



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MOMBAS

Criminal Case 11 of 2008

REPUBLIC.....PROSECUTION

=VERSUS=

JUMA MUNGA BIDII.....ACCUSED

**JUDGEMENT**

The accused **JUMA MUNGA BIDII** has been charged with the offence of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENL CODE**. The particulars of the charge were that:

***“On the 4<sup>th</sup> day of July, 2006 at Kwa Punda village in Chagamwe Location in Mombasa District within Coast province jointly with another not before court murdered HUSSEIN KONDE KENGA”***

The accused entered a plea of **‘Not Guilty’** to the charge and his trial commenced before Hon. Justice Sergon at the Mombasa High Court on 25<sup>th</sup> May 2009. The Honourable Judge heard a total of five (5) witnesses before he was transferred to the Nyeri High Court. On 31<sup>st</sup> March 2010 I took over the hearing of this case and heard the remaining two (2) prosecution witnesses. **MR. OJODE** Advocate represented the accused.

The brief facts of the case were that on the night of 4<sup>th</sup> July 2006 the deceased **‘Hussein Konde’** together with friends and family members were in his house watching a foot-ball match. At about 1.00 A.M. there was a loud bang on the door. The deceased went to check what the problem was. There was a group of rowdy youth demanding to be let into the house to watch the foot-ball match. The deceased declined to let them in. The youth began to throw stones. One of the stones hit the deceased on the head and he fell down unconscious. The deceased’s relatives rushed him to a nearby hospital where he unfortunately died whilst undergoing treatment. The accused who was said to have been amongst the group of youths who were throwing stones at the deceased was later arrested and charged.

At the close of the prosecution case the accused was found to have a case to answer and was placed onto his defence in accordance with Section 306(2) of the Criminal Procedure Code. The accused opted to give a sworn defence in which he denied any and all involvement in the death of the deceased. It is now the duty of this court to determine whether this charge of murder has been proved to the standard required by

law.

The offence of Murder is defined by 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 gives rise to three crucial ingredients that the prosecution must prove namely

- 1) That the death of the deceased has occurred and the cause of that death
- 2) That the death of the deceased was occasioned by an unlawful act or omission on the part of the accused
- 3) That said unlawful act or omission was done with malice aforethought.

The first ingredient is quite straight forward and has been readily proved. **PW1 ABDALLA KENGA KONDE** a brother to the deceased, and **PW2 REHEMA CHIGAMBA** a wife to the deceased both testify that on the material day the deceased was attacked by stones and injured. The two confirm that the deceased later met his death whilst undergoing treatment. The two identify the deceased as ***“Hussein Kenga Konde”***.

**PW7 DR. BERNARD JAPHET MWERU** a surgeon based at Voi Hospital told the court that he conducted the autopsy on the body of the deceased. He noted a linear cut wound on the skull of the deceased. His expert medical opinion was that the cause of death was ***“cardio pulmonary arrest due to head wound”***. He filled and signed the post-mortem report which is produced in court **Pexb2**. This opinion was not challenged nor controverted in any way. I am therefore satisfied that the death and the cause of the death of the deceased have been proved beyond a reasonable doubt.

The prosecution must proceed to prove that it was the accused who committed the unlawful act which directly led to the death of the deceased. There does not appear to be unanimity amongst the prosecution witnesses as to exactly what this unlawful act was. **PW1** who was an eye-witness told the court that the deceased was hit on the head by a stone thrown by a group of youth who were attempting to gain forcible access to his house. **PW2** the deceased’s wife who was also an eyewitness told the court that the youths used a stone ***‘and a knife’*** to attack the deceased. Under cross-examination **PW2** says

***“I am not sure what hurt him. It may have been a knife, a stone etc”***

By this it appears that though she was present at the scene **PW2** did not see exactly how the deceased was injured or what implement/weapon was used. **PW3 PASTOR PAUL KIZUNGU** a neighbor to the deceased was also an eye-witness to the incident. He told the court that upon hearing the commotion at the house of the deceased he got out of his house to check. On his part **PW3** states that he saw two men armed with stones attack the deceased. Under cross-examination by defence counsel **PW3** is categorical that:

***“I did not see anyone with a panga. Hassan had no panga but a stone. I did not personally see a panga ...”***

Surprisingly **PW6 CORPORAL JOAB OLUOCH** the investigating officer was equally categorical that the deceased was cut on the head. It is therefore clear that it is uncertain as to how the deceased sustained the injuries that led to his death. The evidence of the doctor **PW7** does not shed much light on this issue. The doctor’s evidence was that the wound which he saw on the deceased’s skull could have been caused by either a blunt or sharp object. In his evidence **PW7** says:

