



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL CASE NO. 19 OF 2007

**REPUBLIC.....STATE
COUNSEL**

VERSUS

**ABDALLA HAMISI
MWABAKO.....ACCUSED**

RULING

The accused **ABDALLA HAMISI MWABAKO** alias **TABIA ALI MWACHURA** faces a charge of **MURDER CONTARY TO SECTION 203 AS READ WITH SECTION 204 OF THE PENAL CODE**. The particulars of the charge were as follows:-

“on the night of 13th December 2004 at 8.30 p.m. at simkumbe village Tiwi Location in Kwale district within Coast Province, murdered AMANI RASHID MWATENGULI”

The accused entered a plea of “not guilty” to the charge and his trial commenced in the High Court at Mombasa on 24/2/2010. The prosecution led by the learned state counsel called a total of nine (9) witnesses in support of their case.

The brief facts of the prosecution case were that on 13/2/2004 at about 8.00 p.m. the deceased and the accused were amongst a group of young men chatting within the compound of one Mwanakombo. For one reason or another an alteration erupted between the accused and the deceased. This led to a fight and the two men continued to struggle with each other into the bushes out of sight of the others. A few minutes later the deceased emerged from the bushes bleeding from cuts on the elbows and the head. His relatives rushed him to Tiwi clinic and there after to Msambweni Hospital. He was eventually referred to Coast Provincial General hospital where he unfortunately succumbed to his injuries.

The following day after investigations into the matter the accused was arrested and charged with the

offence of murder. The fact of the death of the deceased cannot be in any doubt. Several of the prosecution witnesses testify that on the material day the deceased having been engaged in a fight with the accused emerged from the bushes bleeding heavily with cut wounds on his head and face. He was rushed to hospital but unfortunately lost the fight for his life. Evidence as to the cause of death was given by **DR. K N. MANDALIA** who testified as **PW3** in this matter. He conducted an autopsy on the body of the deceased. He noted cut wounds as well as a fracture of the ribs on the left side of the body. In the opinion of **PW3** the cause of death was “intracranial hemorrhage due to head injury resulting from a cut wound to the skull”. This is expert medical evidence which has not been challenged or controverted in any way. I therefore find a fact that the deceased met his untimely death as a result of a cut wound to the head.

However to merely prove the death and the cause of death of the deceased will not suffice. The prosecution must adduce evidence sufficient to prove that it was the accused person who committed the unlawful act which led to the death of the deceased. i.e it must be proved that it was the accused who committed the *actus reus* that led to the death of the deceased.

In this case it is alleged that the accused and the deceased who were friends had disagreed over their miraa business. Apparently the deceased had alleged that the accused had stolen his miraa. This disagreement led to a fight between the two. **PW1 RASHID MWATENGULI** a brother to the deceased told the court that he was called to the scene by neighbours. He saw his brother (the deceased) emerge from the bushes with cuts on his head. Neither he nor any other witness actually saw the accused cut the deceased. Although the cause of death is said to have resulted from cut wound, the weapon which inflicted these cut wounds was apparently never recovered. No witness saw the accused arrive with a panga and police who visited the scene immediately thereafter did not recover any panga or knife at the scene. As the trial court, I was able to observe the demeanour of **PW1** as he gave evidence. He was confused and self-contradicting. Under cross examination by **MR KADIMA**, learned counsel for the accused, **PW1** stated as follows

“the deceased said he has been injured by Tabia”[the accused]. He said he has been cut by a panga”

Surprisingly **PW1** then proceeds to admit that he did not include this crucial evidence of a dying declaration in his statement. Why would he leave out so important a statement. The demeanour of **PW1** was in my view totally dishonest. It was clear that he was out to slant his evidence so as to “pin” this murder on the accused. The veracity of this witness cannot be taken at face value and his evidence is suspect.

PW6 SALIM MOHAMED RAMOYO was the only eyewitness to the incident. Contrary to the assertions made by **PW1** that the deceased did not drink alcohol at all **PW6** told the court that both the accused and the deceased were drunk at the time of the incident. He told the court that after the quarrel ensued the accused and deceased continued pushing and shoving each other into the bushes. A few minutes later the deceased emerged from the bushes with cuts.

PW6 is categorical that he never saw accused with any type of weapon, much less a panga. More pertinently, **PW6** did not see what happened after the two left his line of vision. He therefore cannot tell what happened to the deceased after he disappeared into the bushes.

PW2 HAMISI MOHAMMED MWANGOZI the village chairman states in his evidence that after the two men fought each other into the bushes

“the accused ran home and got a panga. He returned and cut up the deceased”

This is mere conjecture on the part of **PW2**. He did not see this panga and neither did he see the accused cutting up the deceased. Further **PW2** admits that these were the ‘stories’ he heard from fellow villagers. He does not name these ‘fellow villagers’ nor has any one of them been called to corroborate his tale.

It appears that the case against the accused is largely based on suspicion because it is claimed that he ran away after the incident. It is a well established tenet of law that mere suspicion no matter how strong cannot form the basis for a conviction. There is no concrete evidence to show what befell the deceased after he went into the bushes. The court cannot rule out the possibility that a person or persons other than the accused attacked and killed him. No murder weapon was recovered.

In my view the evidence tendered against the accused is weak at best. If the accused elected to keep silent in his defence then this evidence would not support a conviction. The witnesses were unreliable and contradictory. I find that the prosecution have not established a prima facie case against the accused and I do hereby acquit him of this charge 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 2nd day of September 2011.

M. ODERO

JUDGE

In the presence of

Mr. Onserio – state counsel

Mr. Ngetich holding brief for Mr. kadima – for accused

Mutisya – court clerk.

M. ODERO

JUDGE

2/09/2011