



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL CASE NO. 19 OF 2013

REPUBLICRESPONDENT

VERSUS

DALMAS MACHANGA1 ST ACCUSED

MODESTY NGURE 2ND ACCUSED

DALMAS KIVUMBA SHAKE 3RD ACCUSED

JUDGMENT

The three (3) Accused persons were charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars being that:-

“On the 30th day of March, 2013 at Msorongu village in Musakitau location within Taita-Taveta County, jointly murdered PHILIP MWATATE MWIKAMBA”.

The prosecution called six (6) Witnesses in support of their case. The Deceased father **MWIKAMBA NYAMBU** testified that his son went missing on 30th day of March, 2013. The following day one **MODESTY NGURA** (the 2nd Accused) found him at a local pub and informed him that his son had been killed. The matter was reported to the local Administration and they were referred to the police who told them that they had no vehicle.

Members of public decided to go in search of the Deceased while in the company of the 2nd Accused.

They later recovered the body of the Deceased which was tied with wires and was decomposing. They reported to police who went to the scene and took photographs.

The second Accused mentioned the first and third Accused as the murderers. The first and third Accused mentioned the 2nd Accused as the murderer.

He further told the Court that the Accused persons were saying that they had been given a contract by police to kill the Deceased because he was a poacher.

SAMSON SHUMA (PW 2) in his evidence in chief also testified that its the second Accused who

mentioned the first and the third Accused as the killers but when they were arrested and interrogated they pointed to the Accused number 2 as the murderer. The Witness also told the Court that the motive for killing the Deceased was because he was a cattle thief.

He mentioned two suspects one **FUNDI** and **MWANYIKA** who were cattle owners who had contracted the three Accused persons to kill the Deceased.

What transpires from the evidence adduced in this case is that there was no proper investigation carried out in this case by police. It is apparent that there was a lot of mistrust of police by the local villagers who decided to take upon themselves the duties of investigations.

That explains why there are two versions given as the motive for the murder.

The first one being that the Deceased was a poacher and that police gave money to the Accused persons to commit the murder.

The second one being that the Deceased was a cattle thief and money was given to the Accused persons by the two suspects who were cattle owners to have him killed.

The main substantive evidence against the Accused persons is that they mentioned each other as the killers. There were no confessions taken by authorized officers from the Accused persons.

The three Accused persons being accomplices there was no evidence adduced in corroboration. **PW 3 S M** is a child of tender years whose evidence requires corroboration. There is none. He alleges to have seen the three Accused persons beating the Deceased but he did not report the incident to anyone. His evidence has to be taken with a lot of caution.

Section 203 of the Penal Code defines murder thus,

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

Malice aforethought is defined under Section 206 of the Penal Code thus,

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances .

(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not

(b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such, knowledge is accompanied by indifference whether death or grievous bodily harm if caused or not, or by a wish that it may not be caused.

(c) an intent to commit a felony

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony”.

In the present case none of the ingredients above mentioned have been satisfied by the prosecution.

This case has not been proved beyond reasonable doubt as against any of the three Accused persons. They are each found not guilty of the charge of murder contrary to Section 203 as read with Section 204 of the Penal Code and are acquitted accordingly. They are each set at liberty unless otherwise lawfully held.

Judgment delivered dated and signed in open Court this **28th** day of **May, 2014**.

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M. MUYA

JUDGE

28TH MAY, 2014

In the presence of:-

Learned State Counsel Mr. Kiprop

Egunza for the Defence

Miss Odhiang for the Defence

Accused present

Court clerk Musundi