***“I saw one compound fracture on the head. This was caused by a single blow to the head. A blunt object like a rungu [or a stone] or a sharp object may have caused the wound. A blunt object can cause***

***a linear crack on the skull ...”***

The fact that the eye-witnesses cannot seem to agree on what caused the injury to the deceased brings to the fore the inconsistency in the evidence of these witnesses. Yet further contradictions emerge when one considers the testimony of **PW6** when he says:

***“This is the statement of **PW1** Abdalla Kenga. He states that the attackers ran away and left behind the sword they had. **PW1** says he picked the sword and handed it to the police as an exhibit. I never saw the sword. The sword was never handed over to me. I do not know which policeman received the sword ...”***

If as **PW6** states a sword was recovered at the scene and handed over to the police then why was the same not produced before court as an exhibit? Why would a police officer recover a murder weapon only to fail to tender it as evidence in court? Further despite **PW6** insisting that it was **PW1** who in his statement narrated to police how the deceased was cut with a sword, **PW1** himself in his testimony directly contradicted the evidence of **PW6**. **PW1** stated as follows:

***“I saw one Hassan in possession of a knife. I did not take the knife to the police. Hassan fled with the knife. My statement states that I took the knife to the police. That is not true. The police wrote something I did not say ....”***

Why would the police include in the statement of **PW1** something that he denies having told them? Were the police attempting to fabricate evidence? Why would **PW1** sign a statement which contained untruths? With such contradictions the veracity of the prosecution witnesses remains grave in doubt.

Be that as it may even if this court were to proceed on the assumption that there is clear proof of which weapon was used on the deceased, the prosecution must prove that it was actually the accused who wielding this weapon (or object) assaulted the deceased. **PW1** told the court that two boys one of whom was the accused came to the deceased’s door and began to assault him. He later alters this to say:

***“The duo were in a crowd of many people”***

This was a scenario of great confusion. There were people outside the deceased’s house hurling stones. In such a scenario I am very skeptical that it would have been possible to pin-point with certainty who threw the stone that hit the deceased. **PW2** concedes as much when she states under cross-examination:

***“There were many people outside. I did not personally see Juma [the accused] throwing a stone”***

**PW6** the investigating officer told the court that he went to Farouk Hospital where the deceased was admitted and he recorded a statement from the deceased before he died. The said statement was produced as an exhibit **Pexb1**. In his statement the deceased refers to two suspects – Juma and Hassan. He goes further to state:

***“I would want the two suspects namely Juma and Hassan to be arrested and charged in the court of law because they have caused me a serious injury amounting to permanent disability”***

In this statement which I believe the prosecution seeks to rely upon as a dying declaration the deceased merely refers to Juma and Hassan as ‘suspects’. He does not state what act the two did to him – he does not state which one of them hit him with a stone. Indeed from this statement it is quite evident that even the deceased himself was not sure which of the two men he named was to blame for his injury.

From the evidence on record it is clear that this was some kind of a fracas. A gang of youth attacked the deceased’s house and began throwing stones. In such a situation it cannot be certain who threw the stone which hit and injured the deceased. Whilst **PW1** and **PW3** insist that they saw accused hit the deceased with a stone **PW2** also an eye-witness contradicts this when she says:

***“There were many people outside. I did not personally see Juma throwing a stone.”***

Taken on its totality I find that due to several inconsistencies and contradictions the evidence purporting to identify the accused as the one who threw the stone which hit the deceased cannot be entirely relied upon. Greater doubt is placed on this identification given that it took police almost two (2) years to arrest the accused. The incident occurred on 4<sup>th</sup> July 2006 but it was not until 7<sup>th</sup> April 2008 that the accused was arrested. If as alleged the accused had been positively identified even by name and was a man who lived in the vicinity then why was he not arrested immediately? There is no evidence that the accused ever ran away or absconded from his residence. In his defence the accused stated that during all this period he was engaged in his normal business of selling fish. The only reason why it would have taken a full two (2) years to apprehend the accused is because it was not entirely clear if he was the one who threw the stone that hit the deceased. From the foregoing I find that it has not been proved beyond a reasonable doubt that it was infact the accused who committed the unlawful act which led to the death of the deceased. The actus reus of this offence has not been proved as against the accused. In the absence of such proof of actus reus a charge of Murder cannot be sustained. 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 11<sup>th</sup> day of May 2012.**

**M. ODERO**  
**JUDGE**

In the presence of:

Mr. Ojode for Accused

Mr. Onserio for State