



REPUBLIC OF KENYA

High Court at Mombasa

Criminal Case 1 of 2011

REPUBLIC PROSECUTOR

=VERSUS=

VUNJA MUGALA KIRIMA ACCUSED

JUDGEMENT

The accused **VUNJA MUGALA KIRIMA** 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 3rd day of January, 2011 at about 8.00 A.M. at Kiwegu Village Kwale County within Coast Region murdered ANDREW MASAI MONGO”

The accused entered a plea of ‘**Not Guilty**’ to the charge and his trial commenced before me on 7th April 2011. The prosecution led by **MR. ONSERIO** learned State Counsel called a total of eight (8) witnesses in support of their case. **MR. MBUYA** Advocate acted for the accused.

PW2 MUGANDI KOMBO MWAMOSI was the only eye-witness to the incident. He told the court that on 3rd January 2011 he and the deceased whom he refers as ‘**ANDREA**’ went together to the home of the accused. The accused was not at home so they sat to wait for him. Soon thereafter the accused came in shouting at the deceased and warning him to leave his home. The accused then attacked the deceased with a stick and a knife. The deceased ran away into a nearby plantation. The accused chased him and **PW2** followed in an attempt to separate the two. Then according to **PW2** the accused stabbed the deceased in the left side of his back. The deceased fell down coughing up blood. The accused continued to hit the deceased with the stick several times. The deceased died at that point. The accused then got onto his bicycle and rode off claiming that he was going to report the matter to police.

At the close of the prosecution case the accused was found to have a case to answer and was placed onto his defence. He gave an unsworn statement in which he denied having intentionally stabbed and killed the deceased. It is now the duty of this court to determine whether the charge of murder has been proved beyond a reasonable doubt.

The felony of murder is defined thus by Section 203 of the Penal code:

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder”

From this definition derive three crucial ingredients of the offence of murder:

- 1) That a death has occurred and the cause of that death,
- 2) That death resulted from an unlawful act or omission on the part of the accused and
- 3) That said unlawful act or omission was committed with malice aforethought.

In this case the fact of death of the deceased is not in any doubt. **PW2** a friend and neighbour was with the deceased when the incident occurred. He was able to positively identify the deceased as **'ANDREA'**. **PW6 SERGEANT MICHAEL ODUOR** was the scenes of crime officer who developed and enlarged the photographs taken at the scene which photographs he produces as exhibits in court **Pexb2**. The court was able to view the photographs and saw that they depicted the body of an African male adult lying dead in a grassy location.

Evidence on the cause of death is equally uncontroversial. **PW2** told the court that he saw a man stab the deceased on the side. **PW1 DR. ANDERSON KAHINDI**, the medical superintendent at Msambweni District Hospital told the court that an autopsy was conducted on the body of the deceased by his colleague **'Dr. Gitau'**. He produced the post-mortem report as an exhibit **Pexb1**. The doctor noted a deep penetrating wound in the back of the deceased's body. The cause of death was opined to be **"severe haemorrhage due to stab wound"**. This was expert medical testimony which was neither challenged nor controverted. The evidence of **PW1** confirms the testimony of **PW2** that the deceased was stabbed to death. This court so finds.

The next crucial question is whether there is sufficient evidence pointing at the accused as the perpetrator of this offence. There was only one eye witness to the incident – that being **PW2**. His evidence is that he was with the deceased at the material morning and that he saw the accused stab the deceased in the left side. **PW2** positively identified the accused as **'Vunja Mugala'**. He knew the accused very well as a friend and a neighbour. The incident occurred at about 8.00 A.M. It was during the daytime and visibility was good. **PW2** narrated to the court how he and the deceased went to the accused's home at about 7.00 A.M. on 3th January 2011. When the accused came and found them there he began to shout warning the deceased to leave his homestead. **PW2** then said the accused took up a stick and chased the deceased away. **PW2** followed the two trying to intervene to separate them. He caught up with them a few metres away. The accused was still attacking the deceased. **PW2** said he saw the accused stab the deceased with a knife he was holding. The deceased fell down. It is clear therefore that **PW2** spent a sufficient amount of time in the company of the two men. He even tried to separate them to no avail. He had a clear view of events as they unfolded.

The evidence of **PW2** is corroborated by that of **PW3 MWINYIHERI RASHID** who was the assistant chief. This witness told the court that on the material day he received news that **'Andrea'** the deceased had been killed by Vunja the accused. **PW3** who knew the accused well immediately phoned him to find out what had happened. Upon answering the phone-call the accused immediately said:

"Bwana chief unisaidie nime ua"

Which means **'Mr. Chief please help me as I have killed somebody'**. **PW3** told the accused to turn himself in at Jengo Police Base. When **PW3** upon reaching the police base failed to find accused there, he searched and traced accused to a place called Kwa-Njuguna near the Kenya/Tanzania Border. **PW3** then took the accused to the police station. Therefore there is evidence that the deceased himself conceded to having stabbed and killed the deceased. There is no evidence that either **PW2** or **PW3** had any grudge against the accused that would cause either to lie against him. The fact that **PW2** freely accompanied the deceased to the accused's home is indicative of the fact that the two were on good terms. In his defence the accused suggests that **PW2** had a grudge against him due to a dispute over farming rights. However this issue was never raised during cross-examination at all. In my view this allegation was merely an afterthought brought up by the accused to try to justify his claim of bias against **PW2**. **PW2** did admit that several years prior to this incident he had quarrelled with the accused over a chicken. I do not think

that a squabble over a chicken could amount to sufficient motive for **PW2** to fabricate evidence against the accused. As such I find that the actus reus of murder has been proved and that it was the accused who stabbed and killed the deceased.

