REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL CASE NO. 22 OF 2007

REPUBLIC …….....……..……..… PROSECUTION

=VERSUS=

REUBEN MATIRO MBILISHE ……..…….....…..…… ACCUSED

JUDGMENT

The two accused persons namely **REUBEN MATIRO MBILISHE** (hereinafter referred to as the 1st accused) and **CHRISTINE MKAMBURI KALUTU** (hereinafter referred to as the 2nd accused) are jointly 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 that:

"On the 10th day of October 2007 at Singila-Majengo Village, Mwatate Location in Taita-Taveta District within Coast Province, jointly murdered *PHILLIP NYAYO ASIBO"*

Both accused denied the charge and their trial commenced before the High Court in Mombasa on 12th February 2010. The prosecution led by **MR. ONSERIO**, learned State Counsel called a total of ten (10) witnesses in support of their case. **MR. MWAKIRETI**, Advocate acted for both accused persons during the trial.

The facts of the case are as follows. The 1st accused is the husband of the 2nd accused. The 2nd accused earned a living brewing and selling Muratina in their home at Singila Majenga Village whilst the 1st accused was a labourer in the nearby sisal plantations. On the material date of 10th October 2007 both accuseds were in their home and Accused 2 was engaged in her usual business of selling traditional brew. The customers who included the deceased one **PHILLIP ASIBO** continued drinking until about 7.00 p.m. After the other patrons left the deceased remained behind (probably demanding to be given more brew). The 2 accuseds told him to leave and they retired to their house for the night. The deceased continued to bang and kick their door (he must have been drunk at this stage). Finally in exasperation the 1st accused got out of the house to get the deceased to go away. The 1st accused was out of the house for a brief while before he returned and the family slept until the next day. The following day the dead body of the deceased with a wound to the back of his head was found lying in a nearby gulley. Police followed drag marks from the scene where the body was recovered which marks led to the home of the two accuseds. A pool of blood was seen outside the door. Police then arrested the two accused. The 1st accused then led police to recovery of a blood-stained jembe near the gulley where the body of the deceased was recovered. Both accused were taken to the police station. The body of the deceased was taken to the mortuary where an autopsy was conducted. Police completed their investigations and finally charged the two accuseds with the offence of murder.

At the close of the prosecution case the court acquitted the 2nd accused under S. 306(1) of the Criminal Procedure Code whilst the 1st accused was ruled to have a case to answer and was placed on his defence. The 1st accused gave an unsworn defence in which he denied the charge of murder. The matter now rests with this court for a judgement.

The charge of murder is defined in Section 203 of the Penal Code thus:

"Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder."

The offence of murder has three key ingredients which the prosecution is required to prove beyond a reasonable doubt in order to secure the conviction of the accused. These are:

1) The death of the deceased and the cause of that death
2) That the accused committed the unlawful act which caused the death of the deceased
3) That the accused had malice aforethought

The fact of the death of the deceased and the cause of his death are not in any doubt. **PW2 JONATHAN ASIBO**, **PW3 MICHAEL KASILWA** and **PW4 EVALYN SIRUYA** are all siblings of the deceased. They all testified that upon receiving news of their brother's death they rushed to the scene which was a small valley within the village where they found the body of their brother lying dead with a wound on his head. All three identify the dead man as ***'PHILLIP ASIBO'***, the deceased named in the charge sheet. Likewise **PW9 PC JAMES RUPA** was the first officer to arrive at the scene told the court that he found the dead body lying in a small valley. He collected the body and moved it to Wesu District Hospital mortuary for purposes of an autopsy. These witnesses all saw the body and they all confirm having noted a cut on the forehead. No doubt this was the injury that caused the death of the deceased.

