



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL CASE NO. 29 OF 2007

REPUBLIC **PROSECUTOR**

VERSUS

BAMBO DZIRO **ACCUSED**

JUDGEMENT

The accused **BAMBO DZIRO** faces a charge of **MURDER CONTRARY TO SECTION 203 as read with S. 204 OF THE PENAL CODE**. The particulars of the charge are as follows:

“On 25th day of November 2007 at about 5.00 p.m. at Bomani Village, Samburu Location in Kwale District within Coast Province, murdered SAMSON CHILAULO CHITUMBUA”

The accused pleaded not guilty to the charge and his trial commenced before the High Court Mombasa on 24th March 2009. The prosecution led by the learned State Counsel called a total of eight (8) witnesses in support of their case. **Ms. MBOGO** Advocate represented the accused.

Briefly the prosecution case is that on 25th November 2007 at about 7.00 p.m. the wife of the deceased **MARIA SAMSON (PW1)** received news that her husband **SAMSON CHITUMBUA** had killed and that his body was lying by the roadside. She rushed to the scene and indeed found the dead body of her husband lying by the road with cuts on his head and neck. The matter was reported to the village chairman **JULO NYAE PW3** who in turn reported the incident to the police. Police from Samburu Police Station arrived at the scene at about 11.00 p.m. They collected the body and removed it to the mortuary where a post-mortem examination was later conducted. Police investigated the matter after which the accused was identified as one of the men who attacked and killed the deceased. He was then arrested and charged.

At this stage, the prosecution having closed its case, this court must determine whether a prima facie case has been made out to warrant the accused to be placed on his defence.

In any murder trial the prosecution is required to prove two key ingredients of the charge. Firstly there must be sufficient proof that the death of the deceased was caused by some unlawful act or omission – this is the **‘actus reus’** of the offence. Secondly and of equal importance the prosecution must prove that the unlawful act or omission which caused the death of the deceased was committed with malice aforethought. This forms the **‘mens rea’** of the offence.

In this case the death of the deceased is not in any doubt. **PW1** who was the deceased’s wife as well

as several other relatives all testified and all stated that they saw the dead body of the deceased lying on the road. They all confirm the identity of the dead man. Similarly all these witnesses testify that they found the body lying in a pool of blood with deep cuts on the head and neck. It is obvious from this evidence that the deceased had been attacked and fatally wounded. The cause of death is confirmed by the evidence of **PW8 DR. MANDALYA** who performed the autopsy on the body of the deceased. He noted “multiple cut wounds on back of head with herniation of brain tissue”. He also noted “*extensive skull fractures with multiple loose bone fracture to the left base of skull*”. Internally the doctor noted “*swelling and bleeding in the brain and the cervical spine was fractured*”. From this testimony there can be no doubt that the deceased was savagely attacked. **PW8** finally opined that the cause of death was “*intracranial haemorage due to skull fractures due to cut wounds on the head*”. This is expert evidence which has not been challenged or controverted in any way. Therefore I am satisfied that the deceased met his death as a result of massive internal bleeding due to a savage attack.

The next crucial question is whether it was the accused before the court who so attacked and fatally injured the deceased. Out of the total of 8 witnesses called to testify not a single one was an eyewitness to the attack on the deceased. Thus there is no eyewitness who is able to identify the accused as being one of those who attacked and killed the deceased. **PW4 ROBERT BAYA CHITUMBUA** an elder brother to the deceased told the court that on the material day the deceased borrowed his bicycle to go to Lusanga. About 30 minutes later **PW4** says he saw the accused and one Mwero ride in the same direction. This of course is not proof of any guilt on the part of the accused. He like any other person was actually free to ride his bicycle to whichever destination he wished.

The reason why the police eventually arrested the accused is quite bizzare. **PW5 MBARU MWARO** a self proclaimed herbalist/witchdoctor told the court that on 26th November 2007 one day after the deceased had been killed the accused came to him and sought to be cleansed for having killed a fellow villager. **PW5** told the court that the accused confessed to him that he and two others had killed the deceased. **PW5** told the accused to return the following day with the necessary items including a black hen to facilitate the cleansing. Meanwhile **PW5** alerted the village chairman who in turn also alerted the police. The next day accused came for his appointed cleansing. As **PW5** was proceeding with the ritual police stormed in and arrested accused and took him to the police station. He was later charged with murder.

It is very strange that police now appear to be relying on village witchdoctors to conduct investigations on their behalf. It is mind boggling that based on the word of a witchdoctor the police would proceed to arrest a man as a suspect. The police did not appear concerned that **PW5** was practicing witchcraft which is outlawed in Kenya but relied on this law-breaker to lead them to the arrest of the accused. As counsel for the defence has pointed out the law lays down strict procedures regarding how confessions are to be taken or received. This is clearly stated in S. 25 of the Evidence Act. Confessions made to witchdoctors is not covered by S. 25. Aside from this so-called confession the police did not bother to conduct any further investigations to establish the complicity of the accused into this crime. There was an allegation by **PW5** that the accused had a grudge against the deceased who he believed was sleeping with his (the deceased's) wife. Police took no steps to establish much less prove this allegation. No other witness seems to be aware of this grudge. **PW1** the deceased's wife as would be expected denied all knowledge of this issue. **PW5** in my view is not a credible witness at all. He has admitted to being a law-breaker. The chicken allegedly recovered in his compound was photographed according to **PW7 PC. CHARLES OYOO** the investigating officer. No such photographs were produced in court. In my view no meaningful investigations were conducted into this case. There is no reliable evidence that accused was indeed involved in the murder of the deceased. No prima facie case has been shown to exist. I do hereby enter a verdict of ‘*not guilty*’ in accordance with S. 306(1) of the Criminal Procedure Code. I acquit the accused of this charge of murder and direct that he be set at liberty forthwith unless he is otherwise lawfully held.

Dated and Delivered at Mombasa this 6th day of June 2011.

M. ODERO
JUDGE

In the presence of:
Mr. Magolo holding brief for Ms. Mbogo
Mr. Onserio for State