



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CRIMINAL CASE NO. 49 OF 2009**

**REPUBLIC ..... PROSECUTION**  
**=VERSUS=**  
**MANGALE SOMBO MRICHENI ..... ACCUSED**

**JUDGEMENT**

The accused **MANGALE SOMBO MRICHENI** was arraigned before the High Court in Mombasa on 1<sup>st</sup> December 2009 facing a charge of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE**. The particulars of the charge were that:

***“On the 7<sup>th</sup> day of March 2007 at Mtumwa Village, Mwereni Location, Msambweni District within Coast Province murdered CHIBUTA MWACHILUNGO”.***

The accused entered a plea of **‘not guilty’** to the charge and his trial commenced before me on 2<sup>nd</sup> June 2010. The State led by **MR. ONSERIO**, learned State Counsel called a total of twelve (12) witnesses in support of their case. **MR. BIRIR** Advocate acted for the accused.

A brief history of the prosecution case is as follows. The deceased **CHIBUTA MWACHILUNGO**, a resident of Mtumwa village, had been accused by a fellow villager of being a witch. As a result of these accusations the deceased volunteered to undergo an oathing ceremony in line with Duruma cultural norms. The oathing ceremony was conducted and **‘revealed’** that the deceased was indeed a witch. Once again in line with Duruma cultural practice the deceased was fined which fine his brother **MRIBE MWACHILUNGO PW5** assisted him to pay. That ought to have been the end of the matter but unfortunately it was not. On 7<sup>th</sup> March 2007 at about 6.00 p.m. the deceased was accosted by two men armed with pangas and brutally slashed to death. Police were called in and came and removed the body to the mortuary. Upon completion of police investigations the accused herein was charged.

At the close of the prosecution case the accused was found to have a case to answer and was placed on his defence. The accused elected to give an unsworn statement in which he denied any and all involvement in the death of the deceased. It now behoves this court to determine whether the prosecution have proved their case to the standard required in law.

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

***“Any person who of malice aforethought causes the death of another by an unlawful act or omission is guilty of murder”***

This definition gives rise to the three crucial ingredients that must be proved in order to secure a

conviction in a murder charge.

- (1) The fact of and cause of death of the deceased
- (2) The fact that it was the accused who caused the death of the deceased by an unlawful act or omission – this forms the actus reus of the offence, and
- (3) The fact that the act or omission in (2) above was committed with malice aforethought – this forms the mens rea of the offence.

With respect to ingredient No. (1) there is no real difficulty. There is evidence from several witnesses who saw the body of the deceased where it lay outside his door. **PW2 NYAMAI CHIBAYA MWETO**, the village chairman of Mtumwa Village told the court that on being informed that the deceased had been murdered he rushed to the scene. He found the deceased lying dead in a pool of blood outside his house. **PW5** a brother to the deceased also confirms having seen his brother's dead body with serious cuts and with the hands severed. **PW7 NADZUA NDEGWA** is the wife of the deceased. She confirms that on the material day at about 6.00 p.m. she left her home to go to a nearby stream to draw water. As she returned home she heard the deceased who was her husband call out for help. She rushed home and found two men armed with pangas slashing the deceased. **PW7** confirms that the deceased died there and then. Lastly on this point there is the evidence of **PW1 CHIEF INSPECTOR JOSEPH OKISA**, who was then the Deputy O.C.S. at Lunga Lunga Police Station. He told the court that he received the report of the murder on 7<sup>th</sup> March 2007 at about 8.00 A.M. However he did not get to the scene until the following day 8<sup>th</sup> March 2007 at about 11.00 A.M. **PW1** told the court that he found the body of the deceased lying just where he had fallen with several deep cut wounds on the head, neck and torso. He arranged for photographs to be taken of the scene and then removed the body to the mortuary. All these witnesses have testified that they found the body of a male adult African lying dead with deep cuts. Indeed it appears that the attack was particularly horrific such that the deceased's hands were severed from his body. **PW2, PW5** and **PW7** all knew the dead man very well. They all identify him as '**Chibuta Mwachilungo**'.

Conclusive evidence on the cause of the deceased's death is provided by the evidence of **PW12 DR. ANDERSON KAHINDO** who produced the post-mortem form as an exhibit **Pexb1. PW12** confirmed to the court that during the autopsy the body was found to have several severe cuts. The cause of death was found to be "**severe haemorrhage subsequent to cut wounds**". **PW2** told the court that the cut to the deceased's neck was the fatal wound as it severed all major blood vessels. From the weight of this evidence I do not hesitate to find as a fact that the deceased met his untimely death as the result of fatal cut wounds inflicted on his person specifically on his neck.

