion at the police station with the two protagonists. They decided in accordance with Duruma cultural norms that the deceased pay a fine of Kshs. 6,000/= and a sheep to the accused for sleeping with his wife. A written agreement was prepared and signed by all parties. The deceased however only managed to pay Kshs. 3,000/= and did not give the sheep. It was suggest that the existence of this bad blood is what led the accused to murder the deceased.

Whilst the existence of this type of wrangle would certainly constitute a possible motive for murder, the fact is that the dispute had been settled traditionally and all parties went away satisfied. Further proof of motive is not in itself proof that the accused committed the murder.

The murder incident occurred at night – at 8.00 p.m. to be precise. The only eyewitness was **PW2** who was the son of the deceased. **PW5** and **PW6** the wives of the deceased were also present in the homestead at the material time. **PW5** told the court that upon hearing the commotion she ran away to save her own life and was not able to identify any of the attackers. **PW6** on her part testified that she too was assaulted by one of the men. However, she states that although she saw the man’s face she is not able to identify him. Therefore the only witness who positively identifies the accused as one of the attackers was **PW1**. Whilst it is well established that the evidence of a single eyewitness is sufficient to support a conviction that evidence must be closely interrogated to ensure that there is no possibility of a mistaken identity.

As stated earlier the incident occurred at night. It was in the country side where there are no electric lights. **PW1** states that they were attacked by a ‘*tall man*’ and a ‘*short man*’ and that he was able to identify the short man as the accused. **PW1** states that there was a tin lamp outside the house which

enabled him to see. I have major doubts as to whether a tin lamp which gives out a small weak light would have been sufficient to enable **PW1** make a clear and positive identification of the attackers. Although **PW1** talked of the presence of a lamp at the scene **PW6** who was also present states

“The only light was from the cooking fire.”

With respect to the lamp **PW6** states

“I had lit the lantern. As I ran out I kicked the lantern and it went out”

She goes on to state

“There was no light outside the house.”

Under cross-examination by defence counsel **PW6** reiterates

“There was no light outside the kitchen.”

The evidence of **PW6** therefore contradicts that of **PW1** with respect to light available at the scene. **PW1** stated that he and the deceased were seated outside the house waiting to be served with their supper. If as **PW6** asserts there was no light outside the house then there was no way that **PW1** could have seen and identified the attackers.

The circumstances under which **PW1** was purportedly making this identification must also be taken into consideration. Both he and his father were under attack by two panga-wielding men. **PW1** managed to escape unhurt. Under those circumstances he must have been more concerned with saving his skin than trying to identify the assailants. Although **PW1** claimed to have recognized the accused during the attack it is curious that when he ran to call his uncle **PW4** he did not give **PW4** the name of the man he claims to have recognized. In his evidence **PW4** states

“He [PW1] told me two men had invaded their home. He did not give me their names”

If indeed the attacker was a fellow villager known to both **PW1** and **PW4** then I have no doubt that **PW1** would have run to **PW4** saying so and so has attacked us. The fact that **PW1** gave no name raises the very real possibility that he did not actually recognize the attacker. His identification of the accused may have been an afterthought based on mere suspicion due to the known grudge between the two men.

There is evidence that an identification parade was conducted at which the witness identified the accused. However, given that **PW1** already knew the accused very well, this parade was of no evidential value.

Based on the foregoing I find that there remains great doubt as to whether the identification of the accused by **PW1** was truly free from error. I am not persuaded that this identification is reliable. In a charge as serious as murder identification must be watertight. This is not the case here. The court must award the benefit of doubt to the accused. I find that the *actus reus* of murder has not been sufficiently established against the accused. I therefore acquit the accused of this charge of murder. He is to be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered in Mombasa this 19th day of March, 2014.

M. ODERO

JUDGE

In the presence of:

Mr. Egunza for Accused

Mr. Kipro for State

Court Clerk Mutisya