



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CRIMINAL CASE NO. 21 OF 2011**

REPUBLIC.....PROSECUTION

VERSUS

NDEGWA JUMA IDDI.....ACCUSED

**RULING**

The accused **NDEGWA JUMA IDDI** faces a charge of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE**. The particulars of the charge were that

**“On the 2<sup>nd</sup> July, 2005 at about 3.00 a.m. at Magwagwaru village in Gandini Location in Kinango District murdered CHRUNGA JUMA.”**

The accused entered a plea of ‘*Not Guilty*’ to the charge and his trial commenced before the High Court in Mombasa on 7<sup>th</sup> March, 2012. The prosecution led by **MR. JAMII** State Counsel called a total of ten (10) witnesses in support of their case. **MR. GICHANA** Advocate acted for the accused.

**PW1 MBEYU KIPITO** the wife of the deceased told the court that on the night of 2<sup>nd</sup> July, 2005, she and her husband (the deceased) spent the night outside in their shamba in order to guard their cassava crop. They were sleeping in shifts. At about mid-night **PW1** who was asleep heard the barking of dogs. She awoke to see two men approach their makeshift hut. The men asked who the owner of the shamba was. The deceased replied that he was the owner. The men then set upon him with pangas and began to cut him up. **PW1** managed to escape and ran away to save her own life. She ran to the home of her brother-in-law **SIMON LOYA (PW2)** and reported to him that they had been attacked in their shamba. The next morning at 6.00 a.m. the two reported the matter to the chief who called the police. They all went back to the farm and found the deceased lying dead face down on the ground with deep cuts all over his body. A police doctor performed an autopsy at the scene and the family thereafter buried the body immediately. Police commenced investigations. An inquest was held and thereafter the accused was arraigned in court and charged with the offence of murder.

At this point upon the close of the prosecution case the court is required to critically examine the evidence on record in order to determine whether a *prima facie* case has been established sufficient to warrant the accused being called upon to give his defence. A *prima facie* case has been described as one where even if the accused were to opt to keep silent in defence, the evidence on record would be sufficient to render a conviction.

Section 203 of the Penal Code defines the offence of murder as follows

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

Therefore in order to establish the offence of murder the prosecution is required to tender evidence sufficient to prove the following three ingredients

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

With regard to the first ingredient there can be no controversy. **PW1** the widow of the deceased clearly narrated how two men armed with pangas set upon the deceased and began to cut him up in her presence. All the prosecution witnesses who later went to the scene testify that they found the body of the deceased lying in the shamba with deep cuts all over. The witnesses who all knew the deceased very well identify him as ‘*Chirunga Juma*’. Clear evidence on the cause of death is adduced by **PW9 DR. ERICK WANJALA** who was the Medical Superintendent at Kilifi Hospital. He told the court that he accompanied police to the scene and that he proceeded to conduct an autopsy in the open field at the scene. He narrated how upon an external examination of the body he noted several deep cut wounds to the head, skull bone, face, arm including amputation of some of the fingers of both hands. His medical opinion was that the cause of death was ‘*cardio pulmonary arrest secondary to massive bleeding due to multiple trauma*’. **PW9** filled and signed the post mortem report which he produced as an exhibit in court **Pexb1**. This was expert medical evidence which was neither challenged nor controverted by the defence. It is clear therefore that the deceased met his untimely death as the result of being hacked by sharp objects (most likely pangas).

The crucial question is whether there is sufficient evidence on record to point at the accused as the person who unlawfully attacked and hacked the deceased leading to his death. There was only one eyewitness to the incident and that was **PW1** the wife of the deceased. She told the court that although the men who accosted them in the shamba had torches, she would not be in a position to identify any one of them as the light from the torch blinded her. More pertinently **PW1** is unable to positively identify the accused in the dock as one of the men who murdered the deceased. In her evidence **PW1** states that

**“The men had a torch when they shone the torch light to me I could not see clearly .....**”

Further on **PW1** reiterates this evidence when she states

**“I cannot tell who killed the deceased as it was night and though they had a torch I cannot see well.”**

Further **PW1** told the court that when the murderers struck she ran away to save her own life. She ran to the home of her brother-in-law Simon Loya **PW2** who under cross-examination by defence counsel confirmed that

**“PW1 told me she did not know the men who killed her husband.”**

The name of the accused in connection with the murder of the deceased was mentioned by **PW3 HAMISI CHIRUNGA** a son to the deceased. He testified as follows

**“At 8.30 p.m. my uncle Chongwa Juma came. He said Ndegwa Juma (the accused) paid thugs. Then Dzombo Ngoka and Mchomba Juma took the thugs to my parents’ farm. There they cut and killed the deceased. Chongwa said he was told this and that he will speak without fear about this.”**

The said ‘*Chongwa Juma*’ testified in court as **PW7**. In his evidence he categorically stated

**“I do not know who killed the deceased.”**

Under cross-examination by defence counsel **PW7** is more specific and states

**“At no time did I ever name accused as the murderer. It is not true that I was drunk and I named accused as the murderer.”**

The evidence of **PW7** directly contradicts the testimony of **PW3**. Indeed **PW7** told the court that he and other brothers were arrested by police and placed in cells as suspects to this murder. If **PW7** had information on who had committed the murder I have no doubt that he would have shared such information with the police if only to get himself off the hook and out of the cells. The evidence of **PW3** therefore cannot be relied upon to implicate the accused as it has been directly contradicted by the very source of his information.

