



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL CASE NO. 12 OF 2008

REPUBLIC.....PROSECUTOR

-VERSUS-

SAID ABDALLA WANJE1ST ACCUSED
REHEMA ABDALLA WANJE2ND ACCUSED
ABDALLA ATHMAN LWEMBE3RD ACCUSED

RULING

The three accused persons **SAID ABDALLA WANJE** (hereinafter referred to as the 1st accused) **REHEMA ABDALLA WANJE** (hereinafter referred to as the 2nd accused) and **ABDALLA ATHMAN LWEMBE** (hereinafter referred to as the 3rd accused) were jointly arraigned before the Mombasa High Court on a charge of **MURDER CONTRARY TO SECTION 203 as read with S. 204 OF THE PENAL CODE OF KENYA**. The particulars of the offence were that :

“Between the night of 8th and 9th day of March 2008 at Biriyaan Village Jibana Location in Kaloleni District of the Coast Province, jointly murdered ABDALLA KAZUNGU WANJE”

All three accused persons entered a plea of **‘not guilty’** to the charge and their trial commenced before **Hon. Justice J. Sergon** on 23rd October 2008. Following the transfer of the learned trial Judge to Nyeri High Court I did take over the conduct of the case on 27th October 2009. The prosecution led by **MR. ONSERIO** learned State Counsel called a total of ten (10) witnesses in support of their case. The three accused were represented in court by **MR. KIRUI** Advocate.

The prosecution case was narrated by **PW1 HILALI ABDALLA WANJE**, who is a son to the deceased. He told the court that on 13th March 2008 he went to his parent’s home and found only the 2nd accused who is his mother present. His father was not present. Upon enquiring the 2nd accused told **PW1** that his father had left on a journey without revealing where he was going to. **PW1** was not satisfied with this answer and he began to make enquiries from other relatives. From his enquiries **PW1** was informed that his father had been murdered and further that his brother **‘Saidi’** the 1st accused herein had a hand in the murder. At this point **PW1** reported the matter to police who took action and arrested the 1st accused

who promptly identified the 3rd accused as his accomplice in the matter. On 3rd April 2008 both 1st and 3rd accused led police to a valley about 15 kilometres from the home of the deceased where police recovered a mattress, rope, sisal bag, piece of timber and decomposing remains of a body including a human skull and bones. All these exhibits were collected and were taken to the police station. In the course of further investigations police also visited the homestead of the deceased in order to conduct a search therein. The 2nd accused, who is the deceased's wife pointed out to police a huge rock allegedly used to hit the deceased on the head. Police recovered said rock and also arrested the 2nd accused. Upon completion of investigations all three accused persons were brought to court and charged with the murder of the deceased.

At the close of the prosecution case the court ruled that all three accused had a case to answer and they were duly called upon to make their defences in accordance with S. 306(a) of the Criminal Procedure Code. All three accuseds gave unsworn statements denying any involvement in the murder of the deceased. After hearing final submissions from counsel judgement was reserved for today.

The crime of murder is defined in S. 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 it is only logical and stands to reason that in order for the crime of murder to be established there must be a death. The prosecution must satisfy the court that the person alleged to have been killed is in fact dead. In this case the deceased is alleged to be one **‘Mzee Abdalla Kazungu Wanje’**. This old man was last seen in his homestead in Biriya Village of Kaloleni District in March 2008. When his son Hilali Wanje **PW1** went to the home on 13th March 2008 his father was not there, and he has never been seen since. Upon enquiries all he was told by his mother (2nd accused), is that the deceased left to go on a journey but did not say where he was headed to. It is highly unlikely that an old man having established his own homestead would walk out of his home never to return. It is reasonably safe to assume that something untoward happened to the old man. Mr. Kirui for the accused persons has submitted that in the absence of recovery of a body, the offence of murder cannot be proved. Counsel has cited the case of **KIMWERI –VS- REPUBLIC [1968] E.A.L.R. 452**. In that case where similarly the alleged victim of the murder had disappeared from her home without trace the Court of Appeal at Dar-es-salaam held:

