



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL CASE NOS. 18 & 14 OF 2005

REPUBLIC.....PROSECUTION

=VERSUS=

- 1. MARTIN MAINA alias KAKA**
- 2. JOSEPH MAINA alias RASTA.....ACCUSED**

JUDGEMENT

The two accused persons **MARTIN MAINA** alias **KAKA** (hereinafter referred to as the 1st accused) and **JOSEPH MAINA** alias **RASTA**, hereinafter referred to as the 2nd accused together with a third man **PATRICK SHIKANGA LIKHOTIO** (hereinafter referred to as the 3rd accused) were all jointly charged with the offence of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE**. The particulars of the charge were that:

“On the 3rd day of April 2005 at Kisimani Village of Kongowea Location, Mombasa District within Coast Province jointly with others murdered GEOFFREY GITHAIGA WAMBUGU”

All three accused entered a plea of ‘**Not guilty**’ to the charge. **MR. WAMEYO** Advocate represented the 1st and 2nd accused persons whilst **MR. ABDALLA** acted for the 3rd accused. The learned State Counsel **MR. ONSERIO**, prosecuted the case on behalf of the State.

The brief facts of the case were as follows. On 2nd April 2005 at about 10.00 p.m. the deceased who was an army officer requested his colleague Snr Private **GIDEON KOECH PW1** to drive him to Bombolulu where he was to meet someone. **PW1** obliged and at 11.00 p.m. they set out with five other fellow soldiers in a vehicle Registration No. KAR 566 being driven by **PW1**. The five other soldiers alighted at

the Kenol Petrol Station thus **PW1** proceeded with the deceased alone to Bombolulu. At Acapulco Bar the deceased asked **PW1** to stop to enable him check on somebody in the bar. Ten minutes later the deceased came back and requested **PW1** to drive him to Ibiza Restaurant. There the deceased met and conversed with his girlfriend one **STELA NGINA PW5**. All three took some drinks then they all got back into the vehicle and drove to Kisimani stage where the deceased and **PW1** alighted. The deceased promised to give **PW1** a **'token'** the next day for his trouble so **PW1** left the two and drove to his home. By now it was about 12.00 midnight.

At this point **PW5** takes over the narration of events. She told the court that she and the deceased walked towards her house. Upon reaching the house the deceased knocked on the window to alert a neighbour to open the door for them. As they stood waiting three men accosted them. One man demanded money from **PW5**. Another man warned the neighbour **PW6 SHADRACK JOSEPH MAYOLI** who had opened his window to check what was happening not to open the door. The men claimed to be police officers and demanded that the deceased and **PW5** identify themselves. As the deceased made to remove his identity card from his wallet, one of the men grabbed this wallet. A commotion ensued as the deceased resisted and one of the men cut the deceased who fell down screaming. **PW5** rushed to the deceased also screaming and the attackers took off. Neighbours including **PW6** responded to the screams of **PW5**. The deceased was rushed first to Kisimani Medical Centre then later to Coast Provincial General Hospital where he died whilst undergoing treatment. The matter was reported to the senior Army officers as well as to the police who commenced investigations. The 1st and 2nd accused were arrested at the scene that same night and were taken to Nyali Police Station. Two identification parades were later conducted in which **PW5** identified both the 1st and 2nd accused. Upon completion of police investigations all the three accused persons were brought to court and charged with the offence of murder.

The prosecution called a total of eleven (11) witnesses in support of their case. At the close of the prosecution case this court ruled that the 1st and 2nd accused had a case to answer. However upon an analysis of the evidence on record I found that no prima facie case had been shown against the 3rd accused. As promised in my ruling then I will proceed now to give the reasons for that decision. Out of a total of 11 witnesses not a single one mentioned the 3rd accused at all. No single witness placed him at the **'locus in quo'**. There was not a shred of evidence to connect the 3rd accused to the murder of the deceased. Indeed it remains unclear exactly how and why the 3rd accused was arrested. Even **PW8 INSPECTOR PETER OCHIENG**, the investigating officer is unable to show any nexus between the 3rd accused and this crime. Under cross-examination by Mr. Wameyo counsel for the 3rd accused **PW8** can only lamely state:

"I do not know why A-3 was arrested. I have not mentioned A-3 in my evidence"

If even the investigating officer has no evidence to offer against the 3rd accused then clearly he ought not to have been brought before the court. These are the reasons that informed my finding of **'not guilty'** against the 3rd accused and his eventual acquittal of this charge under S. 306(1) of the Criminal Procedure Code.

