



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL CASE NO. 30 OF 2007

REPUBLIC.....STATE COUNSEL

VERSUS

TSUMA BAGALA NZIJE.....ACCUSED

RULING

The accused TSUMA BAGALA NZIJE has been charged with the offence of MURDER CONTRARY TO SECTION 203 AS READ WITH SECTION 204 OF THE PENAL CODE. The particulars of the offence were that

“on the 30th day of November 2007 at about 8.00 a.m. at Msinji village Tiribe area in Kwale District murdered BAGALA NZIJE MAONO”

The accused entered a plea of ‘not guilty’ to the charge and his trial commenced before the Mombasa High Court on 26/10/2009. The prosecution led by MR. MONDA learned state counsel called a total of ten(10) witnesses in support of their case MS. MBOGO advocate represented the accused.

Briefly the prosecution case is that on the morning of 30/11/2007 the deceased who was the accused’s father Bagla Nzije was found lying dead inside his house. It was alleged by several witnesses that it was the accused who killed his father. The matter was reported to local authorities who called in the police who then arrested the accused. He was then charged with the present offence.

At this point this court must determine whether the evidence on record establishes a prima facie case to

warrant the accused being called upon to give his defence to the charge.

The fact of the death of the deceased is not in any doubt. Almost all the prosecution witnesses testify that they saw the body of the deceased lying in his house. **PW 8 APC HUMPHERY KARISA** told the court that he is the officer who went to the scene after the murder was reported. He told court that he found the body of the deceased lying dead at the scene. **PW11 CHIEF INSPECTOR MUTUKU** is the scene of crime officer who visited the scene. He took photographs of the dead body which photographs were produced in court as exhibits **Pexb3**

The court was able to observe the photographs which were of a male adult African lying dead on the ground. The deceased has been identified by several witnesses including his son **PW3 NZIJE BAGALA NZIJE** as Nzije Bagala.

PW 9 DR ANDERSON KAHINDI the Medical Superintendent at Msambweni District hospital gave evidence about the cause of death. He testified that an autopsy was performed on the body of the deceased on 3/12/2007. The pathologist noted a broken spine and neck area consistent with strangulation. The cause of death was found to be 'asphyxiation and cervical spine trauma'. The post-mortem report which was duly filled and signed was produced in court as an exhibit **Pexb1**

From the foregoing, there can therefore be no doubt about the fact and cause of death of the deceased. However, mere proof that death has occurred will not on its own suffice to prove a charge of murder. The prosecution must adduce evidence to prove that it was the accused person who by some unlawful act or omission caused the death of the deceased. In this case there was no eye-witness to the murder. There is no witness who saw the accused strangle and kill the deceased. In fact there is no witness who actually saw the accused and the deceased together on the material day. Some of the witnesses **like PW 2 JUMA NZIJE** and **PW 5 OMAR SHERIA** who was the local chief told the court that they received news of the death of the deceased while they were attending yet another funeral within the locality. **PW2** and **PW5** said that they were merely '**told**' that it was the accused who killed his father. None of them witnessed the murder and neither has any concrete or tangible evidence to offer regarding how the deceased met his death. Their evidence was basically hearsay evidence which was of little or no assistance to the court.

The reason why the police arrested accused in connection with this murder is because it was alleged that he confessed to the crime. Who is it that this so called 'confession' was made to. **PW1** told court that when he got to the scene accused opened the door and said '*oneni vile nimefanya*' i.e. '*see what I have done*'. Accused did not state the specific deed he had done and he certainly did not say that he had killed the deceased. On his part **PW8** tells the court that accused told him '*nimemaliza hiyo maneno*' '*I have completed the task*'. Once again the accused did not specify that the task at hand was murder. In my view both alleged confession were vague and ambiguous and could refer to anything other than the act of murder. These statements do not on their own provide proof that the accused killed the deceased.

In any event the law regarding the making of confession is very clear. It is not a statement made to any Tom Dick or Harry that will be deemed to amount to a confession. S 25 A(1) of the Evidence Act provides

25A(1) A confession or any admission of a fact tending to be the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or a police officer (other than the investigating officer) being an officer not below the rank of chief Inspector of police and a third party of the persons choice".

The law therefore set out very clear and definite parameters in which a confession may be admitted by the courts. None of these parameters were met in this case. Neither **PW2**, **PW5** nor any of the other witnesses was qualified to receive a confession from the accused.

PW4 PC CHRISPUS MWIKAMBA was a police officer who testified that the accused confessed to him in the words ‘*mzee nimeshamumaliza*’ ‘*I have finished the old man*’. **PW4** was not an officer of or above the rank of chief Inspector. He was a police constable and thus any confession purportedly made to him is not admissible as evidence. **PW10 MOSES KIRUI CHEBASOS** was the deputy officer Commanding Kwale police Station at the material time. He told the court that the accused’s confession was received and recorded by one Chief Inspector Moss Ndua. The said Chief Inspector Ndua was not called as a witness in this case. This was a fatal omission. If indeed a confession was made to this chief Inspector Ndua, then such a confession would have fulfilled the requirements of s.25A(1) of the Evidence Act and would therefore have been admissible. It was remiss of the prosecution to fail to call such crucial evidence if indeed they had it. As things stand there is no evidence to point at the accused as the perpetrator of this act. The *actus reus* of the offence of murder has not been proved against the accused.

Apart from the *actus reus* the prosecution must prove the ‘*mens rea*’ of this offence of murder which *mens rea* is defined as ‘malice aforethought’. The facts are that the accused was the deceased son. Why would the son want to eliminate his father. Was there any reason the accused had to get rid of the deceased. No evidence is tendered on this aspect of the offence. **PW1** a cousin to accused told the court that the accused blamed the deceased for bewitching him. Yet **PW3** a brother to the accused told the court that there was no disagreement between the accused and their father. The two witnesses both close family members contradict each other. Apart from this offhand allegation of witchcraft which the police apparently did not bother to investigate further, no evidence of malice aforethought on the part of the accused has been proved.

On the whole I find that the prosecutions have failed to prove a prima facie case against the accused. The police did not bother to investigate this murder. They merely relied on tales, rumors and innuendo from villagers. If the accused elected to keep silent in his defence the evidence on record would not warrant a conviction. The prosecution case is large one of suspicion. It is trite law that suspicion no matter how strong will suffice as a basis for a conviction.

I therefore enter a verdict of ‘not guilty’ and I acquit the accused of this charge under s. 306(1) of the Criminal procedure Code. Accused to be set at liberty forthwith unless he is otherwise lawfully held.

DATED and delivered in Mombasa this 7th day of September 2011.

M ODERO

JUDGE

In the presence of

Ms Mbega for accused

Mr. Onserio – for state

M. ODERO

JUDGE