



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL CASE NO. 38 OF 2012

REPUBLIC RESPONDENT

VERSUS

MKUTANO KITSAO NTHENGEAPPELLANT

JUDGMENT

The Accused was charged with murder contrary to section 203 as read with section 204 of the penal code.

The particulars being that on the night of 16th and 17th day of July, 2012 at Birini Mwamleka Sub location Changamwe Location within Kilifi county he murdered **NGUMBAO KADENGE YAA**.

The Accused was examined by Doctor Mwangome consultant psychiatrist and was fit to plead.

A post mortem examination of the deceased was done by Dr. Mngola of Coast General Hospital whose finding was that death was as a result of Traumatic decapitation head injury.

In this case none of the prosecution witnesses saw the Accused kill the deceased. The incident happened at night in the house of the deceased. The Decapitated body was discovered the following day.

The Accused was arrested because he had previously called the deceased a wizard. A panga was later recovered in a shamba belonging to the Accused family. It was not blood stained but it was rusty.

It was not taken to Government chemist for analysis if any. The Accused was arrested purely on suspicion that because he had called the deceased a wizard he could have had a hand in his gruesome death.

Upon a careful analysis of the evidence before the Court I find no tangible evidence to link the Accused to the offence of murder. The fact that several years before the murder he had quarrelled with the Deceased and called him a wizard is not sufficient. He was arrested principally on suspicion. Its trite law that suspicion alone however strong cannot be the basis of a conviction. The panga was not found in house but in a shamba belonging to the family. There is nothing to link the panga with the murder, nor is there evidence that it belonged to the Accused and he had personally used it to commit murder. This case has not been proved beyond reasonable doubt and the Accused is acquitted under section 322 of the Criminal Procedure Code.

He is set at liberty unless otherwise lawfully held.

Judgment dated, delivered in open Court this **19th** day of **June, 2013**.

In the presence of:-

Learned State Counsel Mr. Jami

Learned Counsel for the Accused Mr. Mushelle

Court Clerk Mr. Musundi

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M. MUYA

JUDGE

19TH JUNE, 2013