



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL CASE NO. 3 OF 2011

REPUBLIC.....RESPONDENT

VERSUS

MWEMBE NYONDO MWATSUMA.....ACCUSED

JUDGMENT

The two accused persons **MWEMBE NYONDO** (hereinafter referred to as the 1st accused) and **RAI NYAE NGAO** (hereinafter referred to as the 2nd accused) were jointly charged with the offence of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE**. The particulars of the charge were that:

“On the 13th day of January, 2011 at about 10.00 p.m. at Makamini Location Vinyunduni village within Kwale County jointly before court murdered DAUDI MBARU.”

Each accused persons entered a plea of ‘*Not Guilty*’ to the charge and their trial commenced before me on 14th September, 2011. The prosecution led by learned state counsel **MR. ONSERIO** called a total of seven (7) witnesses in support of their case. **MR. MUSHELLE** Advocate appeared for the 1st accused whilst **MR. CHIDZIPHA** acted for the 2nd accused.

The brief facts of the prosecution case were as follows. **PW1 JULIUS MBEIZA MBARU** had employed the 1st accused to work for him as a herdsman. He told the court that it was the deceased who brought him the 1st accused to employ. **PW1** claimed the 1st accused had stolen a bicycle and other items from him. He reported the matter to the authorities. On 13th January, 2011 **PW1** travelled to Vinyunduni village to seek the help of the local chief to trace the 1st accused in his rural home. **PW2 SALIM NYIRO CHIKOPHE** is the Assistant Chief of Vinyunduni location. He confirms to the court that **PW1** came to him to seek help in tracing his former employee. **PW1** assigned two of his village community policing agents **MBARU MWERO PW6** and **DIGO CHONDO** to go to the home of the 1st accused and arrest him. The deceased was to accompany **PW6** and Digo in order to identify the 1st accused whom he knew. **PW6** in his evidence told the court that he and his group set out on this mission on 13th January, 2011. They got to the home of the 1st accused at 4.00 a.m. on 14th January, 2011. When they arrived they knocked on the door of 1st accused. An alarm was raised and pandemonium broke out. Neighbours emerged armed with crude weapons and set upon the emissaries. **PW6** and ‘*Digo*’ ran for dear life. They left the deceased to the mercy of his attackers.

PW1 told the court that on the morning of 14th January, 2011 at about 7.00 a.m. **PW6** and 'Digo' reported back to him. Both men had severe cuts and bruises all over their bodies. They told him that they had left the deceased behind being beaten. **PW1** called in police who went to the scene. They recovered the dead body of the deceased lying on the ground. Meanwhile the 1st and 2nd accused's who had gone to report the incident at the police station were arrested and placed in cells. Upon completion of police investigations both were arraigned in court and charged with the offence of murder.

At the close of the prosecution case the 1st accused was found to have a case to answer and was placed onto his defence. With respect to the 2nd accused the court found that no *prima facie* case had been made against him and he was acquitted under section 306(1) of the Criminal Procedure Code. The 1st accused on his part gave a sworn defence in which he denied any and all involvement in the murder of the deceased. Before I proceed to analyze the evidence in respect of the case against the 1st accused, I will now give the reasons for my acquittal of the 2nd accused.

Out of the total seven (7) prosecution witnesses not a single one testified that the 2nd accused assaulted the deceased in any way. The only witness who placed the 2nd accused at the scene was **PW3 NGAI TSUMA** who stated that he did not see the 2nd accused beat or stab anyone. On his part **PW6** an eyewitness clearly stated in his evidence that:

“I know Rai Nyae (Accused 2). He is here in court (witness points at Accused2). We were not sent to arrest Accused 2. Accused 2 did not cut me at all. I will not lie. I did not see Accused 2 cut anyone. I am here to tell the truth.....”

Thus it is clear that no single witness has implicated the 2nd accused in the attack against the deceased. For this reason I found that no case had been established against the 2nd accused and I acquitted him of the charge of murder.

I will now proceed to consider the evidence adduced in court in so far as it relates to the charge of murder against the 1st accused.

Section 203 of the Penal Code defines the offence of murder thus:

“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 prove a charge of murder the prosecution must adduce evidence sufficient to prove the following three ingredients of the offence.

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

The first ingredient was quite easily proved. **PW6** told the court that the deceased was set upon by a group of people who slashed him to death. **PW3** told the court that he went to the scene of the incident where he found the deceased lying there barely alive with cut wounds on his head. **PW4 PC JOHN KOECH** was the first officer to arrive at the scene. He confirms that he found the body of a dead man with multiple cuts on the head. He collected the said body and took it to the mortuary. Although no relative of the deceased testified in court, **PW1** who knew the deceased well identified him as 'Daudi Mbaru'.