Expert and conclusive evidence on the cause of death is provided by **DR. SHEM KATA PW10** the District Medical Officer at Wesu Hospital who testified regarding the autopsy conducted on the body of the deceased. The doctor noted a ***"2 inch cut wound on the scalp and bruising on both upper limbs"***. He further noted ***"a 2 inch fracture at the back of the head which penetrated the meninges***". This fracture caused bleeding inside the brain. The cause of death was opined by PW10 to be "***head injury due to subdural haematoma as a result of a blow by a sharp heavy object"***. This is expert medical evidence. It has not been challenged nor controverted in any way. It is clear therefore that the deceased did meet his death as the result of an unlawful act – that of being hit on the head with a ***'sharp heavy object'***. I therefore find that the fact of death and the cause of death of the deceased have both been proved beyond a reasonable doubt.

I will now move on to consider whether there exists proof of the second ingredient of the offence of murder i.e. that it was the two accused or either of them who committed the unlawful act which caused the death of the deceased. **PW1 JABRAM MAGHANGA**, a 13 year old minor who is the son of the couple testified in court. After conducting a ***'voire dire'*** examination I concluded that the child did not fully comprehend the nature and meaning of an oath. He therefore gave unsworn evidence. **PW1** told the court that on the material day his mother 1st accused was engaged in her usual business of brewing ***'muratina'***. He states:

"On the material day there were people in our home drinking muratina. They drank until night time. After that the people left. One of the drinkers remained. His name is 'Kachuja'. He was a neighbour who lived near us in Majengo. He was drunk. Kachuya was hitting and kicking our door demanding to be let into our house …."

PW1 was in the homestead and was an eyewitness to the events. Revellers were partaking of the local brew and as he states they continued drinking until nighttime (certainly an unsuitable environment for so young a child but I digress). **PW1** says one neighbour whom he knew and whom he names as ***'Kachuja'*** (probably a nickname) remained in the compound after all the other revelers had left. The man was drunk and was generally making a nuisance of himself. Then **PW1** continues:

"When the man hit our door my father went outside. I heard Kachuja shouting We remained in our house sleeping. My father did not return to our house …"

PW1 further states:

"When my father left the house at night he was carrying a jembe. My mother remained in the house. She had a headache so she did not go out …"

This ***'Kachuja'*** whom the 1st accused went out to confront at night, armed with a jembe was found the very next day lying dead in a gulley close to the accused's house. The finger of blame clearly point at the 1st accused. **PW8 RAPHAEL KALUTU** who is an adult son of the couple confirms that the deceased was in their home drinking on that material day. **PW8** told the court that on that date he returned from his job of tapping wine at about 5.00 p.m. He found the deceased and others whom he names as ***'Rufus'*** and ***'Mwatatu'*** drinking in his parent's compound. The deceased's siblings **PW2, PW3** and **PW4** do all confirm that the deceased often used to go to the home of the 2 accused to partake of the local brew. Thus the presence of the deceased in that home is not in any doubt.

There was no eyewitness to the actual killing of the deceased. The evidence against the 1st accused is circumstantial. The rules regarding the application of circumstantial evidence were clearly set out in the case of **JAMES MWANGI –VS- REPUBLIC [1983] KLR 327** where it was held as follows:

"1) In a case depending on circumstantial evidence, in order to justify the inference of guilt, the incriminating facts must be incompatible with the innocence of the accused, the guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of guilt.
2) In order to draw the inference of the accuseds guilt from circumstantial evidence, there must be no other coexisting circumstances which would weaken or destroy the inference …"

In other words circumstantial evidence must point conclusively at the guilt of the accused and in no other direction whatsoever.

