



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL CASE NO. 23 OF 2004

REPUBLIC PROSECUTION
-VERSUS-

NDIKIRA MVUMBA KIZUNDU 1ST ACCUSED

CHANGOTI CHIBAO GANJA Alias SAIDI 2ND ACCUSED

RULING

The two accused persons namely **NDIKIRA MVUMBA KIZUNDU** (hereinafter referred to as the 1st accused) and **CHANGOTI CHIBAO GANJA alias SAIDI** (hereinafter referred to as the 2nd accused) were jointly charged with two counts of **MURDER CONTRARY TO SECTION 203 as read with S. 204 OF THE PENAL CODE**. The particulars with respect to Count No. 1 were:

“On the 9th day of December 2003 at Kibokoni area within Mombasa District of Coast Province of the Coast Province, jointly murdered BILKIS BHAIJI”

The particulars with respect to Count No. 2 were that:

“On the 9th day of December 2003 at Kibokoni area within Mombasa District of the Coast Province, jointly murdered ASGARALI BHAIJI”

Both accuseds pleaded ‘**not guilty**’ to the offence.

At the outset I must state that this case has a very unfortunate history. The two accused persons were first arraigned in the High Court of Mombasa before **HON. JUSTICE MARAGA** on 3rd May 2004. Today almost seven (7) years down the line, and the accuseds having been in custody all this while there still appeared to be no end in sight for a variety of reasons. Following the transfer of Hon. Justice Maraga, the case was taken over by **HON. JUSTICE SERGON**, before whom hearing commenced on 24th April 2006. The Honourable Judge heard a total of thirteen (13) prosecution witnesses and gave his ruling placing both accused persons on their defence. The 2 accused duly made their statements in defence and the defence closed their case on 27th April 2009. Final submissions were made and judgement was reserved for 27th November 2009. By this time Hon. Justice Sergon had been transferred to Nyeri High Court and reserved the judgement for delivery on notice. However, instead of delivering the judgement, the Honourable Judge gave directions that the hearing start de novo. This was due to the

fact that ten (10) of the prosecution witnesses testified in the presence of assessors pursuant to S. 262 of the Criminal Procedure Code. However the requirement that murder trials be conducted with assessors sitting was done away with by the enactment of the **STATUTE LAW (MISCELLANEOUS AMENDMENTS) ACT** which came into effect on 15th January 2007. Following this new provision, the learned trial Judge dispensed with the presence of the assessors on 26th June 2008. In his ruling dated 25th June 2010 Justice Sergon writes that in so doing :

“It is obvious I have made an error”

There can be doubt that the learned Judge became aware of the decision of the Court of Appeal in the case of **BERNARD KINOTI M’ARACHI –VS- REPUBLIC CRIMINAL APPEAL 114 of 2008**. In that case the Court of Appeal held that where a murder trial is commenced in the presence of assessors, the accused acquires the right to have assessors present until the final determination of the case. Justice Sergon had no option but to declare a mistrial in this case.

The hearing started afresh before me on 1st September 2010 almost six (6) years after the accuseds were first incarcerated. The prosecution on that day had no witnesses in court. On 17th November 2010 the matter was listed for hearing. Yet again the prosecution had no witness ready to testify. On 18th November 2010 two witnesses both medical doctors testified. The case was then adjourned to 9th February 2011. There was no witness in court. On 10th February 2011 the prosecution sought an adjournment. The defence lawyer **MR. OBURO**, rightly objected. I declined to allow any further adjournment and the prosecution closed their case. Therefore as matters stand only 2 medical witnesses have testified in the new trial before me. I cannot rule out *‘witness fatigue’* as a reason for the failure of the other witnesses to come to court. The two medical witnesses had no evidence about the connection of the 2 accused to the alleged murders. The evidence available before me is woefully inadequate. I am also mindful that the 2 accused as suspects are in law considered innocent until proven guilty. Under Article 50(2) the 2 accuseds are entitled to a fair trial which includes under Article 50(2)(e) the right –

“to have the trial begin and conclude without unreasonable delay”

This right has been breached in this case. A 7 year wait for justice is by any standards inordinate. I find no evidence has been adduced to warrant the 2 accuseds to be called upon to defend themselves. I therefore enter a verdict of *‘not guilty’* and acquit the two accuseds under S. 306(1) of the Penal Code. Each accused to be set at liberty forthwith unless they are otherwise lawfully held.

Dated and Delivered in Mombasa this 10th day of March 2011.

M. ODERO
JUDGE

In the presence of:
Mr. Muteti for State
Mr. Oburo for both accuseds