“although death may be proved by circumstantial evidence that evidence must be such as to compel the inference of death and must be such as to be inconsistent with any theory of the alleged deceased being alive, with the result that taken as a whole the evidence leaves no doubt whatsoever that the person in question is dead”

In other words the court was saying that even in the absence of a body, death may be inferred by the circumstantial evidence available, where that circumstantial evidence is compelling enough to lead to an inference of death. Therefore it is not correct to assert as counsel has done that the absence of a body automatically negates a charge of murder.

Having so stated the present case is in fact distinguishable from the above cited **‘Kimweri’** case because in this case the police did recover human remains which included bones and a skull. These remains were taken to Coast General Hospital where the Chief Pathologist **Dr. K.N. MANDALYA PW9** carried out an autopsy. He filled and signed a post-mortem report which he produces as an exhibit in court **Pexb10**. The findings of **PW9** were that the remains which he examined belonged to a human adult. He examined the skull and found a gaping hole the result of severe trauma on the left side of the skull. This is evidence of

an unlawful act as human beings do not ordinarily have gaping holes on one side of the skull (this fact will become important later on). **PW9** is a qualified pathologist, and has been in government service for several decades. No challenge was made to his expertise by the defence. He was categorical that the recovered remains which he examined were human remains, specifically the remains of a human adult. I accept this as reliable expert testimony and find that the skull and bones were those of a human being and rule out the possibility that these were animal remains. There was therefore in this case recovery of body parts and remains if not a complete body.

The next question is whether there exists sufficient circumstantial evidence to show a nexus between these remains and the deceased. It is pertinent that it was the deceased's son who led police to a valley where these remains were recovered. Secondly the remains were found wrapped inside a mattress which **PW1** identified as belonging to the deceased. In addition most importantly **PW4 MWALIMU WANJE** a grandson to the deceased testified that he last saw the deceased being carried out of his house bundled in his mattress on the night of 9th March 2008. The above facts taken together lead to the inescapable conclusion that these remains were indeed the remains of the deceased. No other possible inference may be drawn from this set of facts. I therefore find that the circumstantial evidence in this case is sufficiently compelling to lead to the inference firstly that the deceased was actually dead and secondly that the remains recovered by police and examined by **PW9** were in actual fact the remains of the deceased Abdalla Kazungu Wanje. The gaping hole in the skull is evidence that the deceased met an untimely death. **PW9** Dr. Mandalya who examined the skull formed the opinion that the cause of death was multiple fractures due to crush wounds on the head. He filled and signed the post-mortem form which he produces before court as an exhibit **Pexb 10**. There can therefore be no doubt that the deceased met his death as the result of the unlawful act i.e. bashing in of his skull, by some person or persons.

The second element of a murder trial is that the court must satisfy itself that it was the accused person(s) who committed the unlawful act the direct consequence of which was the death of the deceased person. **PW1** narrated to the court how in his endeavour to trace his father he made enquiries from several relatives and friends in the village. This led to the revelation of what he termed a '*terrible secret*' within the family. **PW3 SAHIHI SAMSON** and her husband **SAMSON CHIDINGO WANJE PW2** both grand-children to the deceased told **PW1** that one Santa, who was also the deceased's grand-child informed them that the deceased had been murdered by his son Saidi (1st accused). **PW4 MWALIMU WANJE** a minor told the court that on the night of 9th March 2008 at about 2.00 A.M. he was asleep in his grandparents room. He heard the deceased shout out saying '*Nauliwa*' meaning '*I am being killed*'. The boy awoke and saw his uncle Saidi and his grandmother 2nd accused holding down the deceased. He then saw them use a stone to hit him on the head then drag the body outside. After that **PW4** never saw the deceased again. **PW4** though a minor gave his evidence in a clear and concise manner. He remained unshaken under cross-examination by Mr. Kirui for the accused persons. Though the incident occurred at night **PW4** states that he was able to see and identify both 1st and 2nd accused due to the light from the torch they had. The 2 accused were his uncle and grandmother respectively. They all lived in the same compound and he knew them well. There can be no possibility of a mistaken identify. **PW4** was candid enough to admit that in his first appearance in court he feared to tell all he had seen due to being threatened by the 1st accused. It is only when he was re-called to testify that he revealed all he knew. The evidence of **PW4** provides corroboration for the cause of death which was multiple head injuries. I have no doubt that bashing the deceased's head with a stone would cause exactly the kind of injuries seen.

