REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL CASE NO. 19 OF 2009

REPUBLIC.....PROSECUTION

=VERSUS=

KIDUNGO CHIKOPHE.....1ST ACCUSED
MRABU CHIRUNGU.....2ND ACCUSED

JUDGEMENT

The two accused persons **KIDUNGO CHIKOPHE** (hereinafter referred to as the 1st accused) and **MRABU CHIRUNGU** (hereinafter referred to as the 2nd accused) were both arraigned before the High Court in Mombasa on a charge of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE**. The particulars of the charge were as follows:

"On the 25th day of April 2009 at Chifusini Village in Kinango District within Coast Province jointly with others not before court murdered GAMEMA MENZA TURUTURU"

The State led by **MR. ONSERIO** State Counsel called a total of eleven (11) witnesses in support of their case. **MS. OKECH** Advocate represented both accused persons. Both accused persons entered a plea of ***'Not guilty'*** to the charge and their trial commenced before me on 5th May 2010.

The brief facts of the prosecution case are as follows. On the night of 25th April 2009, the deceased ***'GAMEMA MENZA'*** took supper with his wife and children at his home at Chifusini Village at about 8.30 p.m. By 10.00 p.m. the family had all retired to bed. The deceased, his wife **MWANAIDI GAMEMA PW6**, a young child and their 7 day old baby were all occupying the main house and slept in the same bed-room. The deceased other four sons were sleeping in the boy's hut adjacent to the main house – about 2 feet away. At 10.30 p.m. **MBEYA GAMEMA PW5** a son of the deceased heard a commotion from his parent's hut. He heard banging on their door and his parents were shouting saying ***'Tunakufa'*** i.e. ***'we are dying'***. **PW5** feared to go to his parent's house. Instead he went out through the rear door of his hut and ran 6 kilometers to alert their nearest neighbour. Together they phoned the police. It was only when the police finally arrived at about 1.00 A.M. that **PW5** returned to the scene. He found his father the deceased lying dead in his house with deep cuts all over his body. His mother **PW6** was cowering nearby with her two children.

Police thereafter took over the matter. The scene was photographed. The deceased body was removed to Msambweni District Hospital Mortuary where a post-mortem was later conducted. The police

commenced investigations into the matter which led to the arrest and charging of both accused.

At the close of the prosecution case both accused were found to have a case to answer and were placed on their defence. They each gave an unsworn defence in which they denied any and all involvement in the death of the deceased. It now rests upon this court to interrogate the evidence adduced and render a judgement in the matter.

The offence of Murder is defined in Section 203 of the Penal Code as follows:

"Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder"

Following from this legal definition in order to prove a charge of murder the prosecution must adduce sufficient proof of the following three ingredients of murder.

(1) That a death has occurred the identity of the deceased and the cause of that death

(2) That the death of the deceased was the result of an unlawful act or omission on the part of the accused

(3) That the accused was possessed of malice aforethought at the time of committing the unlawful act or omission which led to the death of the deceased.

From the evidence adduced before this court I am satisfied that the first element has been sufficiently proven. **PW5** a son to the deceased, **PW6** the deceased's wife as well as **PW1 MAZERA KITZUGIWE** and **PW2 NGOA GAMBARE**, a nephew and uncle respectively of the deceased all testify that the deceased whom they identify as ***'GAMEMA MENZA'*** met his untimely death on the night of 25th April 2009. All four witnesses saw the body of the deceased lying inside his house and they all testify having noted severe cuts all over the body. **PW6 SERGEANT MICHAEL ODUOR** a Scenes of Crime officer produces a set of photographs taken at the scene **Pexb6.** The photographs clearly show the badly mutilated body of an African adult male. Conclusive proof of the cause of death is provided by the testimony of **PW8 DR. JUDITH NJERI GITAU** who told the court that on 27th April 2009 she conducted an autopsy on the body of the deceased, which was identified to her by relatives. **PW8** confirms that there were several deep cuts on the body and opined that the cause of death was severe spinal cord injury caused by a sharp instrument. She filled and signed the postmortem report which was exhibited in the court **Pexb5**. The evidence of **PW8** is expert medical testimony and has not in any way been challenged and/or controverted. It is quite clear that the deceased met his death as the result of a vicious attack on his person which undoubtedly constitutes an unlawful act.

The prosecution having proved the fact and the cause of death of the deceased must proceed and satisfy the court that it was the two accused who launched this vicious attack on the deceased. They must prove the actus reus of the charge of murder against the two accuseds. On the fact of the attack there can be no doubt. **PW5** the deceased's son told the court that on the material night at 10.30 p.m. he heard banging on his parent's metal door and he also heard his parents calling out for help. However **PW5** being a young boy quite understandably feared to confront the attackers. Instead he ran to a neighbour to seek assistance. As such **PW5** did not see and cannot identify those who killed his father. Likewise **PW1** and **PW2** only went to the home of the deceased after the fact of his killing. Both candidly tell the court that they have no information and/or knowledge on the identity of the perpetrator(s).