Another witness who implicated accused in the murder of the deceased was **PW4 CHONDO JUMA**. He told the court that

**“Rashid said one Dzombo Ngoka told him that he had been sent by Ndegwa (accused) to kill the deceased in his farm at night.”**

**PW4** goes on to state in cross-examination that

**“Rashid said Dzombo said accused paid him Kshs. 60,000/= in total to kill the deceased. Dzombo is currently in prison due to a conviction on robbery.....”**

The said **RASHID MWERO** testified as **PW5**. He told the court that he is a community policing officer in Gandini village. He appears to corroborate the evidence of **PW4**. **PW5** states that he did arrest one Dzombo in connection with a robbery incident. Upon questioning this Dzombo admitted to **PW5** that he had been paid Kshs. 60,000/= by accused to kill the deceased. **PW5** goes on to state that this ‘Dzombo’ named ‘Omondi’ and ‘Hamisi’ as his accomplices in the murder and that Dzombo made this admission before police at Kinango police station. If indeed Dzombo made such an admission then this amounts to a confession. The law regarding the admissibility of confessions is very clear and is to be found in section 25A of the Evidence Act. In order for a confession to amount to proof of a fact in issue, it must be made before a police officer of or above the rank of an Inspector. If as **PW5** insists this Dzombo made his confession to police then why was Dzombo not charged with the murder of the deceased. Why charge accused and leave the person who confesses to having committed the very act of murder. No properly recorded confession has been produced in court. Indeed this ‘Dzombo’ did not testify so as to confirm or deny the claims that he confessed to the murder. The court was told that the said Dzombo was in prison serving a sentence for the offence of robbery. As such he was in police custody and nothing would have been easier than to produce him in court to verify these claims. The fact that the prosecution failed to produce this witness in court persuades me that he would not have confirmed these claims linking the accused to the murder. The court is entitled to draw an adverse inference from the failure by the prosecution to avail this witness. Therefore the evidence relating to what Dzombo may have told any witness remains hearsay evidence which is uncorroborated as no written confession has been produced in court. Such hearsay evidence cannot be relied upon as the basis for a conviction. I therefore find that the prosecution has failed to prove beyond reasonable doubt that it was the accused who attacked and killed the deceased. The *actus reus* of the offence of murder has not been sufficiently proved as against the accused.

The prosecution did attempt to suggest that the motive for the murder may have been a family land dispute between the accused and the deceased. However even on this evidence is wildly contradictory. **PW3** the son to the deceased in his evidence says

**“I am aware of a land dispute between the deceased and his brothers.....”**

He goes on to state that

**“I am aware that there was a case filed by accused in the Kadhi’s Court over inheritance. There was a land dispute pending in the land tribunal when the deceased was killed.....”**

Similarly **PW4 CHONDO JUMA** a brother to the deceased confirms the existence of a land dispute when he states in his evidence that

**“There was a land dispute. The accused took the case before the Land Board. Before the Land Board made any decision the deceased was killed. I heard the accused say that he must get what he wants.....”**

However an equal number of family members contradict the testimony of **PW3** and **PW4** and totally deny the existence of any family land dispute. **PW1** the wife of the deceased says

**“I am not aware of any land dispute involving the deceased and his brothers. I do not know of any dispute in the Kadhi’s Court over land. I have no knowledge of any land dispute.....”**

Similarly **PW2** who is a cousin to the deceased and accused states

**“I knew the deceased well. I also know the accused. They are from the same family. I am not aware of any land dispute in the family.”**

**PW7 CHANGWA JUMA IDDI** and **PW8 BAKARI NGIYA IDDI** both brothers to the accused and the deceased also deny the existence of any family dispute over land and instead insist that the land dispute was between their family and another family known as the ‘*Ndurya family*’. In his evidence **PW8** says

**“We had no family dispute over land at all. I am sure of this. Previously our family and that of Ndurya had a land dispute.....”**

On his part **PW8** states

**“There was a dispute over land between our family and that of Ndurya Saidi. There was no dispute between ourselves as brothers.....”**

Therefore even the evidence of a possible motive is contradictory. The allegation of a land dispute within the family has not been proved. On the whole I find that the prosecution evidence is lacking cogency, it is full of contradictions and unanswered questions. The evidence against accused is largely suspicion, hearsay, rumours and innuendo. If accused elected to keep silent in his defence no conviction would be forthcoming on the basis of the evidence on record. I find that the prosecution have failed to establish a *prima facie* case to warrant the accused being called upon to defend himself. 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 28<sup>th</sup> day of April, 2014.**

**M. ODERO**

**JUDGE**

In the presence of:

Mr. Gichana for Accused

Mr. Dzumo for State

Court Clerk Mutisya