



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CRIMINAL CASE NO. 16 OF 2006**

**REPUBLIC.....PROSECUTION**

**=VERSUS=**

**HAMISI MOHAMED MKALI.....ACCUSED**

**JUDGEMENT**

The accused **HAMISI MOHAMED MKALI** faces a charge of **MURDER CONTRARY TO SECTION 203** as read with **SECTION 204 OF THE PENAL CODE**. The particulars of the charge were:

***“On the night of 24<sup>th</sup> May 2006 at unknown time at Mahoro area Dzombo Location in Kwale District within Coast Province, jointly with others not before court murdered PETER IRUNGU NGURE”***

The accused entered a plea of **‘not guilty’** to the charge and his trial commenced before Hon. Justice L.N. Njagi on 27<sup>th</sup> June 2007. He heard a total of three (3) witnesses Upon the transfer of the learned Judge to Nairobi I did take over the case and heard the remaining four (4) witnesses. On 17<sup>th</sup> November 2010 having realized that this trial began with the attendance of assessors who were dismissed mid-trial I did declare a mistrial and directed that the trial begin de novo. From that time and despite having been allowed several opportunities to avail their witnesses the State were not able to avail any witnesses for the re-trial. On 25<sup>th</sup> August 2011 the court allowed a **last adjournment**. Even then the State was still unable to avail any witness. The learned State Counsel had no option but to close his case without adducing any evidence in the re-trial. Certainly the accused person merits an acquittal

However in order to diminish any lingering doubts I will analyze the evidence adduced before the mistrial was declared.

As stated earlier the State called a total of 7 witnesses in support of their case. The brief facts were that the deceased left his home in Mombasa on 24<sup>th</sup> May 2006 in a hired vehicle heading to Shimba Hills for a business transaction. He never returned home. On 26<sup>th</sup> May 2006 the deceased’s wife **GRACE WANJIRU GITHU PW1** was informed by police that her husband’s body had been found bundled inside the boot of the vehicle Registration No. KAT 164B which he had hired. **PW1** went to Msambweni Police Station where she identified the body of her late husband.

In order to prove a charge of murder the prosecution is required to prove the cause of death of the

deceased. In this case no medical evidence was adduced to prove the exact cause of death of the deceased. **PW1** and other witnesses merely talked of having seen wounds on the head of the deceased. It may well be that it was these wounds which led to the death of the deceased but this element must be specifically proved. Failure to call in medical evidence on the cause of death is a fatal omission by the State.

Out of the 7 witnesses called to testify none was an eye witness who could testify as to how the deceased met his untimely death. The closest to an eye witness was **PW6 STEPHEN MUTISO** who said that he discovered the body of the deceased in the car boot two days **after** the vehicle had been abandoned outside his compound. **PW6** has no idea how the deceased met his death, who killed him, nor how the body ended up in the boot.

**PW6** identified the accused as one of the persons whom he saw trying to push the motor vehicle registration No. KAT 164R which had stalled outside his gate. The time was 10.00 p.m. It was dark. **PW6** states that he was able to see and identify accused by way of the headlamps of the vehicle. **PW6** does not describe how bright these lights were nor does he describe where accused was standing in relation to those lights. The headlamps of a vehicle will only illuminate persons in its direct path. **PW6** was behind the vehicle helping to push it. He states that the accused stood in front of the vehicle. It is unlikely that **PW6** would have had a clear and unfettered view of the suspect – remember **PW6** was engaged in pushing the vehicle from behind. In the poor light such evidence of identification cannot be deemed free from error. Further **PW6** told court that the man he saw on the night in question was light skinned. Yet he proceeds to identify accused who he admits is dark-skinned at the identification parade. If **PW6** is sure that he saw a light-skinned man, then how does he identify accused a dark-skinned man as the suspect. This is a clear indicator that **PW6** was not sure of whom he had seen.

No other witness places accused at the scene. The man who allegedly hired out this vehicle to the deceased was not called to confirm whether the deceased was in the company of the accused when he took the vehicle. In all respects the prosecution case is woefully inadequate. The accused was charged based on mere suspicion. There is no concrete evidence to link the accused to the death of the deceased. As such I find no prima facie case was shown and 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 unless he is otherwise lawfully held.

**Dated and Delivered in Mombasa this 24<sup>th</sup> day of November 2011.**

**M. ODERO**  
**JUDGE**

In the presence of:  
Mr. Gichana for Accused  
Mr. Onserio for State