REPUBLIC OF KENYA

IN THE HIGH COURT

AT MOMBASA

CRIMINAL CASE 27 OF 2010

REPUBLIC ..... PROSECUTION

=VERSUS=

HELTAN MNJAMA NGETI ..... ACCUSED

JUDGEMENT

The accused **HELTAN MNJAMA NGETI** faces a charge of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE.** The particulars of the charge are that:

"On the 6th day of October 2010 at Ngulu village, Werugha Location in Taita Taveta County murdered ELIZAPHAN MSHILA MWACHOFI"

The accused who was represented by **MR. TARUS** Advocate entered a plea of '***Not guilty'*** to the charge. His trial commenced before the High court in Mombasa on 12th May 2011. At that trial the prosecution led by **MR.ONSERIO,** learned State Counsel called a total of six (6) witnesses in support of their case. The brief facts of the prosecution case were that on the night of 5th October 2010 at about 2.00 A.M. **PW1 VALERIE WACHIA MSHILA** heard cries of help. She recognised the voice as that of the deceased who was her husband. **PW1** together with her daughter **J M M PW2** and a neighbour **BRAMWEL MWAMBURI PW3** all went out in response to the deceased's cries for help. They found the deceased lying alongside the path. He had been badly injured and could barely talk. The deceased told them that it was Heltan (accused) who had beaten him. The three carried the deceased back to his house. The next day he was taken to Wesu Hospital for treatment. However he unfortunately died whilst undergoing treatment. The matter was thereafter reported to the police. The accused was arrested and charged.

At the close of the prosecution case the accused was ruled to have a case to answer and was placed onto his defence. He gave a sworn statement in which he denied any and all involvement in the death of the deceased. This court must now determine whether the charge of murder has been proved as against the accused to the standard required in law.

The offence of murder has three main ingredients all of which must be proved. Firstly proof must be tendered that the deceased is actually dead. Secondly it must be shown that the deceased met his death as

the result of an unlawful act or omission on the part of the accused. Thirdly it must be proved that said unlawful act or omission was committed with malice aforethought.

In this case the fact and cause of death of the deceased are not in any doubt. **PW1** **PW2** and **PW4** all testify as to how they found the deceased badly injured lying by the foot-path. **PW3 THOMAS EKSON MAGANGA** an in-law to the deceased confirmed that he attended and witnessed the post-mortem examination carried out on the body of the deceased. **PW5 DR. MWALESO KISHINDO** of Wesu District Hospital testified that he conducted the autopsy on the body of the deceased. He noted bruises and fractures on the body. In his expert medical opinion the cause of death was ***'cardio-respiratory arrest secondary to severe haemorrhage due to multiple injuries'***. **PW5** filled and signed the post-mortem report which is produced in court as an exhibit.

From the evidence it would appear that the only reason why the accused was arrested and charged with this offence was the evidence of **PW1**, **PW2** and **PW4** that at the time of his rescue the deceased named the accused as the one who had assaulted him. The prosecution therefore relies on this ***'dying declaration'*** as the basis for charging the accused.

S. 33(a) of the Evidence Act provides that a statement made by a deceased as to the cause of his death or as to the circumstances of the transaction which resulted in his death in cases in which the cause of death of the person comes into question are admissible as evidence. However as a general rule courts must exercise circumspection in placing reliance solely upon a dying declaration. In the case of **CHOGE –VS- REPUBLIC CRIM APPEAL 69 of 1984**, the Court of Appeal sitting in Nakuru held that:

"There need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in the reception into evidence of such a declaration of a deceased person."

In this case aside from this dying declaration allegedly made by the deceased no other piece of evidence links the accused to the death of the deceased. There is no witness who saw the two together at any time whatsoever. There is no evidence that the accused and the deceased were ever at any time involved in a quarrel or disagreement. Indeed **PW1**, **PW2** and **PW4** all of whom were neighbours all testify that there was never any disagreement between the accused and the deceased. If so then what possible reason would the accused have had to so savagely attack and injure the deceased.

The behaviour of the accused did not raise any suspicion at all. The accused made no attempt to flee or to abscond. **PW7 PC JOSEPH MUKUNZU** the arresting officer told the court that he found the accused in his home. The police recovered no weapon or any blood-stained clothes inside the accused's house. The accused made no attempt to resist arrest. No bruises and/or injuries were seen on the body of the accused dispelling any notion that he could have been engaged in a fight with the deceased.

Although the deceased's wife **PW1** denied that the deceased had taken any alcohol on the material night both **PW2** and **PW4** who also saw the deceased state that he smelt of alcohol and was drunk when they rescued him. The police did not bother to investigate where the deceased had been drinking alcohol or whom he may have been with. The incident occurred at night. It was dark and indeed **PW1** and **PW2** said they needed torches to enable them see. This court cannot rule out the very real possibility that the deceased in his intoxicated state may have mistakenly identified the accused as the person who attacked him.

On the whole I find this case to have been very poorly investigated. A dying declaration is not a ***'fait accompli'*** in proving a charge of murder. To present as evidence a dying declaration and nothing else falls way below the legal threshold of proof required. I find no independent or tangible evidence to link the accused to the death of the deceased. In my view the prosecution have not proved this charge of murder beyond all reasonable doubt. I therefore enter a verdict of ***'Not guilty'*** and I hereby acquit the accused of this charge. Accused is to be set at liberty forthwith unless he is otherwise lawfully held.

Dated and Delivered in Mombasa this 17th day of May 2012.

M. ODERO
JUDGE

In the presence of:

Mr. Tarus for Accused

Mr. Onserio for State