REPUBLIC OF KENYA

IN THE HIGH COURT

AT MOMBASA

Criminal Case 34 of 2008

REPUBLIC ..... PROSECUTION

=VERSUS=

SALIM MWATSUMO SALIM ..... 1ST ACCUSED

MICHAEL MUTUNGI ..... 2ND ACCUSED

JUDGEMENT

The two accused persons namely **SALIM MWATSUMO SALIM** (hereinafter referred to as the 1st accused) and **MICHAEL MUTUNGI** (hereinafter referred to as the 2nd accused) are jointly charged before this court 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 14th day of December, 2008 at Jomvu village of Changamwe Location in Kilindini District within Coast Province, jointly murdered IBRAHIM OKARI ARORI"

Both accused persons entered a plea of ***'Not guilty'*** to the charge and their trial commenced before the High Court in Mombasa on 28th April 2010. The prosecution led by **MR. ONSERIO**, learned State Counsel called a total of six (6) witnesses in support of their case. **MR. MUSHELLE** Advocate acted for the 1st accused whilst **MR. AZIZ** appeared for the second accused.

The brief facts of the prosecution case were narrated by **PW5 PC DAVID MUNENE** an officer who at the material time was attached to Changamwe Police Station. This witness told the court that on 13th December 2008 from about 6.00 A.M. he was on mobile patrol duties. At 2.15 A.M. along the Miritini-Mainland Road he came across a stationery vehicle Registration No. KBA 423E parked across the road near nursery stage. The fact that the vehicle's headlights were on and its wipers running roused the suspicion of **PW5**. He and his fellow officer **CORPORAL KAHINGO** stopped and went to check on the stationery vehicle. Using a torch **PW5** looked into the front seat. He saw a man on top of another in the front seat. Upon noticing the police one man whom **PW5** identified as the 1st accused quickly opened the front door and ran out. At the same time the 2nd accused ran out of the rear seat. **PW5** shot into the air

with his rifle. The 1st accused ran back and knelt down in surrender. **PW5** apprehended and handcuffed the 1st accused whilst Corp. Kahungo detained and handcuffed the 2nd accused. Both accused person's T-shirts were stained with blood.

Upon looking into the front seat of the car **PW5** found a man who had been stabbed in the chest and was bleeding heavily. He also recovered a rope tied across the injured man's mouth as well as a knife on the front passenger seat. The injured man was barely alive. Police rushed him to the Provincial Coast General Hospital where he unfortunately died before being treated. The two accused were both taken to Changamwe Police Station and placed in cells.

Using the deceased's mobile phone police managed to trace his relatives. **PW1 PATRICIA WANJIRU** told the court that the motor vehicle Registration No. KBA 423E was her vehicle which she used as a taxi and confirmed that the deceased was her employee who used to ply this trade with her vehicle. The matter was thereafter investigated and the two accuseds were finally arraigned in court and charged with the offence of murder.

At the close of the prosecution case I did rule that both accuseds had a case to answer. Each accused elected to make an unsworn statement in which they denied any involvement in the death of the deceased. Rather the 1st accused claimed that he was merely passing-by when he came across the stationery vehicle and moved closer to assist the driver. On his part the 2nd accused also said that he just happened to be passing by when the police called him and instructed him to help put the injured man into the police landrover. It is now the duty of this court having heard all the evidence to make a determination as to whether the prosecution have proved this charge of murder as against both accused to the standard required in 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"

From this definition arise three crucial ingredients of the offence of murder namely:

1) That a death has infact occurred and the cause of that death

2) That the accused (or accuseds) caused the death of the deceased by an unlawful act or omission and

3) That said unlawful act or omission was committed with malice aforethought

In this case the first two ingredients have in my opinion been quite satisfactorily proved. **PW5** gave a very graphic description of the scene which he encountered on the night of 13th/14th December 2008. He described having found a man badly injured in the front seat of the stationary vehicle. The victim was literally sitting in a pool of blood with stab wounds on his neck. The injured man was rushed to hospital but unfortunately succumbed to his injuries.

PW5 in his evidence did tell the court that he recovered a sisal rope tied around the mouth of the dead man as well as a knife on the front passenger seat. Both items were identified by **PW5** and were produced before this court as exhibits **Pexb3** and **Pexb4** . The presence of these items at the scene leads to the ready conclusion that the said knife must have been the weapon used to inflict injuries on the deceased whilst the rope must have been used to tie the deceased and subdue any resistance that he may have put up.

