

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL CASE NO. 70 OF 2009

REPUBLIC.....PROSECUTOR

-VERSUS-

SAMSON SIGANGA KIBWABWA..... ACCUSED

RULING

The accused was charged with the murder of **Charles Mwangi Chacha** vide information dated 19th November, 2009 and filed in court on 23rd November, 2009. It was alleged that on 4th July, 2008 at Nyagautu village, Komamange sub location, Bokera South location, Kuria West District within Nyanza Province, he murdered, **Charles Mwangi Chacha**, deceased. He pleaded not guilty to the information and he was tried.

The facts of the case as presented by the prosecution are that on 4th July, 2008 at about 2.30p.m, **Joseph Marwa Chacha** visited the deceased whom he found with another friend, **Stephen Maikena Marwa**. They stayed together until about 5.30p.m. They then all decided to visit yet another friend, **Francis Ginono**. Here, they stayed until 8p.m when they parted ways for their respective homes. On the way however, and about 70 metres from Ginono's home, they heard footstep of someone approaching them from behind. The deceased turned to see who the person was but was suddenly hit with a blunt object on the forehead. His friend **Joseph Marwa Chacha** immediately flashed his torch and recognized the accused walking away briskly. He knew him before and was convinced that he was the one who had assaulted the deceased. As a result of the injury, the deceased was bleeding profusely. The group administered first aid on him and escorted him to his home. His condition however deteriorated and was taken to Nyakie Medical Clinic within Kehancha Township the following day. His condition could not be managed at the clinic. He was therefore referred to Kuria District Hospital and later to **Pastor Machage Memorial Hospital** and thence to Kisii Level 5 Hospital where he eventually passed on whilst undergoing treatment. On 11th July, 2008 a post mortem was allegedly conducted on the body of the deceased at Kisii Level 5 Hospital but the same was never availed in evidence by the time the prosecution closed its case.

In his written submissions on no case to answer, **Mr. Ogari**, learned counsel for the accused stated that it was incumbent upon the prosecution to show that the accused had the intention to kill and that indeed he had killed the deceased. The incident occurred at night and only a torch was used to identify the accused. Such conditions were not favourable for positive and or proper identification of the accused. The prosecution was unable to secure the attendance of the **Investigating Officer** and the **Doctor** who performed the post mortem. In the absence of a post mortem report, the prosecution case fails flat on its feet. Accordingly, no prima facie case had been established against the accused to warrant him being put on his defence.

Mr. Mutai, learned state counsel in response merely stated that he relied on the evidence on record.

I have no doubt at all in my mind that the prosecution at this stage has failed to establish a prima facie case against the accused to warrant him being placed on his defence. Even if the case was to be left the way it is and no evidence in rebuttal was called by the accused, a conviction cannot be found on that evidence. I say so because it is trite law that in an information of murder, the prosecution must not only

prove that the accused killed the deceased but that he did so with malice aforethought. In the circumstances of this case, there is no prove that the deceased died and that he died as a result of the actions of the accused. No post mortem report, death certificate and or even a burial permit was tendered in evidence to establish the fact of the death of the deceased. In other words, no medical evidence was tendered to establish or confirm that a person known a **Charles Mwanga Chacha** was allegedly murdered by the accused on 4th July, 2008. It is trite law that the standard of proof in any criminal trial is beyond reasonable doubt. Thus it behoves the prosecution to prove beyond reasonable doubt, with cogent evidence and which must be beyond pre adventure that the deceased in fact died. That fact cannot be left to suppositions, speculation and assumptions. Nothing stopped the prosecution from tendering in evidence the aforesaid documents to establish the fact of the death of the deceased.

Besides lack of proof of such death, the prosecution was also minded to place the accused at the scene of crime through watertight, direct or circumstantial evidence. The cause of death must bear direct linkage to the activities of the accused. There must be a nexus between the actions of the accused and the death of the deceased. Such nexus can only be established by the doctor's opinion as to the cause of death in his post mortem report. In the absence of such evidence how can we be sure that the death of the deceased if at all had a direct relation to the actions of the accused? The deceased could as well have died of other causes unrelated to the assault allegedly administered on him by the accused. There is no room for speculation in criminal proceedings. The doubts created as to the death of the deceased if at all and the cause of such death thereof must in the end be resolved in favour of the accused.

Of course, I am aware of the case of **Republic V Cheya and Another (1973) E. A 500** in which the Judge rendered himself on the above issues thus “...*However the absence of medical evidence as to death and the cause of it is not fatal because as I said at that stage post mortem reports primarily are evidence of two things; the fact of death and the cause of death. Therefore it was open to the prosecution to produce and rely on other evidence to establish these facts...*”. I do not wholly agree with this position. Luckily it is a decision of the High court of Tanzania that is not binding on me. I must repeat that there was no medical evidence to support the contention by the state that the accused can be said to have caused the deceased's death within the meaning of section 203 of the **Penal Code** or that the specific injuries which he inflicted on the deceased in the course of the attack resulted in his death. But again even if I was to accept the above position, I will still find it difficult to attribute the death of the deceased to the accused. There is no other evidence proving that the deceased died and that he died as a result of the activities of the accused.

It is also instructive that no evidence of the Investigating Officer was availed to court to establish the basis upon which he came to the conclusion that the accused be charged with the information. His evidence was crucial in view of the lack of medical evidence as to the death of the deceased and the cause thereof. Such evidence no doubt would have shown that the deceased passed on for he must have collected or seen the body and that the accused undoubtedly committed the offence from his own investigations. No reason was advanced by the prosecution as to why it could not avail such vital witness.

In the absence of such crucial evidence viz medical as well as that of the investigating officer, I am left with no other choice but to hold that nobody by the names of **Charles Mwanga Chacha** was murdered by the accused on 4th July, 2008 as per the information. Since the prosecution has failed to prove a prima facie case against the accused to require him to be put on his defence, he stands acquitted of the information. It is so ordered.

Ruling dated, signed and delivered at Kisii this 26th day of May, 2011.

ASIKE-MAKHANDIA
JUDGE