



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL CASE NO. 30 OF 2009

REPUBLICPROSECUTION

VERSUS

MUSEE KIVUNGA MUKULE.....ACCUSED

JUDGMENT

The accused **MUSEE KIVUNGA MUKELE** faces a charge of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE**. The particulars of the case are that:

“On the night of 9th June, 2009 at about 7.00 p.m. at Puma villag4e, Virungani Location, Kinango District within Coast Province murdered TSUMA MWATSUMA.”

The accused entered a plea of ‘*Not Guilty*’ to the charge and his trial commenced before me on 5th May, 2010. The prosecution led by senior state counsel **MR. ONSERIO** called a total of eight (8) witnesses in support of their case. The accused was represented by learned counsel **MR. AZIZ**.

PW1 BEYU RUMBA told the court that the deceased ‘*Tsuma Mwatsuma*’ was her husband. She told the court that she and the deceased were charcoal dealers. On 6th September, 2009 she was out with the deceased burning charcoal. A quarrel arose between them and **PW1** ran away when the deceased began to beat her. **PW1** states that she came across the accused who pulled her into his house where he kept her locked up for a period of one and a half months while he raped her continuously.

Meanwhile **PW2 MWATSUMA NYAE RAI** the father of the deceased told court that he received a report from another charcoal dealer that both deceased and his wife were missing from the camp where the charcoal dealers operated. **PW2** began to search for his son and daughter-in-law. He eventually was alerted of the presence of **PW1** inside the house of the accused. He went and rescued **PW1** and accused was arrested and taken to the police station. The search continued for the deceased. His badly decomposing headless body was later recovered buried in a shallow grave. The severed head of the deceased was recovered buried close to the torso. The police completed their investigations upon which accused was charged with the offence of murder.

At the close of the prosecution case the accused was found to have a case to answer and was placed on his defence. He gave an unsworn defence in which he denied any and all involvement in the death of the deceased. The court must now examine the evidence on record with a view to determining whether the charge of murder has been proved to the standard required in law.

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.”

The prosecution must therefore adduce evidence to prove the following three ingredients of this offence.

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

The fact and cause of death of the deceased have been easily proved. **PW2** the father of the deceased, **PW4 MWANDURYA MBEGA** an uncle to the deceased all testify that the headless body of the deceased was found in a shallow grave. They all state that although the body was decomposed the face was identifiable. **PW1** the wife of the deceased told the court that she was able to identify the body as that of her husband and that she was also able to identify the clothes and sandals found on the body. All these witnesses who knew the deceased well identify him as ‘*Tsuma Mwatsuma*’.

PW8 DR. MWANGI told the court that he conducted an autopsy on the body of the deceased. Upon examination **PW8** found a linear fracture on the right temporal bone. His opinion was that the cause of death was “*head injury secondary to head trauma*”. He filled and signed the post-mortem form which he produces as an exhibit **Pexb1**. This is expert medical evidence and has not been controverted by the defence. It is clear therefore that the deceased met his death as a result of a blow to the head.

Secondly the prosecution must prove beyond a reasonable doubt that it was the accused who hit the deceased on the head and killed him. There was no eye witness to the murder. **PW1** who was the widow to the deceased has no idea of how or when he was killed. She told the court that during the material time she herself was being kept prisoner in the house of the accused. **PW2 MWATSUMA NYAE RAI** the father of the deceased only narrated to the court how he recovered the badly decomposed body of his son with the head severed buried in a hole close to the house of the accused. In his evidence in chief **PW2** told the court that the accused had told him to look out for a freshly dug hole. This leads to the inference that the accused knew where the body of the deceased was buried. However, under cross examination **PW2** changes his story and states:

“The sub-chief told me to search for any freshly dug holes. I did so and I found two fresh holes so I called the police.”

Whereas **PW2** initially said it was the accused who told him about the freshly dug holes but under cross examination he says it was the sub-chief who told him this. Which was it. The evidence of **PW2** is contradictory in this respect. From the evidence on record the accused was arrested **before** the body of the deceased was found and the reason why the accused was arrested was because he was alleged to have abducted the wife of the deceased. It was not the accused who led police to the recovery of the body of the deceased nor was the accused at any time seen in the company of the deceased. **PW7 CORPORAL RICHARD MACHASIO** who was the investigating officer told the court that **after** the body had been recovered the accused then led police and he showed them where the body had been buried. I find this evidence to be very curious to say the least. Why would police lead a suspect to show them where the body was **after** they had already recovered the body? Even if as **PW7** claims the accused had no prior knowledge that the body had already been recovered, it is likely that the hole in which the body had been recovered had been dug up and was therefore conspicuous. As such anybody visiting or passing that area would be able to point out the site. I am not persuaded by the evidence of **PW7**. I find that the charge against the accused is based on suspicion and mere suspicion cannot form the basis of a conviction. **PW7** suggests that the accused may have murdered the deceased in order to enable him to live with the wife of the deceased. However, even the tale by **PW1** of her alleged abduction and detention by the accused in his house is not persuasive. **PW1** made no attempt to call out for help or to escape. She meekly remained in the house of the accused cooking for him and having regular sexual intercourse with him for an extended

period of time. Even when **PW1** heard the voice of her husband talking to the accused she did not shout out to him. Clearly she did not want her husband to discover her whereabouts. This is not the behavior of an abductee. As a court I harbour grave doubts about the story given by **PW1** that she had been abducted.

Finally, I find that no credible, tangible or convincing evidence has been adduced to prove that it was the accused who killed the deceased. The *actus reus* for the offence of murder has not been proved. As such I enter a verdict of '*Not guilty*' and I acquit the accused of this charge of murder. The accused is to be set at liberty forthwith unless he is otherwise lawfully held.

Dated and delivered in Mombasa this 3rd day of September, 2013.

M. ODERO

JUDGE

In the presence of:

Ms. Okumu h/b for Mr. Aziz for Accused

Ms. Ogwenyo for State

Court Clerk Mutisya