



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CRIMINAL CASE NO. 51 OF 2004**

**REPUBLIC ..... PROSECUTOR**

**=VERSUS=**

**MOSES OTIENO JAMES ..... 1<sup>ST</sup> ACCUSED**  
**HAMISI SHEE HUSSEIN ..... 2<sup>ND</sup> ACCUSED**

**JUDGEMENT**

**MOSES OTIENO JAMES** (hereinafterreferred to as the 1<sup>st</sup> accused) and **HAMISI SHEE HUSSEIN** (hereinafterreferred to as the 2<sup>nd</sup> accused) have jointly been charged with the offence of **MURDER CONTRARY TO SECTION 203 as read with S. 204 of the PENAL CODE**. The particulars of the charge were as follows:

***“On the 28<sup>th</sup> day of October 2004 at unknown time at Mchinjirini Village, Kingwede Shirazi Location in Kwale District within the Coast Province jointly murdered SAA ABDALLA MACHAFU”***

Both accuseds were arraigned in the High Court on 20<sup>th</sup> December 2004 and entered a plea of guilty to the charge. The prosecution called a total of nine (9) witnesses in support of their case. The brief facts of the case were that on 28<sup>th</sup> October 2004 **PW1 MOHAMED ATHUMAN MLAMBA** and **PW5 ALFAN CHENGA MACHAFU** were coming from bathing at the well at about 4.30 p.m. They noticed blood-stains on the path. They followed the blood stains and found a body lying by the side of the road covered in a lessso. **PW5** recognised the lessso as belonging to his mother one **‘Saa Abdalla Machafu’**. The two men approached the body and removing the lessso they uncovered the face. **PW5** confirmed that it was indeed his mother lying dead by the side of the road. He ran to call relatives and authorities. The matter was reported to police who came to the scene and removed the body to the mortuary. The 2<sup>nd</sup> accused who was said to have threatened the life of the deceased due to a land dispute was arrested together with the 1<sup>st</sup> accused. Both were then charged with this offence. That then is the prosecution evidence in a nutshell. This court must now at this stage determine whether or not a prima facie case has been established to warrant the two accused being called upon to give their defence.

The offence of murder is defined in S. 203 of the Penal Code as follows:

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

In a charge of murder the prosecution must prove **not only** the fact of the death of the deceased but must

also satisfy the court of the cause of death of the deceased. At this point I feel it would be instructive to give a brief history of this file. The hearing of this trial commenced way back on 23<sup>rd</sup> March 2007 before my learned senior brother **Hon. Justice Serгон**. The Honourable Judge heard a total of eight (8) witnesses before the State closed their case. Submissions were then duly made by **MR. KAMOTI** Advocate for the accuseds on no case to answer. However instead of delivering his ruling on this point the Honourable Justice Sergon instead declared a mistrial due to the fact that assessors had been discharged mid-trial [see **BERNARD KINOTI M'ARACHI –VS- REPUBLIC [2008]e KLR**] and ordered a re-trial. This re-trial commenced before me on 11<sup>th</sup> November 2010 (about six (6) years after the two accuseds had first appeared in court). The prosecution led by the learned State Counsel called a total of seven (7) witnesses. Mr. Kamoti remained on record for the two accused persons.

Despite having been given ample time and opportunity to avail their witnesses the prosecution failed to tender any medical evidence to prove the cause of death of the deceased. The prosecution witnesses told the court that the deceased was found lying bloodied and dead by the side of the road with injuries and wounds on various parts of her body. The court cannot just assume that the deceased death was caused by these alleged injuries. This would require expert medical evidence to establish. In the case of **NDUNG'U –VS- REPUBLIC [1985] KLR** the Court of Appeal held:

***“Though there are cases in which death can be established without medical evidence relating to its cause as where there are obvious and grave injuries, medical evidence should still be adduced in such cases of the effect of such injuries as opinion expert evidence and as evidence supporting the cause of death alleged by the prosecution”***

The question of whether medical evidence could be dispensed with i.e. whether the injuries sustained by the deceased were obvious and grave could not be determined by this court as no photographs of the deceased's body were produced as exhibits in court. Failure to adduce expert medical evidence as to the cause of death is a fatal omission by the prosecution. Having perused the earlier proceedings before Hon. Justice Sergon I note that no medical evidence was adduced before him either. It would appear that there existed some problem in securing the evidence of the doctor. Where a post-mortem examination is conducted (as I have no doubt occurred in this case), then it is absolutely essential that these findings be availed in order to establish cause of death. The 2 accuseds cannot be convicted of murder where the cause of death remains uncertain.

Even if this court were to proceed on the assumption that the cause of death has been established I find that the prosecution evidence would still remain wanting. With respect to the 1<sup>st</sup> accused no witness has linked him in any way to the murder of the deceased. There is no allegation that he disagreed with or threatened the deceased in any way. He certainly would have no case to answer.

With respect to the 2<sup>nd</sup> accused, he was a nephew to the deceased. There is evidence that the 2<sup>nd</sup> accused and the deceased had a long-standing feud over a piece of land over which both claimed rights to cultivate. The deceased had complained to several witnesses that the 2<sup>nd</sup> accused was encroaching on her land and stealing her produce. It was also alleged that the 2<sup>nd</sup> accused had threatened the deceased that he would **'maliza'** or **'finish'** her. However firstly no prosecution witness appears to have actually heard the 2<sup>nd</sup> accused utter these threats. Secondly the fact that he may have threatened the deceased cannot in any way amount to proof that he did in fact kill her. No witness saw what happened to the deceased. There is no direct evidence on how the deceased sustained the injuries she had at death. No witness at any time saw the 2<sup>nd</sup> accused with the deceased. Indeed no nexus is shown between the 2<sup>nd</sup> accused and events leading to the death of the deceased. No single police officer was called to testify, the investigating officer did not testify which was another serious omission.

All said and done I find that there does not exist any concrete evidence against the 2 accused. No prima facie case has been shown against the two. I enter a verdict of 'not guilty' with respect to both 1<sup>st</sup> and 2<sup>nd</sup> accused in accordance with S. 306(1) of the Criminal Procedure Code. Each accused is to be set at liberty forthwith unless otherwise lawfully held.

**Dated and Delivered in Mombasa this 30<sup>th</sup> day of May 2011.**

**M. ODERO**  
**JUDGE**

In the presence of:  
Mr. Kamoti for both Accused  
Mr. Onserio for State