PW1 though a young child gave his evidence in a clear and consistent manner. He narrated the events as he remembered them and he remained unshaken under cross-examination by defence counsel. His demeanour was honest and in my view he was an honest witness. **PW1** did not at any time change his story. His testimony remained the same even to the police. In addition **PW8** the adult son of the two accused told the court that he left the deceased drunk in his parent's compound. The following day he came home to find his mother 2nd accused cleaning the compound. **PW8** questioned his mother. She told him that the 1st accused and the deceased had quarreled the previous night. She further stated that the 1st accused picked a jembe from the house and went outside to confront the deceased. I am well aware that the evidence of the comments of the 2nd accused would not on their own hold much water as she is a co-accused and may have been tempted to implicate 1st accused in an attempt to extricate herself from any blame. However these are comments which the 2nd accused made to her son to whom she had no reason to lie and to more importantly the 2nd accused made these comments **before** she had been arrested and charged with any offence. Her statement to **PW8** corroborates what **PW1** told the court.

The situation therefore is that the deceased was banging on the door to the home of the 2 accuseds and the 1st accused picks a jembe and storms out of the house to confront this man who was disturbing the peace of the family. The next time the deceased is seen he is lying dead in a gulley with a fracture to the back of his head caused by a sharp heavy object. It is not lost on this court that a jembe fits the description of a ***'sharp heavy object'***. The police officers who visited the scene told the court that they did recover a blood-stained jembe suspected to be the weapon used to kill the deceased. This jembe was produced before the court as an exhibit **Pexb1.** **PW1** identifies the jembe as belonging to their family and the one which the 1st accused picked as he went outside to confront the deceased. **PW9 PC JAMES RUPA** the police officer who rushed to the scene upon being told of the recovery of the dead body. He

told the court that at the scene they recovered a blood-stained white jacket said to belong to the 1st accused **Pexb2**. Of greater importance **PW9** told the court that the 1st accused led police to where he had hidden the blood-stained jembe. The fact that it was the 1st accused who led police to the recovery of the murder weapon clearly implicates him in the offence. This fact is corroborated by **PW2** who confirms that the jacket recovered at the scene is one which he often saw the 1st accused wearing. **PW2** further confirms that when the 1st accused was arrested from his place of work and brought to the scene, he led police to where he had hidden the jembe under a concrete culvert – about 14 feet from the scene. **PW2** confirms that he saw blood on the blade of the jembe. Further corroboration regarding the role of the 1st accused in the recovery of the murder weapon is provided by **PW4** Evalyn Siroya. She stated that she is the one who went to report the recovery of the dead body at the DO's office. She returned to the scene with police officers. She further stated as follows:

"Then police went and collected A-1 from his place of work and brought him to the scene. A-1 led police to a culvert near the railway line and showed police the jembe. I was present and I witnessed the recovery of the jembe. This is the jembe MFI 1. It had blood on the blade …"

There is therefore overwhelming evidence linking the 1st accused to the recovery of the jembe used to kill the deceased. The circumstantial evidence against the 1st accused tightens and suggest that it was he who struck and killed the deceased.

Further credence is given to this theory by the evidence of **PW9** that the police followed a trail of drag-marks which led them from the gulley where the body of the deceased was recovered right to the doorstep of the home of the 2 accuseds. This evidence is corroborated by **PW1, PW2,** and **PW4**. Nothing could be clearer than this. The 1st accused obviously came out armed with a jembe to confront the deceased who was bothering his peace. The two must have fought and the 1st accused hit the deceased on the head with his jembe. In an attempt to cover up what had happened the 1st accused dragged the body away from his home and threw it in a nearby gulley. He then took the bloodstained jembe and hid it under a culvert near the railway line. In my view the circumstantial evidence is conclusive and points directly at the 1st accused and no other person as the one who committed the unlawful act which led to the death of the deceased. There is no other reasonable hypothesis to explain the death of the deceased.

