



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL CASE NO. 9 OF 2006

REPUBLIC.....PROSECUTOR

=VERSUS=

JUMA MURICHENI MWERO *alias* CHIKOKO JABU..... ACCUSED

RULING

The accused **JUMA MURICHENI MWERO *alias* CHIKOKO JABU** faces a charge of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 of the PENAL CODE**. The particulars of the charge read as follows:

“On the night of 13th and 14th day of March 2006 at Mutumwa Village, Kilimangodo Sub Location in Kwale District within Coast Province, murdered DZOMBO JABU”

The accused pleaded ‘*not guilty*’ to the charge and his trial commenced on 29th November 2007. The prosecution led by **MR. ONSERIO**, learned State Counsel called a total of eight (8) witnesses in support of their case. The brief facts of the prosecution case are as follows: **PW6 KUVA DZOMBO CHAROWA**, told the court that on 13th March 2006 at about 8.00 p.m. the deceased who was her husband left their home to go and purchase maize flour for the evening meal. **PW6** explained to the court that she was unable to go herself to purchase the flour as she had just delivered a baby the previous day. She further told the court that she waited the whole night but the deceased did not return. Infact **PW6** told court that she slept hungry that night. **PW3 MJENI MZUMBA KARIMA** told the court that on 13th March 2006 at 9.00 p.m. he was at the shopping centre conducting his business of selling porridge as usual. He states that he saw and spoke to the deceased who informed him that he was on his way to buy maize flour for the evening meal. Both **PW6** and **PW3** testified that on 14th March 2006 they received news that the deceased had been killed. His body was lying by the road with savage cut wounds all over and infact some of the fingers had been cut off. The matter was reported to Lunga Lunga Police Station after which the accused was arrested and charged with this offence.

At this point the court has to decide whether the prosecution have adduced evidence sufficient to show a prima facie case. 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”

From this definition three key or essential ingredients of the offence of murder emerge –

- (1) That a death occurred
- (2) That the death was caused by an unlawful act or omission; and
- (3) That said unlawful act or omission was committed with malice aforethought.

The death of the deceased cannot be in any doubt. **PW7 SERGEANT MICHAEL ODUOR** who is a scenes of crime officer told the court that he received a film from the O.C.S. Lunga Lunga Police Station. **PW7** developed the 7 photographs depicting the body of an African male adult lying in a pool of blood with multiple cuts to the body. He produced these photographs as exhibits in this case **Pexb1**. As stated earlier both **PW3** and **PW6** who knew the deceased before testified that they found the body lying dead by the road with multiple cuts to the face and torso. The same evidence is given by several other prosecution witnesses all of who knew the deceased. They have all identified the deceased man as a fellow villager **“Dzombo Jabu”**.

However for the prosecution to merely prove the fact of death is not sufficient. The State must adduce evidence to prove the **‘cause of death’** of the deceased. Ordinarily evidence relating to the cause of death can only be adduced by way of medical evidence arising from an autopsy. In the case of **NDUNGU –VS- REPUBLIC [1985] KLR 487** the Court of Appeal held:

“Though there are cases in which death can be established without medical evidence relating to its cause as where there are obvious and grave injuries, medical evidence should still be adduced in such cases of the effect of such injuries as opinion expert evidence and as evidence supporting the cause of death alleged by the prosecution”

From the evidence of the prosecution witnesses and from my own observations of the photographs taken by **PW7** the alleged cause of death is no doubt the cut wounds which the deceased sustained. However the State failed and/or neglected to call expert opinion evidence from a medical practitioner to prove that this was in actual fact the cause of death of the accused. This is an omission which in my view is prejudicial to the prosecution case.

Be that as it may, even if this court takes it that the deceased’s cause of death has been sufficiently proven, the prosecution evidence still leaves a lot to be desired. There was no eye witness to the murder, thus there was no witness who actually saw the accused attack and cut up the deceased. **PW3** met the deceased at their local shopping centre and he tells court that when they parted company that evening, the deceased was healthy and normal and did not appear at all worried or anxious for his life. The other prosecution witnesses only arrived at the scene **after** the deceased had been killed and thus they only saw the dead body. None of them is able to state with certainty how the deceased met his death. There is no evidence that the accused was found or seen near the scene of the murder. **PW1 EMMANUEL KADZOYO** a step-brother to the deceased and the accused told court that he went to the house of the accused where he recovered a blood-stained panga (more on this later) and a blood-stained T-shirt. Neither this panga nor the clothes allegedly recovered inside the accused’s house were produced as exhibits in this case. The court is unable to tell whether these items actually existed and were recovered as alleged. Secondly **PW1** states that the panga was recovered **inside** the accused’s house. This evidence is contradicted by the testimony of **PW4 MWADUKA MWASUDI** a village elder who is also a brother of the deceased tells the court that the panga was recovered at the scene i.e. outside by the roadside. **PW7** who took photo included a photograph of the panga. This implies the panga was found outside and **not** inside the accused’s house as alleged by **PW1**. It remains unclear exactly where this panga (which was not produced in court) was actually recovered.

PW8 PC WILLIS OTIENO told the court that he found a note at the scene written *‘ni mimi Chironda*

Mwababu’ i.e. ‘*it is me Chironda Mwarabu*’. It is highly unlikely that a murderer would announce his identity to all and sundry in this manner. **PW8** under cross-examination by **MS. KAYATA** for the accused admits that he did not in his statement make any mention of his having recovered a note at the scene. This note was a key clue and a crucial piece of evidence. Why would **PW8** refer to it in his testimony yet surprisingly make no mention of the note in his statement? **PW8** is a trained police officer who was no doubt aware that all crucial leads found at the scene must be included in his statement. His failure to include this clue leads me to doubt whether this note was actually recovered at the scene as alleged. Furthermore **PW8** told the court that he took the said note as well as sample handwriting recovered from the accused’s house to a document examiner for analysis. No evidence was called from the document examiner to establish exactly what his findings were. In short no nexus is shown between this note and the accused.

As stated earlier in order to prove the offence of murder the prosecution must prove the existence of malice aforethought on the part of the accused. Here again the prosecution falls short. The evidence reveals that the accused and the deceased were brothers but no evidence is tendered of any disagreement or hostility between the two that would cause the accused to seek to eliminate his own brother. **PW4** who was the village elder declares in his evidence that:

“The deceased was killed by his own brother. I do not know why they fought. I do not know why they quarreled”

PW4 offers no proof that the accused and deceased actually quarreled or fought. He did not witness this fight. Neither did **PW4** see the accused kill the deceased. His evidence is basically rumour and innuendo. There is no evidence to back what this witness has told the court. Whilst **PW4** states that the two quarrelled **PW6** who was the wife of the deceased told the court that she was not aware of any disagreement between her husband and the accused. Here again is a major contradiction in the prosecution case. Lastly the accused made no attempt to abscond or to flee from justice, as would be expected of one who had committed such a heinous crime. By all accounts accused was arrested at the home of the deceased. He did not resist arrest. On the whole I find no evidence of any ill-will on the part of the accused toward the deceased

Finally I find that the prosecution case falls way short of the standard which is required in criminal cases. No tangible evidence has been adduced linking the accused to this crime. As such I find no prima facie case has been shown. I enter a verdict of ‘*not guilty*’ and acquit the accused under S. 306(1) of the Criminal Procedure Code. The accused is to be set at liberty forthwith unless he is otherwise lawfully held.

Dated and Delivered in Mombasa this 11th day of July 2011.

M. ODERO

JUDGE

In the presence of:

Mr. Were holding brief for Ms. Kayata

Mr. Onserio for State