The evidence of **PW4** is corroborated in all material respects by his cousin **SANTA** who testified as **PW5**. She told the court that on the material night she was away from the home having traveled on 7th March 2008 to attend a burial. She returned home on 9th March 2008 at 4.00 p.m. to find the deceased who was her grandfather missing. She enquired from **PW4** who was her younger brother and he informed her that the deceased had been murdered. It is clear therefore that **PW4** was consistent in his evidence and his evidence cannot by any means be termed an afterthought. **PW5** herself stated that later that night she saw her uncle Saidi (1st accused) and another man collect the body from under the bed where it had been hidden - roll it up in a mattress and take it away. No doubt this was the body that was later recovered

rolled up in a mattress.

The final nail in the coffin is provided by the evidence of **PW8 CORPORAL CHRISTOPHER MAGAIWA**. He tells the court that after receiving the report from **PW1** on 13th March 2008 he went to the scene and arrested the 1st accused. Accused 1 led police to the home of **ABDALLA** Accused 3 whom he claimed had been his accomplice. Police also arrested Accused 3. On 4th April 2008 police returned to the homestead and arrested the deceased's wife Accused 2 who showed them the stone used to hit the deceased **Pexb1**. Thereafter 1st and 3rd accuseds led police to Chengono area and pointed out the remains of the deceased. The fact that 1st accused and 3rd accused knew where the remains of the deceased had been thrown is proof that they were involved in his death. Police recovered the deceased's remains as well as his mattress in which his body had been wrapped **Pexb 6**. The evidence of this officer is corroborated by the evidence of **PW6 WILSON SHIDOKO** who accompanied police to the scene where the remains were recovered. **PW6** confirms that it was 1st and 3rd accused who led them to the valley where the remains had been disposed of. **PW6** was a fellow villager and knew all three accused persons very well. He reveals the motive for the murder when he tells court that 1st accused told him that he (1st accused) had visited a witchdoctor who told him that the deceased had bewitched him. It is clear therefore that the 1st accused had a grudge against the deceased who he believed to be a witch. There clearly was malice aforethought by the '**1st accused**' in the killing of the deceased. The fact that after killing the deceased neither the 1st nor 2nd accused made any attempt to report the death to authorities but instead organized to have the body illegally disposed off is a clear indication of a guilty mind on their part. I am satisfied that the mens rea for the offence of murder has been shown to exist.

With respect to the 3rd accused, there is no evidence of his active participation in the murder of the deceased. His arrest was instigated by the fact that the 1st accused named him as an accomplice. This is evidence of co-accused which is not sufficient to form the basis for a conviction of 3rd accused. Further there is no evidence that 3rd accused had any grudge against the deceased, that would cause him to want to eliminate the deceased. I find that the evidence linking the 3rd accused to this crime is scanty and I therefore acquit him and enter a finding of '**not guilty**'.

With respect to the 1st and 2nd accused however I am satisfied that the charge of murder has been sufficiently proved against them. The evidence against them is reliable and water tight. As such I convict both the 1st and 2nd accused persons with the offence of murder.

Read in open court on the 28th day of February 2011.

M. ODERO

JUDGE

In the presence of:

Mr. Onserio for State

Mr. Kirui for 1st & 2nd Accused