Evidence on the cause of death was rendered by **PW5 DR. LUCY ANN WAHOME** a medical practitioner at the Coast General Hospital. She told the court that on 19th January, 2011 she performed the autopsy on the body of the deceased. She confirms that she noted multiple cuts on the head and

hands. There was a cut on the skull with the brain spilling out and a fracture to the skull. In her opinion the cause of death was “*head injury secondary to assault*”. **PW5** filled and signed the post mortem form which is produced in court as an exhibit **Pexb1**. Hers was expert medical evidence which was neither challenged nor controverted by the defence. I therefore find as a fact that the deceased met his unfortunate demise as the result of being slashed about the head with a sharp object.

Having proved the fact and cause of death the prosecution is required to go a step further and prove that it was the 1st accused who so unlawfully attacked, slashed and ultimately killed the deceased. As stated earlier this incident occurred at night – at about 2.00 a.m. to be precise. No doubt it was dark. Villagers were probably asleep in their houses and no lights were on. **PW1** who had reported that 1st accused had robbed him did not go with the deceased to the home of the accused. He therefore did not witness the events of that night. **PW6 MBARU MWERU** told the court that he is a community policing officer. On the material night he did accompany the deceased in order to effect the arrest of the 1st accused who had been implicated by **PW1** in a theft. **PW6** states that upon arrival they knocked on the door of Accused 1 and Accused 1 who knew them all well came out. **PW6** claims that they then handed to the 1st accused a letter requiring his presence at the Chief’s office. The 1st accused asked to be allowed to dress and entered his house. He later emerged with a panga with which he attacked **PW6**. A crowd gathered and they began to assault **PW6** and the deceased. **PW6** ran into the bushes to save themselves. **PW6** states that he heard the deceased call out saying ‘*Mwembe*’ [i.e. 1st accused] ‘*why are you killing me*’ – the implication here being that the deceased named his attacker before he died. This was the evidence of **PW6**. The third community policing officer who also went to the scene whose name was given as ‘*Digo*’ did not testify in this court to confirm that the events did in fact occur as narrated by **PW6**.

The only other eye witness who testified was **PW3** who was a neighbour of the deceased. His evidence is at odds with that of **PW6** in several respects. **PW3** told the court that on the material night he had gone out to relieve himself when he heard shouts from his neighbour called ‘*Chidzi*’ crying that her home had been invaded by thugs. **PW3** ran to help. **PW3** said that he found the deceased whom he knew as a community policing officer at the scene. **PW3** said that he asked deceased if they had a letter but the deceased said they had no such letter. This is contrary to the evidence of **PW6** that they had a letter from the Chief. Even if there existed such a letter court wonders why an official letter summoning the 1st accused to the Chief’s office should be delivered at 2.00a.m.!! What was the difficulty in summoning the 1st accused during normal working hours? In this scenario the belief by other villagers that they were under attack cannot be discounted.

Whilst there is no doubt that the deceased lost his life due to an attack on the material night the crucial question is whether the 1st accused was one of those who assaulted the deceased. **PW3** in his evidence states:

“I could not identify the people who beat Mbaru [deceased]. Some had rungas and others had pangas. I could not see the attackers well as it was dark. The said Mwembe [1st accused] was also at the scene. I did not see him with any weapon.”

This directly contradicts the evidence of **PW6** that 1st accused was one of those who attacked the deceased. If it was ‘*too dark*’ as **PW3** testified, how possible was it for **PW6** to see clearly. Further **PW6** himself was under attack and was forced to run away to save his own skin. Under those circumstances **PW6** could not have had an opportunity to see and identify who was assaulting the deceased. Under cross examination **PW3** says:

“I did not see Accused 1 or Accused 2 with any weapon. I did not see Accused 1 or Accused 2 beat the deceased. It was the crowd who beat the deceased.”

In my view **PW3** was better placed to see the events as he was not under attack and was not trying to save himself. The evidence of **PW2** contradicts that of **PW6** on the question of identification. This is a major contradiction which the court cannot ignore.

Aside from these glaring contradictions and inconsistencies in the prosecution case, the conduct of the 1st accused was not that of one who had a guilty mind. **PW7 SERGEANT PAUL MUTEA** who was the investigating officer told the court that on 14th January, 2011 the 1st and 2nd accused voluntarily went to the police station to report the incident. If the accused's had maliciously attacked and killed the deceased he would not have gone to present himself at the police station. His action in doing so shows that he had no guilty mind over the incident.

Taking the evidence as a whole and based on my analysis above, I find that it has not been proved beyond a reasonable doubt that the 1st accused was one of those who inflicted any injuries on the deceased. The '*actus reus*' has not been proved as against the 1st accused. As such I enter a verdict of '*Not Guilty*' and I acquit the 1st accused of this charge of murder. He to be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered in Mombasa this 13th day of August, 2013.

M. ODERO

JUDGE

In the presence of:

Mr. Mushelle h/b Mr. Chidzipha for Accused

Mr. Mungai for State

Court Clerk Mutisya