



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 9 OF 2006

REPUBLIC
.....PROSECUTOR

-VERSUS-

ANTHONY MUGWANGA.....
.....1ST ACCUSED

JOSEPH KIHANDA NDUNGU.....
.....2ND ACCUSED

J U D G M E N T

The accused herein, **Anthony Mugwanga**, (hereinafter referred to as the first accused) and **Joseph Kihanda Ndungu** (hereinafter referred to as the second accused) respectively are jointly charged with the offence of murder contrary to section 203 as read together with section 204 of the Penal Code.

The particulars of the charge are that on the 16th day of November 2002 at Biafra Estate in Thika District within the Central Province jointly with others not before the Court murdered **Thadius Ochieng Opondo** (hereinafter referred to as the deceased)

The prosecution called **3 witnesses** in support of its case.

Patrick Nduati Ngare (PW 1) was a neighbour to the deceased at Starehe Estate in Thika Town. He recalled that on 16th November 2002, at Thingira Petrol Station, while inside a Nissan vehicle which was being fueled, another Nissan matatu (yellow in colour) came at high speed. About 14 passengers came out of the said yellow Nissan. The two accused persons, whom he claimed to know well before this incident, came out with rungun, descended on the deceased and bulgeoned him to death. He viewed the incident, which took about 2 minutes, from a distance because the group of 14 people were armed with crude weapons and he feared for his life.

The driver of the matatu, in which PW 1 was a passenger, took the deceased, who was bleeding to the hospital. Unfortunately, the deceased passed on before reaching.

No. 66866 PC Raphael Mwaka (PW 2), was stationed at Thika Police Station as at 21st November 2002. He accompanied the relative of the deceased to the mortuary for purposes of witnessing the post-mortem.

After the post-mortem was done, Dr. Maundu gave him the post- mortem form for safe custody. He marked the Post –Mortem form as MFI-I which was later admitted as exhibit 1.

On 13th February, 2003 he took the two suspects to Dr. Maundu at Thika District Hospital for age and mental assessment. The P3 form in respect of accused No. 1 was marked as MFI-2 and in respect of accused No. 2 as MFI-3. The same were subsequently admitted as exhibit 2 and 3 respectively through PW 3.

No. 217478 Chief Inspector Biketi (PW 3), stationed at Buka Police Station on 16th day of November, 2002 in Crime Branch Office. He received a report that a person had been bulgeoned to death. He accompanied PC Mwahato to the scene. They found when the victim had been taken to the hospital. He observed several foot marks at the scene. He also saw pieces of broken sticks which he concluded could have been used in assaulting the deceased. The witnesses, he found at the scene, gave them the names of the two accused as part of the gang that had set upon the deceased with runigus and other crude weapons and occasioned him grievous harm thus culminating into his death.

Together with his colleagues they arrested the two accused persons and facilitated the taking of charge and cautionary statement from them.

By consent he produced the post-mortem form in respect of the deceased as exhibit I, the P3 in respect of the 1st accused as exhibit 2 and the P3 form in respect of the 2nd accused as exhibit 3.

The prosecution then closed its case. Both counsel did not make submissions on no case to answer. They left it upon the Court to make a ruling on whether there was a *prima-facie* case warranting the putting of one accused or both accused persons on their respective defences.

Both accused chose to remain silent courtesy of section 211 of the Criminal Procedure Code. I then reserved my ruling, which I now give.

Against that backdrop of evidence there is only one eye witness account in respect of the incident. The law, as I understand it, is that a Court of law may rely on the evidence of one eye witness to reach a conviction but that evidence must be tested with the greatest care and circumspection. Given the evidence of PW 1 in its entirety, I am not persuaded that it should be relied upon to find a conviction. The said witness was thoroughly shaken in cross-examination by Mr. Kanyangi the defence counsel. Given the nature of the charge herein and the disclosed circumstances of the offence it is my considered view that it would be unsafe to rely on his evidence. Unfortunately the prosecution did not bring any other witness thus denying the Court the opportunity of additional evidence in support of the prosecution's case.

In a nutshell, there is reasonable doubt created in the mind of the Court by the evidence of PW 1. He appeared to me to exaggerate the circumstances under which the alleged offence was committed. He did not strike me as a witness who told the Court the truth, nothing but the truth as he promised on oath.

In the premises, I resolve the doubt, in my mind, in favour of the two accused persons. Accordingly, I enter a verdict of **NOT GUILTY** under section 306(1) of the Criminal Procedure Code.

In the result, I acquit the two accused persons of the charge of murder. They are set free unless lawfully held for some other lawful reasons.

Dated and delivered at Nairobi this 22nd day of September, 2011.

N.R.O OMBIJA
JUDGE

