



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL CASE NO. 16 OF 2007

REPUBLIC PROSECUTOR

=VERSUS=

ABDALLA SAID MOHAMED 1ST ACCUSED
PETER MUTUKU PAUL 2ND ACCUSED

RULING

The two accused persons namely **ABDALLA SAID MOHAMED** (hereinafter referred to as the 1st accused) and **PETER MUTUKU PAUL** (hereinafter referred to as the 2nd accused) have jointly been charged with the offence of **MURDER CONTRARY TO SECTION 203 as read with S. 204 OF THE PENAL CODE**. The particulars of the charge are that:

“On the night of 27th June 2007 at unknown time at Junda Mishomoroni in Mombasa District within Coast Province, jointly with another not before court, murdered SAMUEL KAMAU KUNGU”

The prosecution led by the learned State Counsel called a total of six (6) witnesses in support of their case. The brief facts of the case were that on 28th June 2007 the 1st accused went to Nyali Police Station and reported that he had witnessed a murder committed by the 2nd accused. The report was duly booked vide OB No. 62 of 28th June 2007. Police commenced investigations into the matter. The two accused allegedly led police to the scene at Junda sub-location in Mishomoroni at the beach where the body of the deceased was recovered. The two accuseds were later charged.

At this point the court has to determine whether or not the prosecution have established a prima facie case to warrant the two accused to be placed on their defence.

The fact of the death of the deceased is not in any doubt. There is evidence from the eye-witnesses who were present when the body was recovered. In addition **PW4 CHIEF INSP. RAPHAEL MUTUA** told the court that he is a scenes of crime officer and went to the scene. He found the dead body having been recovered with the hands and legs tied. He took several photographs of both the body and the scene which photographs he produces in court as exhibits **Pexb 2**.

However to merely prove the death of the deceased is not sufficient. The prosecution took no steps to prove the identity of the deceased person. No evidence was called from a person who knew the deceased e.g. a relative to confirm that the body recovered and which appears in the photographs was actually the body of **‘Samuel Kamau Kungu’**.

Even if this court were to proceed on the assumption that the deceased had been properly identified, there was no eye-witness to the events who could shed light on exactly what happened to lead to the death of this accused. The 1st accused is the one who reported the incident to the Nyali Police Station was later himself charged with the offence of murder. Though **PW1** told court that the 1st accused gave a narration of events in which he implicated the 2nd accused, his evidence is the evidence of a co-accused and is therefore suspect and cannot form the basis upon which the 2nd accused can be convicted.

The police appear to have decided to charge the 2 accused because they are the ones who led police to where the body of the deceased lay. However as rightly pointed out by defence counsel the fact that they knew where the body lay does not make the 2accuseds guilty of murder. There is every possibility that the 2 were merely witnesses and that is how they knew where the body lay.

This matter was investigated by a certain Colp. Njore. The said Colp. Njore was never called to testify in this case. The court is therefore left in the dark as to what his investigations may have revealed, and how he came to the conclusion that the 2 accused killed the deceased.

All in all the prosecution evidence leaves a lot to be desired. To place the accuseds on their defence would be tantamount to calling upon them to fill in the gaps in the prosecution case. The law requires the prosecution to show a prima facie case. They have failed to do so in this case. I therefore enter a verdict of **'not guilty'** in respect to both accused persons under S. 306(1) Criminal Procedure Code. Each accused is hereby acquitted of this charge of murder and is to be set at liberty forthwith unless otherwise lawfully held.

Dated and Delivered in Mombasa this 2nd day of June 2011.

M. ODERO
JUDGE

In the presence of:

Mr. Alwenya for Accused 1

Ms. Kipsang for Accused 2

Mr. Onserio for State