More importantly the 1st accused in his unsworn defence admits that he did infact quarrel and fight with the deceased after which he hit the deceased with a jembe. However the 1st accused goes on to state that the deceased ran away and left the scene alive. However in my view this evidence is not consistent with the facts on record. The 1st accused claims that he was angered and provoked into assaulting the deceased, because he found the deceased seducing and touching his wife in a suggestive manner. This issue did not come up at all in cross-examination of the prosecution. This defence is clearly an afterthought. Secondly if the 1st accused hit the deceased as the result of provocation why did he hide the jembe? Why not just leave it in his home where the incident had occurred? His actions indicate that he had a guilty mind. I find this defence to be far fetched and I do dismiss this defence of provocation. As stated earlier I am satisfied that the *'actus reus'* of this offence i.e. the unlawful act has been proved beyond a reasonable doubt to have been committed by the 1st accused.

With respect to he 2nd accused who this court acquitted under S. 306(1) of the Criminal Procedure Code, it was my view that no prima facie case had been made out against her. There was no allegation that she confronted or otherwise engaged the deceased in any way. The arrest of the 2nd accused was based on the fact that the clothes she was wearing at the time of her arrest had blood-stains. Firstly though an analysis was done on the blood-stains no report was presented to the court to prove that the blood-stains on the 2nd accused's clothes had any connection with the deceased. Secondly a reasonable explanation was given as to why 2nd accused had blood on her clothes. Both her children **PW1** and **PW8** told the court that 2nd accused suffers severe headaches (migraines) and is prone to frequent nose-bleeding which blood she often wipes off using her clothes. I find no clear and direct nexus to have been

shown between the 2nd accused and the death of the deceased and for that reason I did acquit the 2nd accused as stated above.

The last ingredient which the prosecution is required to prove in a murder charge is that of ***'malice aforethought'***. This forms the ***'mens rea'*** of the offence. Clearly the 1st accused was angry or annoyed by the actions of the deceased in banging continually on his door. But did he have the required **intention** to kill the deceased? Malice aforethought is defined in S. 206(b) of the Penal Code thus:

"206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances –
(a) ……..……..
(b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused"

I am satisfied that the facts of this case reveal malice aforethought as described by S 206(b). The 1st accused was clearly aware that hitting the deceased on the head with a jembe would at the very least cause grievous harm and at the worst would lead to the death of the deceased. The actions of the 1st accused were reckless and irresponsible in the extreme and led to the death of the deceased.

Finally I am satisfied the prosecution have proved that all the ingredients of the offence of murder against the 1st accused beyond a reasonable doubt. I therefore enter a verdict of guilty and I convict the 1st accused of the murder of the deceased named in this charge sheet.

Dated and Delivered in Mombasa this 20th day of June 2011.

M. ODERO
JUDGE

In the presence of:
Mr. Mwakireti for Accused
Mr. Onserio for State
MR. MWAKIRETI: Accused is an old man and in his defence he did not deny having killed the deceased. The accused is very remorseful. He has children and a wife who rely on him. He seeks for a lenient sentence. The accused is almost 60 years old.
COURT: Sentence is reserved pending a report from Probation Department.
Mention 15th July 2011.

M. ODERO
JUDGE
20.6.2011

15.7.2011
Before: Hon. Lady Justice M. Odero
Court Clerk – Mutisya
Mr. Onserio for State
Mr. Mwakireti for Accused
COURT: Probation Report is now filed. Sentencing on 18th July 2011.

M. ODERO
JUDGE
15.7.2011

COURT

I have considered the mitigation of the accused. I have also read and considered the pre-sentence report prepared by the Probation Department. The accused used far much force than was necessary in the circumstances and his actions led to the needless loss of a human life. Following recent pronouncements from various courts including the Court of Appeal see [**GODFREY NGOTHO MUTISO –VS-REPUBLIC CRIMINAL APPEAL NO. 17 of 2008**] the death sentence can no longer be deemed as a mandatory sentence even for offences of murder. Each case must be looked at individually. The accused stands convicted of a serious crime. I hereby sentence him to serve twenty-vive [25] years of imprisonment.

Right of Appeal explained.

M. ODERO
JUDGE
18.7.2011

Mr. Mwakireti for Accused
Mr. Onserio for State