With respect to the 1st and 2nd accused they however were found to have a case to answer and were both called upon to give their defence in compliance with S. 306(2) of the Criminal Procedure Code. Both accused elected to make sworn statements in defence and they both gave similar defences. The 1st and 2nd accused are brothers who live together and operate a **'mitumba'** (used) clothes business together near Splendid Hotel in Mombasa. They both told the court that on the material day they worked at their mitumba stall until evening then left for home. They cooked ate and slept. At about 3.00 a.m. the 1st accused received a call from his girlfriend asking him to go and pick her at Acapulco stage. The two accused went together and upon reaching there they met police officers who demanded that they identify

themselves. Despite so doing police arrested them both and took them to Nyali Police Station where to their surprise they were charged with the offence of murder. Both deny any and all involvement in the death of the deceased.

Having set out the evidence it now behoves me as a trial court to determine whether the prosecution have proved their case to the required standard which is proof beyond a reasonable doubt. The offence of Murder is defined in S. 203 of the Penal Code thus:

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

This means that in order to prove the charge of murder the prosecution must prove the following key ingredients:

- 1) The identity and fact of death of the deceased
- 2) The identity of the person who committed the unlawful act or omission which led to the death of the deceased
- 3) The existence of malice aforethought by the perpetrator of the act

In this case the fact of the death of the deceased is not in any doubt. This fact is testified to by **PW1** who was a colleague of the deceased as well as **PW5** who was the girlfriend to the deceased who was actually with the deceased when they were attacked. Both **PW1** and **PW5** were in the hospital with the deceased after the attack and both do confirm that the deceased succumbed to his injuries and died. In addition both **PW1** and **PW5** are able to confirm the identity of the deceased as **‘Geoffrey Githaiga Wambugu’** an Army officer.

In her evidence **PW5** told the court that she and the deceased were accosted by three men as they waited for the gate of their house to be opened. **PW5** states that their attackers hacked and cut the deceased when he attempted to resist them. The deceased was left lying in a pool of blood. The unlawful act which led to the death of the deceased was the fact of his being attacked by the men who were attempting to rob him.

The cause of the death of the deceased is clearly proven by the evidence of **PW7 DR. K.N. MANDALYA** the doctor who performed the autopsy on the body of the deceased. His evidence was that externally the body had cuts on the front and back of the head, cuts on the neck, cuts on left cheek and superficial cuts on the back. Internally the doctor noted fractures to the back of skull, fracture of cervical spine. From this evidence it is in no doubt that the deceased was severely **‘worked over’** or hacked with a sharp object. **PW7** formed the opinion that the cause of death was **“intra cranial injury due to spine and head injuries due to cuts on the head”**. It is clear therefore that it was this unlawful attack on the deceased which was the cause of his death. I am satisfied that both the identity as well as the cause of death of the deceased have been proved beyond a reasonable doubt.

The next question is whether this unlawful act was committed with malice aforethought. This forms the mens rea of the offence of murder. Malice aforethought is defined in S. 206 of the Penal Code to include:

“206 Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances –

- a)
- b)
- c) **An intent to commit a felony**
- d)

The persons who attacked and killed the deceased did so in furtherance of their intent to commit the felony of robbery. **PW5** told the court that one of the men had grabbed hold of the deceased’s wallet. It was when the deceased resisted that the man began to cut him up. I am satisfied that the malice aforethought provided for in S. 206(c) of the Penal Code has been proved and I do so find.

Finally the prosecution must satisfy the court that it was the 2 accused who attacked and so killed the deceased. This was an incident where there was only one eye-witness to the murder who was **PW5** who was in the company of the deceased at the material time. **PW6** the neighbour did not see much as he was warned by the thugs to close his window. He thus was not in a position to identify anyone. There is therefore only one single identifying witness. Added to that the incident occurred at night about 12.00 midnight. It was obviously dark which only serves to make a clear identification all the more difficult. In the case of **MAITANYI –VS- REP [1986] KLR 198**, the Court of Appeal sitting in Nairobi held as follows –

“1. Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult”

Their lordships further held:

“2 When testing the evidence of a single witness a careful enquiry ought to be made into the nature of the light available conditions and whether the witness was able to make a true impression and description.”

Both these above holdings are instructive to this court.

PW5 told the court that though the incident occurred during the night there were bright security lights from the house and the area surrounding the scene. Her own words were:

“There was security light from our house, the kiosk and our neighbour’s house. The light was bright enough to enable me to see”

Curiously under cross-examination by Mr. Wameyo **PW5** says:

“My neighbour opened a window but closed when a torch was flashed”

If the scene was as brightly lit as **PW5** has suggested then why would there be any need for a torch? The use of a torch suggests that the light available was not as bright as **PW5** would like the court to believe. From her evidence **PW5** was being guarded by one of the thugs whilst another man was dealing with the deceased. The attack was unexpected and **PW5** must have been terrified. In these circumstances there is doubt as to whether she would have been in a position to make a clear and positive identification of her attackers.