The only eye-witness to the killing of the deceased was his wife **PW6** who was in the bed-room with him at the time. **PW6** told the court that as they slept, she heard someone hit the door. The deceased switched on his torch and she began to shout for help. Two men broke down the door and came into the bed-room. **PW6** told the court that the first man whom she cannot identity went to the deceased and began to slash him with a panga. She then states that the 2nd man whom she identifies as Kidungo (1st accused) came into the room and began to remove a TV, files, generator and their mobile phones. When police arrived at the scene the two men ran off.

I will now proceed to analyze the evidence against each accused separately. In the case of the 1st accused, there is only one witness who identifies him. The question of the reliance upon the evidence of a single identifying witness has been dealt with in several previous authorities the most cited being the case of **MAITANYI –VS- REPUBLIC [1986] KLR 198** where the court cited the case of **ABDULLA BIN WENDO & ANOTHER –VS- REG (1953) 20 E.A.C.A. 166** held that:

"subject to well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult …."

In this case the attack occurred at night – no doubt it was dark. **PW6** told the court that there was a tin lamp in their room. A tin lamp gives off very little and weak light. **PW6** further stated that the deceased had a torch. The deceased could not have possibly still been shining his torch when he was under such a vicious attack. This was an attack full of terror. Her husband was being brutally slashed in her presence. **PW6** had two small children with her including a 7 day old baby. The circumstances such as existed were not in my view conducive to a clear and positive identification. **PW6** as a mother would have been more concerned with the protection of her young children. In her evidence **PW6** does not clearly describe the quality of light available at the time. There is evidence that **PW6** did later identify the 1st accused at a police identification parade conducted by **PW10 INSPECTOR EVA NYAWIRA** at Diani Police Station. However **PW6** herself had told the court that the 1st accused was a neighbour whom she had known since his childhood. In those circumstances the identification parade was superfluous and indeed **PW10** admitted in court that the 1st accused complained after the parade that the witness **PW6** was a neighbour who knew him well.

If **PW6** was clear and certain that it was the 1st accused who attacked them, then the police ought to have directly arrested 1st accused and no other person. However **PW11** the investigating officer told the court that the suspect was described or named as the ***'son of Chikophe'***. There is every possibility that Chikophe has several sons, not the 1st accused alone. More tellingly under cross-examination by defence counsel **PW11** admits that:

"The deceased's wife did not describe to us which son of Chikophe she saw that night"

This contradicts the evidence of **PW6** who said she saw Kidungo 1st accused, yet to police she gave no name merely describing the suspect as the ***"son of Chikophe***". **PW11** also did admit that police made several arrests in connection with this murder and more pertinently **PW11** admits:

"We had arrested another of Chikophe's sons in Kwale".

Yet further in his cross-examination **PW11** admits:

"We did arrest some other suspects over this matter. We arrested Chikophe and two of his other sons. They were later released because there was no evidence to connect them to this offence …."

It is quite evident that the police did not know exactly which son of Chikophe was the suspect and they simply rounded up all or most of these sons. If as **PW6** claims she was sure of the identity of 1st accused, then she would have given the police his name and they would not have had to go on this wild goose chase. I am not convinced that **PW6** was able to give a clear and positive identification of the 1st accused. **PW6** told the court that there existed a land dispute between her family and the family of Chikophe. I cannot rule out the possibility that this is what may have motivated **PW6** to name a ***'son of Chikophe'*** as one of their attackers. It is not logical that to the police **PW6** refers to a ***'son of Chikophe'*** yet in her evidence in court given almost one year after the incident she suddenly recalls the name of that son as Kidungo (1st accused). If **PW6** was sure of the identity of 1st accused then she would have named

him at the first instance to the police.

It appears that the police also relied on the evidence of **PW3 SAUMU SAWA** to link the 1st accused to this crime. **PW3** told the court that on 26th April 2009 the **day after** the incident she was coming from the stream when she met the 1st accused and another man conversing. **PW3** states that she heard 1st accused say that ***'they'*** had cut a ***'mzee'*** with a panga and he roared like a lion. No mention was made of the name of this ***'Mzee'*** who was slashed. **PW3** assumed it was deceased just because she had received news of his death the previous day. Such evidence is in my view too tenuous to amount to a direct implication of the 1st accused. **PW3** did not see the 1st accused slash any person and she admits that his clothes were not blood-stained when she met him. On the whole in my view the evidence of identification against the 1st accused does not pass muster. Murder is a very serious offence and in order to secure a conviction there must be reasonable certainty with respect to identification. This is not the case here. **PW6** was the only eye-witness. Conditions did not favour a clear and positive identification. It was dark and she feared for her life. The witness did not identify the 1st accused with sufficient clarity. This is evidenced by the fact that the police did not know whom to arrest, and went about arresting several men who fitted the description of ***"son of Chikophe***". There is no certainty in the identification of the 1st accused and this court cannot rule out the possibility of a mistaken identity.