On the question of mens rea which in law is defined as malice aforethought **PW2** told the court that when the accused found the deceased in his homestead he began to shout at the deceased saying **“Andrea leo utakufa”** i.e. **‘Andrea today you will die’**. This indicates that the accused’s declared intention was to kill the deceased. In his defence the accused concedes that he did quarrel with the deceased. He claims that it was the deceased who picked a fight with him and further claims that it was the deceased who had the knife. The accused claimed that the deceased was accidentally cut by his own knife as they struggled. This defence is a direct contradiction of the narration given by **PW2**. The accused’s version of events was not put to **PW2** while being cross-examined by counsel. This raises the likelihood that the accused’s story is a mere afterthought and a fabrication. Further if it was the deceased who started the fight then why did the accused tell **PW3** that he had **‘killed’** somebody instead of saying that he had **‘fought’** with somebody.

The accused in his defence also suggests that he attacked the deceased because the deceased had invaded his house the previous night and raped his (the accused’s) wife. In this the accused is raising the defence of provocation. Firstly the defence of provocation suggests that one acted in the heat of the moment without having had ample time for his temper to cool. This alleged rape occurred the previous night. **PW4 RASHID HAMISI** the village chairman told the court that the accused had gone to his home at 6.45 A.M. to report this alleged rape. By the time the accused was encountering the deceased several hours had elapsed. There had been more than sufficient time for his temper to cool down. If the accused had caught the deceased in the very act of raping his wife and had stabbed him then undoubtedly the defence of provocation would be available. However in the circumstances where the alleged provocative incident occurred several hours prior to the murder, and where the accused had been taken the initiative of going to report his grievance to authorities he cannot still claim to have been in the throes of angry passion. In my view the accused was capable of rational thought by the time he encountered the deceased. As such the defence of provocation would not apply. It is not the mandate of this court to determine whether in actual fact the accused’s wife was raped or not. Suffice to say that **PW7 DR. ALIAN CHEROP** who produced the P3 form allegedly filled in respect of this **‘rape’** cast some doubt on both the P3 form as well as the supporting medical notes. In my view nothing would have been easier to persuade this court that such a rape did actually occur (or even to prove that the accused had reasonable cause to believe that his wife had been raped), than for the accused to call his wife as a defence witness on his behalf. It is curious that accused chose **not** to call the one person who could have supported his defence. Failure to call his wife leads to legitimate doubts as to whether this alleged rape actually occurred.

It is also pertinent that the accused only seemed to mention this alleged rape to some witnesses and not to others. **PW2** in his evidence told the court that:

“Accused never said why he wanted to kill the deceased ...”

On his part **PW3** told the court that:

“Accused told me the deceased had stolen from him”

PW3 goes further to state under cross-examination by counsel that:

“Accused had not made any report about the rape of his wife ...”

On his part **PW5 APC BOSCO MULWA** told the court that:

“At about 9.00 A.M. one Vunja Mukala (accused) came to the station. He reported on 2/11/2011 the deceased Andrea stole a box of clothes from him ...”

There is no consistency in the stories being given by the accused to explain why he held a grievance

against the deceased. Was it a rape of his wife or theft from his residence? It appears that accused was trying very hard to come up with a plausible story to justify his attack on the deceased. Whatever the case is it is clear that for one reason or another the accused did not want to see the deceased in his homestead. However the accused could have just ordered the deceased to leave. He had no reason to attack the deceased chase away and proceed to follow and stab the deceased. From the viciousness of the attack it was clear that accused's intention was to kill the deceased and even the efforts of **PW2** were inadequate to deter him. I find that malice aforethought being the mens rea for murder has been proven. I therefore reject the accused's defence as a mere sham. I find the prosecution have proved their case beyond a reasonable doubt and I hereby convict the accused of this charge of murder.

Dated and Delivered in Mombasa this 14th day of November 2012.

M. ODERO
JUDGE

In the presence of:

Mr. Mbuya for Accused

Mr. Onserio for State

MR. ONSERIO: Treat as 1st offender.

COURT: Mitigation on 27th November 2012.

M. ODERO
JUDGE
14.11.2012

27.11.2012

Before: Hon. Lady Justice M. Odero

Court Clerk – Mutisya

Mr. Onserio for State

Mr. Mbuya for Accused

MR. MBUYA: The accused is very remorseful for this incident. The occurrence was not intended. The accused is a family man and has five daughters who depend on him. He is the bread-winner. We pray for a non-custodial sentence. He seeks for leniency.

M. ODERO
JUDGE

MR. ONSERIO: Deceased was a family man and left a widow and children. He died a painful death. We seek a deterrent sentence.

COURT: Mitigation noted. The offence was serious as a human life was lost. Accused is sentenced to serve 30 years imprisonment. He has a right to appeal.

M. ODERO
JUDGE
27.11.2012