Confirmation on the cause of death of the deceased is provided through the evidence of **PW4 DR. NGALI MBUUKO** a pathologist attached to the Provincial Coast General Hospital. This witness told the court that he did conduct the autopsy on the body of the deceased. He noted several stab wounds on the neck, chest and abdomen of the deceased. The stab wound to the neck was so severe that it had literally severed the trachea (wind-pipe). No doubt this was a particularly viscious attack. **PW4** opined that the

cause of death was ***"heart failure due to stab wound to the heart"***. He filled out and signed the post-mortem report which is produced as an exhibit **Pexb5**. The evidence of the pathologist and his report serve to prove that the deceased met his unfortunate demise as the result of an unlawful and viscous assault to his person. I am therefore satisfied as a court that the first ingredient of the crime of murder has been satisfactorily proved.

Having proved the fact and cause of death of the deceased the prosecution is obliged to tender sufficient evidence to prove that it was the two accused persons charged before this court who committed the unlawful act i.e. the stabbing which led to the death of the deceased.

This is a case where there was effectively only one eyewitness to the incident. **PW5** the police officer who happened upon the scene told the court that he was with a fellow officer **Corporal Kahingo** who is now deceased and was therefore unable to come to court to testify. Although no documents e.g. death certificate or burial permit were produced as evidence of the death of this Corporal Kahingo, I have no reason to doubt what **PW5** has told the court. In any case where there is only one eyewitness (such as the present one) courts must exercise great caution in examining the evidence of such single eyewitness and a court must proper warn itself before relying on such evidence as the basis for a conviction [See **MAITANYI –VS- REPUBLIC [1986] KLR 198**]

PW5 told the court that when he approached the stationery vehicle he saw a man lying (or sitting) on top of the driver of the car. The incident occurred at 2.00 A.M. No doubt it was dark but **PW5** told the court that he had a flashlight which he used to look into the stationery vehicle. In addition the headlights of said vehicle were on providing more light for greater visibility. As the officer approached a man bolted out of the front seat of the vehicle and attempted to run away. He only surrendered when **PW5** fired a shot into the air. **PW5** immediately apprehended and hand-cuffed the man who turned out to be the 1st accused. At the same time a second man ran out of the rear seat. The late Corporal Kahingo apprehended and handcuffed this second man who turned out to be the 2nd accused. From the evidence of **PW5** both accuseds were found at the scene and inside the vehicle were the deceased lay dying. They were both apprehended immediately and at no time did he lose sight of them. In those circumstances there is no possibility of a mistaken identity. In their defence statements to court both accuseds admit to having been at the ***'locus in quo'*.** There can therefore be no doubt that the two accuseds were indeed found at the scene of the murder.

The million dollar question then is what were the two accuseds doing at that scene? Were they involved in the murder of the deceased (as alleged by the prosecution) or were they merely innocent passersby unwillingly caught up in a crime scene (as alleged by the accuseds themselves)?

PW5 told the court that the 1st accused was literally sitting on top of the deceased in the driver's seat. Why would the 1st accused be squashed in the same seat as the driver of the car? After apprehending the 1st accused **PW5** checked on the driver and found him sitting in a pool of blood half-dead from very serious stab wounds. A knife was recovered next to the deceased on the passenger seat. With regard to 2nd accused he emerged from the rear seat of the same vehicle. **PW5** noted that a sisal rope was tied around the deceased's mouth, obviously this was to silence and subdue him. What conclusion can be drawn from this set of facts? In my view the only logical conclusion that can be drawn is that the two accused acting in concert way laid the deceased and attacked and stabbed him. That is why they attempted to flee when police arrived. They were literally caught in the very act by **PW5**.

Further credence is led to this conclusion by the fact that both the 1st and 2nd accuseds were apprehended wearing T-shirts which were blood-stained. These items of clothing were removed and taken to the Government Chemist for analysis and comparison with a blood sample from the deceased. **PW6 RHODA WANJIKU** was the Government analyst based in Mombasa who carried out the analysis. She produced a report of her findings dated 5th May 2010 as an exhibit in this court **Pexb6**. The relevant findings were as follows. The blood sample taken from the deceased showed that he was of Blood Group 'A'. The T-shirts of **both** accuseds were stained with blood of Group 'A'. Similarly the rope and the knife had stains of Group 'A'. Thus the blood found on the clothes of both accuseds as well as on the exhibits could only

have emanated from the deceased. The 1st accused was found to be of blood group 'O' whilst 2nd accused was of blood group 'B' thus there is no way they themselves could have been the source of the blood-stains on their clothes and on the exhibits. In any event neither accused was found to have or even claimed to have sustained any injury on their person.

