



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CRIMINAL CASE NO. 17 OF 2006**

REPUBLIC ..... PROSECUTOR

VERSUS

ERNEST SAKWA KWEYU alias YAWA ..... ACCUSED

**JUDGEMENT**

The accused herein **ERNEST SAKWA alias YAWA** faces a charge 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 night of 2<sup>nd</sup> July 2006 at about 9.00 p.m. at Mwaroni Village, Diani Location within Kwale District of the Coast Province murdered KYALO NZIOKA”***

The accused pleaded **‘not guilty’** to the charge. His trial commenced before me at the Mombasa High Court. The prosecution led by the learned State Counsel called a total of seven (7) witnesses in support of their case. **MR. OBARA** (Advocate) appeared for the accused.

The brief facts of the prosecution case were narrated by **PW1 TABU AUMA**. This witness told the court that on 2<sup>nd</sup> July 2006 she was at her home in Diani. The accused who was her neighbour began to complain that her son was taking and eating his mangoes. **PW1** advised her son who was there to leave the compound. Later on at 7.30 p.m. came back and began to tell the husband of **PW1** (who is now the deceased) about his complaints over their son. Suddenly accused began to hit **PW1** with a hammer. She fell down and in the process of protecting herself her arm was broken and she also lost a tooth. The accused after finishing with **PW1** then turned on her husband. **PW1** crawled into a nearby bush where she spent the night. The following she was rescued and taken to hospital. She later learnt that her husband had been killed in the attack. The matter was reported to police who visited the scene and recovered a bloodied hammer which **PW1** positively identified as the one which the accused used to assault the couple. Upon completion of police investigations the accused was arrested and charged.

At the close of the prosecution case the accused was ruled to have a case to answer and was placed on his defence in accordance with S. 306 (1) Criminal Procedure Code. The accused opted to give a sworn defence in which he denied the charge of murder.

The offence 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”***

The fact of death of the deceased is not in any dispute. **PW1** who is the wife of the deceased told the court that she and her husband were attacked together. She later came to learn that the deceased had died from his injuries. **PW3 JANE ATIENO** a daughter to the deceased told the court that she was called to her home by neighbours. She went and found the body of her father lying in their family home. She states that she noted head injuries on the body of the deceased. **PW5 CAPTAS ONDEGO OLUBA** is one of the neighbours who accompanied **PW3** to her family home. He too told the court that he saw the body of the deceased lying inside the house. Finally on this point there is the evidence of the investigating officer **PC. MARK TIENGO** who testified as **PW7** told the court that he visited the scene on the material day. He found the body of a male adult lying in a pool of blood. He collected the body and removed it to the mortuary. From the evidence above I am indeed satisfied the person known as ‘**Kyalo Nzioka**’ is indeed dead as stated in the charge sheet.

However merely to prove that the deceased is truly dead is not all that is required in a murder trial. It is necessary to prove what factor (s) lead to the death of the deceased i.e. the cause of death must be reliably proved, unless it is so apparent or evident as not to require any proof. How can this cause of death be ascertained ? The answer is to be found in the case of **NDUNGU –VS- REPUBLIC [1985] KLR 487**, in which case the Court of Appeal sitting in Nairobi held as follows:

***“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”***

Therefore although there may be cases where due to the nature and extent of injuries the cause of death may be obvious but even in such cases best practice would dictate that expert medical evidence be availed to expound on the effect of such injuries and how or in what manner these injuries may have caused the death of the deceased. In the present case despite the prosecution being allowed several adjournments to avail their witnesses no medical evidence as availed before this court. The evidence of the prosecution witnesses suggest that the deceased was assaulted with a hammer and a rungu. No doubt he sustained serious and extensive injuries. The prosecution did not call any scenes of crime officer to produce the photographs taken at the scene. The court therefore did not have the benefit of a visual observation of the body of the deceased to enable it determine the nature and extent of the injuries suffered. **PW7** the investigating officer told the court that he removed the body to the mortuary. Presumably therefore a post-mortem examination was carried out on the body of the deceased. The doctor who conducted this post-mortem was not called to testify neither was the post-mortem report produced as an exhibit. The court is therefore left with no tangible or concrete evidence establishing the cause of death of the deceased. This in my view is a serious and fatal omission on the part of the prosecution. The offence of murder cannot be proved without evidence to prove the cause of death of the accused. Similarly **PW7** told the court that he collected blood samples at the scene which samples were forwarded to the Government analyst. No evidence was called from this analyst. No report showing any results of blood analysis was availed to court. Once again the prosecution was lax in this respect.

I do find that the charge of murder against the accused remains unproven since a crucial element of the charge i.e. the cause of death remains undetermined. For this reason I do hereby acquit the accused of this charge. He is to be set at liberty forthwith unless he is otherwise lawfully held.

**Dated and Delivered in Mombasa this 27<sup>th</sup> day of May 2011.**

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

In the presence of:  
Mr. Obara for Accused  
Mr. Onserio for State

