



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL CASE NO. 18 OF 2009

REPUBLIC.....RESPONDENT

VERSUS

HAMISI RAMAH WENDO.....ACCUSED

JUDGMENT

The accused **HAMISI RAMAH WENDO** has been 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 night of 14th day of February, 2008 at 4.00 p.m. at Majera village of Kale District within Coast Province murdered MTENDE JAWA SHOKAWA.”

The accused who was represented by **MR. ALWENYA** Advocate entered a plea of ‘*Not Guilty*’ to the charge. The state led by learned state counsel **MR. ONSERIO** called a total of nine (9) witnesses in support of their case. The brief facts of the prosecution case are as follows:

PW1 M K a minor aged 11 years told the court that on 14th February, 2008 at about 5.00 p.m., she, one ‘*M*’ and the deceased ‘*M*’ (both of whom were also minors) were out herding goats. **PW1** states that as they were out grazing the goats, a man came up and greeted them. The children responded to the greeting. The man whom **PW1** identifies as the accused suddenly grabbed hold of the deceased a boy aged about 8 years old and slit his stomach. **PW1** ran away and alerted the mother of the deceased. **PW2 M S** the mother of the deceased told the court that upon being alerted of the incident by **PW1** she and other villagers rushed to the scene. They found the boy lying on the ground in great pain with his intestines spilling out. They rushed him to Msambweni District Hospital where unfortunately he lost the fight for his life. The matter was reported to the police who carried out investigations. Eventually the accused was arrested and was charged with the murder of the young boy.

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 a sworn defence in which he denied any and all involvement in the death of the deceased. This court must now determine whether the evidence on record is sufficient to prove the charge of murder beyond a reasonable doubt.

The offence of murder is defined in section 203 of the Penal Code as follows:

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

This definition establishes the three crucial ingredients of a murder charge all of which the prosecution is required to prove beyond a reasonable doubt. These three ingredients are as follows:

1. Proof of the death as well as the cause of death of the deceased.
2. Proof that the accused committed some unlawful act or omission which directly resulted in the death of the deceased.
3. Proof that said unlawful act or omission was committed with malice aforethought.

In this case the death of the deceased cannot be said to be in any doubt. **PW2** the mother of the deceased as well as **PW3 B S** an uncle of the deceased both told the court that upon rushing to the scene they found the child lying critically injured with a cut wound to his stomach and his intestines spilling out. They both told the court that despite being rushed to hospital the deceased succumbed to his injuries. **PW9 DR. HELTAN JILLO**, the medical superintendant at Msambweni Hospital gave evidence regarding the cause of death. He produced post-mortem report prepared by his colleague Dr. Zainab in which the cause of death was indicated to be acute ‘*hemorrhage shock and hypoglycaemia*’ resulting from the cut wound to the abdomen. I am therefore satisfied that both the facts as well as the cause of death of the deceased have been sufficiently proven.

The unlawful act which led to the death of the deceased was the knife attack and the cutting of his abdomen. The key question is whether it was the accused who perpetrated this attack leading to the death of the child. There was only one eyewitness to incident who has testified in court. This was **PW1** also a minor who identified the accused as the man whom he saw attack and cut the deceased. **PW1** told the court that he and the deceased were out herding livestock at the time when the attack occurred. It is well established in law that evidence of a single eye-witness may suffice as proof of a fact in issue. However, such evidence must be closely interrogated in order to ensure that there exists no possibility of a mistaken identity. In this case the incident occurred at about 4.00 p.m. It was broad day light and visibility must have been good. **PW1** stated that the accused greeted them thus he had a chance to see him. **PW1** though a minor gave evidence in a clear and consistent manner. He remained unshaken under cross-examination by defence counsel. He clearly stated in his evidence that:

“He [the attacker] is here in court..... The man had not covered his face. I saw him well. I saw his face.”

PW1 gives a clear narration of the events of that fateful day when he explains as follows:

“When the accused came he greeted us saying ‘Habari gani’ and we replied ‘mzuri’. The man [accused] caught M [the deceased]. I ran away. I ran a distance then I looked back. The man removed a knife and cut M then I ran to M’s home.....”

The evidence given by this witness was very persuasive. I was able to observe the witness as he testified. Though young he struck me as a bright boy and his demeanour was honest. However, despite the persuasive nature of evidence tendered by this witness certain major anomalies arise as one continues to analyse the prosecution case.

There is evidence by **PW1** that he identified the accused at a police identification parade. **PW6 CHIEF INSPECTOR LEONARD BARAZA** is the officer who conducted the parade. In his evidence he told the court that he mounted the parade on 9th May, 2009 at 2.50 p.m. at Kwale police station. The parade form produced as an exhibit **Pexb1** also indicates that the parade was conducted on 9th May, 2009 from 2.50 p.m. to 3.20 p.m. However, in his defence accused told the court that he was arrested that very day 9th May, 2009 at 8.00 p.m. If accused was not arrested until 8.00 p.m. there is no way that he could have been a participant in a parade conducted six (6) hours **before** his arrest. In his defence the accused called as a witness the officer who arrested him. This officer **APC BARRACK ODHIAMBO** told the court that on the material date of 9th May, 2009 he went to Kiteje village with the chief who pointed out to him

the accused whom he arrested after 4.00 p.m. **DW2** further states that upon arrest he took the accused to Diani police station and **not** to Kwale police station where the identification parade was said to have been conducted. This is a serious inconsistency for which no explanation has been given. If accused was arrested on 9th May, 2009 **after 4.00 p.m.** he could not have been a participant in a parade conducted on that very same day at 2.50 p.m. Thus **PW1** could not possibly have positively identified the accused – he must have identified some other person. It is also curious that it was the chief who led police to the home of the accused and pointed him out for arrest. The chief did not witness the murder and thus had no way of identifying accused as the culprit. **PW1** told the court that he did not know the accused before thus he could not possibly have named the accused. It is not explained how the chief came to know that accused was the suspect. Once again this remains an anomaly which has not been explained. These are major inconsistencies which cast serious doubt on the identification of the accused by **PW1**. The benefit of such doubt must be resolved in favour of the accused. For this reason I find that it has not been proved beyond a reasonable doubt that the accused was the one who stabbed and killed the deceased. In the absence of such proof the charge of murder collapses. I therefore enter a verdict of '*Not Guilty*' and I acquit the accused under section 306(2) of the Criminal Procedure Code. Accused is to be set at liberty forthwith unless he is otherwise lawfully held.

Dated and delivered in Mombasa this 18th day of December, 2013.

M. ODERO

JUDGE