REPUBLIC OF KENYA

IN THE HIGH COURT

AT MALINDI

Criminal Case 3 of 2007

REPUBLIC .....PROSECUTOR

VERSUS

MURE BAYA KITUNGA alias KAHASO .....ACCUSED

JUDGMENT

1. The accused was charged with the murder of LEMMY FRANCIS THOYA on 21/12/2010 at Boresingwaya village, Kilifi District.

2. The prosecution called eight witnesses. In brief the Prosecution case was that on the night of 20th and 21st December, 2010, there was a funeral wake at the home of CHARO BARAKA who had died. There were young people dancing to Music, including the deceased while the accused displayed cassava for sale to the revellers. A dispute arose between the deceased and the accused who claimed that the former had stolen his cassava or failed to pay for the same after getting it from his cousin, JOSEPH NZAI (PW 8) who earlier on had been selling the cassava on behalf of the accused.

3. At about 3.00am the accused pursued and stabbed the deceased a short distance from the funeral wake. The deceased succumbed to the injuries and died on the same night. On the next day the accused surrendered himself to a local elder KALAMA ANDERSON KISUI (Pw 6) upon learning that he was being sought. He handed over to the elder a knife and sheath with which it is alleged he used to stab the deceased.

4. The accused made an unsworn defence statement. He said he resides at Adu and spent the 21st December 2010 at Kasangani working. Thereafter he accompanied a colleague KASSIM CHARO to a local bar for a drink after a drink in another place, apparently the wake, they left to go home. They met some other people in the way. On the next day he heard the rumours that he was suspected to have murdered someone, which he denied but was eventually arrested.

5. The fact of the presence of the accused at the funeral wake is not in dispute. So too the death of LEMMY FRANCIS THOYA from stabbing injuries on the same night, a short distance away from the venue of the wake. The key question in this case is the identity of the murderer.

6. The Prosecution lined up four witnesses, LEONARD FRANCIS THOYA (Pw 1) a brother of the deceased, NICODEMUS KATANA KITILE (Pw 3) a cousin, NGOMBO KITHI (Pw 4) a brother-in-law and another cousin JOSEPH NZAI (Pw 9) in support of their case against the accused. Of these witnesses, Pw 1 and Pw 9 claim that the killing of the deceased was preceded by a quarrel over some cassava allegedly taken by the deceased without paying at the time Pw 9 was standing in for the accused who was the owner of the cassava. This quarrel allegedly occurred at the venue of the wake where there was light from a generator, according to Pw 1. Pw 1 claimed that he left the venue in search of elders when the dispute was raging but on returning did not find his brother (deceased). Alarmed, he decided to leave only to come upon a scene, 200 metres away where he witnessed his brother being stabbed by the accused.

7. In cross-examination the witness admitted it was a dark night but surprisingly added that there was moonlight. He had not seen the accused prior to the material night. Pw 9 did not witness the attack but it appears from his evidence, that he was the only person familiar with the accused and had seen him earlier that day and agreed to sell his cassava at the funeral wake. He was a suspect in the murder and was arrested during initial inquiries. Pw 9 described the fateful night as dark.

8. Pw 3 also did not know the accused prior to the fateful night. He did not refer to any argument between the deceased and accused. He alleged that he briefly left the funeral wake venue to buy cigarettes at the roadside and on the way back met the accused chanting "I have finished with him". He claimed the accused had fresh blood on his hands and a sheathed knife on his waist. Surprisingly, when he returned to the wake, he found the accused still selling the cassava.

9. The "chanting encounter" allegedly occurred about 100 metres from the wake home from the evidence in chief of Pw 3. He claimed there was bright moonlight enabling him see the accused who passed about 3½ metres away from him. He described his clothes as a black Kaunda suit, as did Pw 1.

10. Another witness, Pw 4 said he had to ask the deceased to identify himself "as it was at night" when he allegedly responded to the deceased cry for help and met him at his (Pw 4`s) home entrance. Pw 4 claimed to have received the dying declaration of the deceased implicating the cassava vendor "whose name he did not give. If indeed the deceased ran off from the scene of the attack screaming, Pw3 should have heard the screams and most likely met with Pw 4 as he stepped out of his home. But infact Pw 1 said the deceased made a sound but not loudly, after the stabbing.

11.Secondly if Pw 1 ran off to report the stabbing he had witnessed he would have arrived home before the victim and/or met with either Pw 3 or Pw 4 on the way. Apparently the three did not meet. That is difficult to understand. It is also inconceivable that Pw 3 after covering a distance of about 100 metres to go back to the wake venue found the man he had met (accused), obviously going in a different direction, already back, cleaned up and selling his cassava like nothing had happened.

12. No identification parade was held in respect of Pw 1 and Pw 3, and considering the circumstances obtaining at the scene of the attack on the deceased, it is most unlikely that either of these witnesses could positively identify the assailant, more so one who was a near stranger to them.

13.The fact that the accused gave himself up on 21/12/10 to a local elder, Pw 6 is not tantamount to an admission of the offence, because he had been forced to flee the wake on the previous night when the family of the deceased returned to get him after the attack. The sword he surrendered to Pw 6 had no blood and Pw 3`s assertion that he has seen the accused wearing the same on the waist while chanting sounds contrived. He could not identify correctly its colour. The knife was not subjected to any examination to confirm if it is the one which was used to stab the deceased.

14.Clearly the prosecution evidence is in serious disarray, raising the spectre of mistaken identity, if not outright fabrication by the witnesses. There were many villagers who must have witnessed part of the transaction especially the quarrel at the wake and dying declaration. It is surprising that none was called, the prosecution confining itself only to close relatives of the deceased. The accused's defence further reinforces the possibility that this could be a case of mistaken identity.

15. In conclusion, and for the reasons given, I find that the prosecution has failed to prove the charge beyond any reasonable doubt. The accused is therefore acquitted under section 322 of the Criminal Procedure Code and is to be released forthwith unless otherwise lawfully held.

Delivered and signed at Malindi this **11th May, 2012** in the presence of the accused, Mr. Kemo for the State, Mr. Wasuna holding brief for Mr. Lughanje for Accused, cc Evans.

C. W. MEOLI
JUDGE