The next question to be answered is whether the accused before court was one of those who unlawfully inflicted these fatal wounds on the deceased. This is an unusual case in that there were several eye witnesses to the incident. The first is **PW6 JULIUS MASUDI NDEGWA**. He tells the court that on the material day at about 6.00 p.m. he was at the local shops when he heard '**Nadzua**' **PW7** the wife of the deceased calling out for help. He rushed to the scene where he found two men slashing the deceased with pangas. **PW6** told the court that he tried to approach but the accused warned him to keep away. The witness identified the accused whom he knew very well as a cousin. Although **PW6** states in his evidence that he saw accused and the other man slashing the deceased, the court found his demeanour to be less than honest. **PW6** admitted under cross-examination by Mr. Birir that he did not include the fact that he actually witnessed the attack in his statement to police. In his statement **PW6** merely told police that he saw the accused and one Mwero each leaving the scene carrying bloodied pangas. He further states that he saw accused wipe the blood off his panga whilst uttering the words '**Nimemaliza kazi**' i.e. '**I have completed the task**'. It is my view that **PW6** did not actually witness the attack. He probably only saw the accused and Mwero as they left the scene brandishing the bloodstained pangas. No doubt **PW6** was trying to embellish his testimony in order to ensure a conviction against the accused. That fact notwithstanding for accused to be seen leaving the scene of a murder wielding a blood-stained panga, in the light of the fact that the deceased's injuries were caused by a sharp object like a panga does certainly implicate him in the murder of the deceased.

As it is the evidence of **PW6** is not the only eye witness testimony available in this case. **PW7**

'**Nadzua**' the wife of the deceased told the court that as she came home from the stream she saw her husband being slashed by '**Bunge**' and accused. She states in her evidence in chief as follows:

***"I can identify the second man I saw slashing the deceased. It was accused. He is my nephew. He is my sisters child ...."***

The accused was a person well known to **PW7**. Indeed he was her relative. The incident occurred in the evening at 6.00 p.m. It was not yet dark and visibility was good.

**PW9 MUNGA NDEGWA** is a nephew to the deceased. He told the court that upon hearing **PW7** call out for help he rushed to the scene. He found accused and another slashing the deceased. As **PW9** attempted to approach accused warned him to keep off. This witness gave a clear and concise account of events. He stated that he saw the accused cut the deceased on the neck a fact he maintained even under cross-examination by defence counsel. He was very clear on the role which accused played in the attack. Once again accused who was a relative was very well known to **PW9**. Furthermore accused spoke to **PW9** warning him not to intervene. I have no doubt that this witness had ample time and opportunity to see and identify the accused. There is no possibility of a mistaken identity. The evidence of **PW9** corroborates in all material respects the testimonies of both **PW6** and **PW7**. I am satisfied that there has been a positive identification of accused by at least three witnesses. Their evidence places the accused at the scene of the murder and infact details the role which he played. The attack on the deceased was committed in full daylight and in full view of his family. I am therefore satisfied and find as a fact that the accused was one of the two men who slashed and killed the deceased.

With respect to the mens rea there is evidence that the deceased had been accused of practicing witchcraft. There is also evidence that the deceased underwent a traditional oathing ceremony which confirmed that he was a witch. I do take judicial notice of the deep abiding belief in witchcraft by coastal communities even despite the spread of Christianity and Islam in the area. **PW2** told the court that the accused was related to one '**Chaka Nyondo**' who had accused the deceased of witchcraft. He may have felt that by killing the deceased he was avenging actions of deceased or protecting the family. Nevertheless the accused took the law into his own hands. He had the option of reporting the deceased to authorities. Instead he unlawfully decided to put an end to the deceased's life. The verocity of the attack leaves no doubt that the accused intended to kill the deceased, He did so motivated by the belief that the deceased was a witch and therefore an undesirable in society. This is evidence of malice aforethought. The fact that the accuseds accomplice known as Mwero has vanished and has not been traced to date proves that the two knew that their actions were illegal

In his defence the accused makes no attempt to disprove the charges. He merely dwells on the matter of his arrest which he claims was not justified. I find no merit in the accused's defence and I dismiss the same. Based on the evidence presented before this court I am satisfied that the prosecution have proved the charge of murder beyond a reasonable doubt. I accordingly convict the accused as charged.

**Dated and Delivered in Mombasa this 16<sup>th</sup> day of November 2011.**

**M. ODERO**

**JUDGE**

In the presence of:

Mr. Birir for Accused

Mr. Onserio for State

**MR. ONSERIO**: We have no previous records. Treat as 1<sup>st</sup> offender.

**MR. BIRR**: Accused has a wife and three children. He is the sole bread winner. He is a young man of 30 years. He is very remorseful. He seeks a chance to reform. He has learnt his lesson. We seek for a lenient sentence.

**M. ODERO**

**JUDGE**

**COURT**

Mention on 17<sup>th</sup> November 2011 for sentencing.

**M. ODERO**

**JUDGE**

**COURT**

I have considered the mitigation raised on behalf of the accused. The accused launched an unprovoked attack on an unarmed old man for no justifiable cause whatsoever. This culture of killing defenceless elders on the pretext of fighting witchcraft must come to an end. The accused showed no mercy to the deceased and in my view does not deserve the mercy of this court. In order to act as a deterrent to other like-minded individuals I feel this maximum penalty is called for. I do therefore sentence the accused to death.

It is so ordered.

**M. ODERO**

**JUDGE**

**17/11/2011**