In their defence the two accuseds concede that the deceased's blood did get onto their clothes. However they both insist that they were innocent passers-by and were in no way involved in the murder of the deceased. Both 1st and 2nd accuseds explain that police ordered them to carry the injured man (he was still alive by then) and place him in the police landrover. This is how, they maintain, the blood of the deceased got onto their clothes. This is as likely a story as any. However the fact that this aspect was not brought up by either counsel whilst cross-examining **PW5** convinces me that there is no truth to this defence. It is merely brought up as an afterthought in an attempt to evade responsibility for the death of the deceased. The time of the incident 2.00 A.M. is not a time when people are normally up and about. What were the two accuseds doing walking about in Jomvu at 2.00 A.M.? They have made no effort to explain their presence at that location. Where were they coming from and where were they going to? It cannot have been a mere coincidence that the two accuseds were walking about in the dead of night at the precise spot where the deceased is murdered. The defence is in my view contrived and does not in any way weaken the prosecution case. I do now as I am required to do warn myself of the dangers of relying on the evidence of a single witness. **PW5** was a police officer out on his normal patrol duties. There is no evidence that he was known to either the deceased or the two accuseds before this incident. He was merely a public officer who spotted a suspicious situation and as required by his office stopped to investigate. This witness has nothing to gain by tendering false evidence to this court. I was able to observe the demeanour of the witness. He appeared honest and remained unshaken under cross-examination by both defence counsel. In my view **PW5** was a truthful witness.

In addition the evidence is strengthened by the evidence of the government chemist. She too had no reason to fabricate evidence against the two accuseds. From the eyewitness account given by **PW5** coupled with the forensic evidence adduced by **PW6** I am satisfied that the two accused were arrested at the ***'locus in quo'*** in the very act of attacking the deceased. They only stopped their actions because police arrived on the scene. From the evidence I am satisfied that the two accuseds were caught in the very act of committing the unlawful act which ultimately led to the death of the deceased.

The last ingredient which needs to be proved in a charge of murder is the element of ***'mens rea'***. This mens rea is defined as malice aforethought which is defined in Section 206 of the Penal Code as follows:

"Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances

(a) An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not

(b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused

(c) .....

(d) ....."

The two accused in attacking the deceased in so viscious a manner and fatally wounding him must have had full knowledge that their actions would probably cause the death of the deceased. Therefore malice aforethought as defined by S. 206(b) is shown to have existed. I am therefore satisfied that the mens rea for the offence of Murder has been proved and I do so find. In conclusion therefore I am satisfied that the prosecution have proved this charge of Murder beyond a reasonable doubt and I do hereby convict the 1st and 2nd accused as charged.

Dated and Delivered in Mombasa this 8th day of June 2012.

M. ODERO

JUDGE
8.6.2012

MR. GIOCHE: I have no records. Let both be treated as first offenders.

MR. MUSHELLE IN MITIGATION: Accused 1 is a first offender and is young. He has been in custody for over 5 years. He is very remorseful. We seek for a lenient sentence.

As regards the 2nd accused he is also a first offender and has been in custody for a long time. We seek a lenient sentence.

M. ODERO
JUDGE

COURT

I have considered the mitigation raised on behalf of the two (2) accused persons. The offence of Murder is extremely serious. Due to the actions of the two accused persons a human life was needlessly lost. Although Section 204 of the Penal Code provides for a mandatory death sentence upon conviction I am guided by the decision of the Court of Appeal in the case of **GODFREY NGOTHO MUTISO –VS-REPUBLIC** where it was held that S. 204 of the Penal Code in so far as it provided for a **mandatory** death sentence upon conviction on a charge of Murder was unconstitutional I consider the fact that this may have been a case of a botched robbery attempt. I therefore sentence each accused to serve forty (40) years imprisonment. They each have a right to appeal.

M. ODERO
JUDGE
8.6.2012