Be that as it may **PW5** later went to the police station and attended two different identification parades. One was conducted by **PW2 INSPECTOR JAMES TARUS** in which **PW5** identified ‘**Joseph Maina**’ the 2nd accused. The second parade was conducted by **PW10 DAVID MWANGANGI** who is now retired but was at the material time the O.C.S. of Nyali Police Station. At this latter parade **PW5** identified ‘**Martin Maina**’ the 1st accused. Both officers insist that they mounted and conducted the parades properly and in line with the Force Standing Orders. However my own analysis reveals several anomalies which cast doubt on the validity of the two identification parades. Both accuseds maintain that the parades were improperly and unfairly conducted because **PW5** had an opportunity to see both of them at the police station before the parades were mounted. **PW5** herself appears to lend credence to this claim when under cross-examination by Mr. Wameyo she states:

“I remember I went back to the police station thrice. I attended an ID parade during my second visit. I can remember the 2nd and 3rd accused persons visited the police where they argued with the OCS.”

If **PW5** saw the two accuseds involved in a verbal altercation with the O.C.S. then obviously this would colour or prejudice her identification of them later on. Further doubt is thrown on the validity of the two identification parades by the evidence of **PW8** the investigating officer. Under cross-examination by Mr. Wameyo **PW8** admits:

“The cells at Nyali Police Station have walls but the front have grills. The cells are adjacent to the office of the OCS It is possible to see somebody standing outside the cells talking to the suspect”

More telling **PW8** admits:

“It would be possible if Stella [PW5] said that on her way to the OCS’s office she saw the two accuseds talking to their lawyer at the cells.”

What all this means is that there exists the very real possibility that **PW5** saw the two accuseds, firstly arguing with the O.C.S. and secondly talking to their lawyer **before** the identification parades were conducted. It is a cardinal rule that an identifying witness should have absolutely **no** contact with a suspect before a parade is conducted. In a case such as this where the identifying witness actually **saw** the two suspects prior to identifying them then such parades are actually valueless. There is the very real possibility that her identification of the two accused was prejudiced by the fact that she had seen them prior to identifying them. Obviously **PW5** would be more likely to point out and identify persons she had seen. For the above reasons I find that these identification parades did not pass muster. The factors mentioned above compromised the validity of the parades and they cannot be said to have provided clear and reliable evidence of the identification of the two accused.

The question of the arrest of the two accuseds is also less than satisfactory. **PW9 PC. DICKSON KALAMA** told the court that on 3rd April 2005 at 3.00 A.M. he and other officers were on patrol duties in the Kisimani area of Mombasa. **PW9** states that he received a call from the controller alerting him of the attack on the deceased. **PW9** proceeds to state that he arrested the two accused based on the **‘description’** given to him of the attackers **“one was brown and short others were black. One was tall”**. Apart from the fact that this description is woefully inadequate as it could refer to any number of Kenyans, it remains a mystery as to whom this description emanated from. **PW5** who was the only eye-witness to the attack stated in her evidence **“I did not give the physical description”**. If no description had been given by the only eye-witness to the incident then the court is left to wonder on what basis the police decided to arrest the two accuseds. The possibility that the two were arrested merely because they happened to be in the vicinity of the attack cannot be ruled out.

Finally **PW5** told the court that the deceased who was her boyfriend was a married man. She told the court that the deceased’s wife was understandably very unhappy about their relationship. This wife had confronted **PW5** several times both in her house and at her place of work, and had actually threatened to kill either the deceased who was her husband or **PW5** who was her rival. Despite having received this information the police apparently made no attempt to investigate the same. The deceased’s wife was not interviewed, nor was her statement recorded. It is not entirely inconceivable that this lady could have made arrangements to have her husband and his lover attacked. As the old adage goes **‘Hell hath no fury like a woman scorned’**. The police ought to have taken steps to follow up this lead in order to conclusively eliminate the wife of the deceased as a possible suspect.

Based on the foregoing I am not satisfied that the prosecution have fulfilled their mandate. The identification of the 2 accuseds is not reliable. Several doubts abound and the prosecution case has several unexplained anomalies. The charge of murder has not been proved beyond a reasonable doubt. I therefore

enter a verdict of '**not guilty**' against each accused persons and acquit them both in accordance with S. 306(2) of the Criminal Procedure Code. Both accused to be set at liberty forthwith unless they are otherwise lawfully held.

Dated and Delivered in Mombasa this 15th day of June 2011.

M. ODERO

JUDGE

In the presence of:

Mr. Onserio for State

Mr. Wameyo for both accused