With regard to the 2nd accused, the prosecution seeks to link him to this crime by the recovery of a hammer allegedly belonging to 2nd accused. **PW4 NDEGWA MWAHAJE** identified a hammer recovered at the scene as belonging to the 2nd accused. **PW4** claims to have known this hammer because he often did construction work together with the 2nd accused and saw him using this hammer and secondly **PW4** claims to have carried out certain repairs on the hammer which he is able to identity. On his part the 2nd accused totally denies that the hammer is his. **PW6** the only eye witness made no mention of having seen the 2nd accused at the scene of the murder. She categorically told the court that she was not able to identify the man who slashed her husband with the panga. Once again the mere allegation that the hammer recovered at the scene (more on this later) belonged to the 2nd accused is in my view too tenuous a connection to conclusively link the 2nd accused to this offence. There is no evidence that it was the 2nd accused who brought the hammer to that scene. Indeed there is every possibility that some other person could have taken the 2nd accused's hammer. With no evidence to place the 2nd accused at the scene of the killing I find there is no evidence to link him with the death of the deceased.

Aside from the dearth of evidence with respect to identification, there did exist other serious contradictions in the prosecution case. Several exhibits produced in court were alleged to have been recovered at the scene of the crime. These include a hammer **Pexb1**, a panga **Pexb2** and a large stone **Pexb5**. It was alleged that the rungu was engraved with the name of the 1st accused. Once again this is an item which any person could have collected and taken to that scene. **PW11** the investigating officer told court that the exhibits were collected from scene on the day after the murder i.e. on 26th April 2009 when they were delivered into his custody. This evidence is directly contradicted by **PW7 PC STEPHEN SHIKUNDI** who told the court that these exhibits were recovered on 30th April 2009 a whole **five days** after the incident. **PW7** is the officer who recovered these exhibits. He told the court that the wife of the deceased gave him the rungu which she had allegedly found under the bed while sweeping. If the police had done their work as they ought to have, and conducted a thorough search of the house (which was a murder scene) they would not have failed to recover that rungu if it was truly present. **PW7** is unable to explain why it took police five whole days to recover exhibits which were allegedly at the scene on the first day police went there. Why would police visit a scene, see crucial exhibits and go away leaving the exhibits behind? Even if as **PW7** alleges the police were awaiting CID officers to visit and photograph the scene thus it would not take five days to secure a photographer. From the evidence the scene was photographed on 26th April 2008 thus the exhibits should have been collected on that very day. I do agree with defence counsel that this anomaly leads to a suspicion that these exhibits were planted at the scene to make certain people look guilty and that is why they were only 'recovered' five days after police had visited and searched the scene. In any event there is a material discrepancy between the evidence of **PW7** and **PW11** regarding the recovery of exhibits which discrepancy seriously weakens the prosecution case.

PW2, PW1 and **PW6** all tell the court that aside from the exhibits mentioned earlier several stones were found in the deceased house due to ongoing construction. **PW6** told the court that the deceased tried to defend himself by throwing these stones at his attackers. However **PW5** the deceased's son who entered the house together with police on the material night not only denies having seen any panga, rungu and hammer in the house, he also denies that there were any stones thrown about as alleged. In his testimony to court **PW5** says:

"I went with the police to my parents door. The door had been broken. I did not see anything at the door. I did not see this hammer at the door. The door had been broken open. I did not see any hammer at the door. I am sure of this. I did enter the deceased bedroom. I did not see any panga, rungu or stick in his room. I did not find any stones inside his room. The windows were broken. I did not find any stones inside the house …. I saw no stones next to the deceased body"

Here again there exists a very material contradiction in the evidence of the prosecution witnesses. Whilst police have claimed that the hammer, rungu and stones were recovered inside the house **PW5** who went to the scene with police immediately after the incident totally denies having seen any of the items in question at the scene. If those exhibits were not in the room when the police got to the scene, then the question this court must ask is, when then were these items brought to the scene so as to be recovered there and by whom? This very crucial question remains unanswered to the detriment of the prosecution case.

Based on the foregoing, the anomalies, inconsistencies and contradictions in the prosecution case I find that no case has been established against the two accused persons. As such I enter a verdict of ***'not guilty'*** and acquit both accuseds in accordance with S. 306(1) of the Criminal Procedure Code. Each accused is to be set at liberty forthwith unless otherwise lawfully held.

Dated and Delivered in Mombasa this 16th day of November, 2011.

M. ODERO
JUDGE

In the presence of:
Mr. Odhiambo holding brief for Ms. Okumu
Mr. Onserio for State