

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL CASE NO. 49 OF 2006

REPUBLIC PROSECUTOR

V E R S U S

GEORGE MAVUKE ACCUSED

J U D G M E N T

The accused person is charged with the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code**. The particulars of the offence are that the accused *on the 9.8.2006 at Sabatia village, West Maragoli location in Vihiga district within Western Province murdered OWEN YALWALA*.

Six witnesses testified for the prosecution. **DUNCAN ENZOYA MUHAMBE** was **PW1**. His evidence is that on the 9.8.2006 he went to Chadumbe market and left at about 7 p.m. The deceased who was his brother went to the market in the company of Dominic Enzoya. PW1 went home and after taking supper prepared to go for a funeral. He heard the deceased crying from the direction of Chadumbe market. He saw the deceased holding his chest and being escorted by Elvis Eresi and Godfrey Mayumba. The deceased told him that he had been stabbed by George. The deceased was taken to Mbale hospital but died the same evening.

JAVAN LUVISU MUHAMBE was **PW2**. The deceased was his grandchild. On the 9.8.2006 he heard that the deceased had been taken to Mbale hospital. PW2 went to the hospital and found that the deceased had already passed on. He saw the body with two injuries on the chest. PW2 identified the body for postmortem purposes on the 16.8.2006. **PW3** was **MINAYO ROSE CHEGERO**. Her evidence is that she was selling mandazi outside Vihindi Primary School on the 9.8.2006 at about 7 p.m. One Mayomba bought one andazi and the accused also bought one andazi. She heard someone saying that between Dominic and Owen one of them had to die that night and she recognized that voice as that of the accused whom she had known for two years. She went home at about 9 p.m. and heard of the deceased's death the following morning. The accused was standing alone and did not have anything in his hands. The deceased was not present where she was selling her mandazi.

PW4, was **ELVIS EREGI NANDOYA**. He testified that he was at his home on the 9.8.2006 when he heard the deceased outside. He asked his wife to open the door for him and PW4 saw the deceased bleeding. The deceased told him that he had been stabbed by George. PW4 informed his brother Godfrey Mayumba (PW5) and the deceased told them that it was George who had stabbed him. They took the deceased home and on the way met the deceased's brother Duncan Enzoya (PW1). PW4 went home. **PW5 GODFREY MAYUMBA** met the deceased with PW4 together with Elvis and Duncan. They were all drunk. Elvis told him that Owen was in his house and had been stabbed. He went and saw the deceased and on the way met PW1. According to him he did not know who had stabbed the deceased. **PW6**, was **DR. DICKSON MCHANA**. He produced the postmortem report prepared by Dr. Kaguthi. The deceased was 18 years old and had two stab wounds over the left shoulder blade. The doctor formed the opinion that the cause of death was severe internal bleeding secondary to penetrating chest injury.

The accused was put on his defence. In his sworn testimony he testified that, he comes from Vihindi sub-location. He was at home on the 9.8.2006 at about 7 p.m. and went to sleep. He did not know the deceased. He was arrested by the police on the 16.8.2006 during the day. He was informed that he was going to assist with investigations. He heard about the deceased in court.

Mr. Wafula, counsel for the accused submitted that the evidence on record does not sustain the charge. No one saw the accused stabbing the deceased. PW3's evidence does not add up as she did not see the deceased that night.

The evidence on record shows that the deceased died of stab wounds. The main issue for determination is whether it is the accused who inflicted the injuries on the deceased. None of the witnesses saw the accused stabbing the deceased. According to PW1 the deceased told him that it is George who stabbed him. The same evidence was adduced by PW4. The main issue would be whether the deceased statement that he was stabbed by George falls within the category of statements under section 33 of the Evidence Act. According to PW3 she heard the accused indicating that one person would die that night. PW3 did not see the deceased that night. According to PW5 the deceased was ELVIS (PW4) and Duncan (PW1). They were all drunk. It is not clear how the deceased was stabbed. According to PW1 the deceased went to Chadumbe market in the company of Dominic Enzoya who did not testify. Under section 36 of the Evidence Act the court is supposed to weigh the circumstances under which statements of people who cannot be called as witnesses, such as the deceased are made. No one saw the accused stabbing the deceased. The name George is too common to hold with finality that it referred to the accused. The investigating officer did not testify so as to shed light on the circumstances under which the deceased met his death. The law requires that a conviction has to be based on proof beyond reasonable doubt. PW3 did not see the accused stabbing the deceased. None of the witnesses saw the accused stabbing the deceased. It is possible that the George mentioned by the deceased was a different George and not the accused. I do find that the prosecution has not proved its case beyond reasonable doubt and the accused is hereby acquitted of the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code**. The accused shall be set at liberty unless otherwise lawfully.

Delivered, dated and signed at Kakamega this 4th day of December 2013

SAID J. CHITEMBWE

J U D G E