



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL CASE NO. 22 OF 2005**

**REPUBLIC.....PROSECUTION**

**=VERSUS=**

**RAI MRABU RAI Alias CHAKA RAI.....ACCUSED**

**RULING**

The accused **RAI MRABU RAI** alias **CHAKA RAI** faces 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 night of 11<sup>th</sup> June 2005 at about 11.00 p.m. at Kilimani village Makamini Location in Kwale District within Coast Province murdered MUNDU MUNYAKA”***

The accused entered a plea of **‘not guilty’** to the charge and his trial commenced on 29<sup>th</sup> August 2007 before **HON. JUSTICE SERGON**. The trial judge heard a total of seven (7) prosecution witnesses. The prosecution was led by the learned State Counsel **MR. MONDA**. On 24<sup>th</sup> August 2010 before the close of the prosecution case **Hon. Sergon J.** gave a ruling in which he declared a mistrial due to the dismissal of assessors midway through the trial. The Judge directed that the trial begin de novo before a different Judge. It was at this point on 13<sup>th</sup> September 2010 that I took over the matter.

On 6<sup>th</sup> July 2011 **MR. OPULLU** acting for the accused made an application to have the orders of Hon. Justice Sergon set aside and further applied that the trial proceed from where it had stopped. Although I did allow this application I realize now on hindsight that being a court of equal and concurrent jurisdiction I had no authority to set aside the orders of a brother judge. Such an application ought to have been made either before the same trial Judge or before the Court of Appeal. As such my ruling that the trial proceed from where Judge Sergon had stopped is in effect, null void and of no effect.

Be that as it may once the re-trial was ordered the State failed to avail even a single witness to testify

despite having been allowed several opportunities to do so. On 22<sup>nd</sup> September 2011 **MR. ONSERIO** threw in the towel and stated:

***“I have been unable to secure attendance of the witnesses. I close the prosecution case”***

There being no evidence tendered at the re-trial of this case, the accused cannot be said to have a case to answer and is certainly entitled to an acquittal. However in order to eliminate any doubts I did peruse the evidence of the seven (7) witnesses who testified at the first trial. I note that there was evidence of witnesses who claim they saw the accused stab the deceased to death on the night of 11<sup>th</sup> June 2005. Likewise there is evidence of motive in that the accused and the deceased were involved in a dispute over a dowry payment which the deceased had allegedly failed to pay to the accused after marrying his (the accused's daughter). However the prosecution failed to prove the cause of death by calling in medical evidence. No doctor or pathologist was called to testify. This is a fatal omission by the prosecution. [see **NDUNGU –VS- REPUBLIC [1985] KLR 487**]. In a charge of murder it is essential that the cause of death be proved beyond a reasonable doubt. In addition to this omission the prosecution also failed to call the investigating officer to testify in this case. This was another serious omission that weakens the prosecution case.

Lastly and of equal importance the court cannot ignore the history of this trial. The accused was first arraigned in court on 22<sup>nd</sup> July 2005. Six (6) years later in December 2011 through no fault of his own the accused is still being held in remand and is still undergoing the rigors of a trial. Article 6 of the Universal Declaration of Human Rights provides for an expeditious trial and states:

***“everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”***

Kenya has ratified this Convention and is therefore bound by its provisions. Article 50(2) (e) of the Constitution of Kenya gives life to this convention by providing:

***“(2) Every accused person has the right to a fair trial, which includes the right –***

***(e) to have the trial begin and conclude without unreasonable delay”***

Six (6) years behind bars awaiting determination of his case, even given the dire shortage of judicial officers in this country is by any standards inordinate delay. In the circumstances the accused's fair trial rights have been jeopardized and even on this basis alone he would in my view be entitled to an acquittal. On the whole based on the foregoing I find that no prima facie case has been shown against the accused. As such I enter a verdict of **‘Not guilty’** and I hereby acquit the accused of this charge of Murder. Accused is to be set at liberty forthwith unless he is otherwise lawfully held.

**Dated and Delivered in Mombasa this 23<sup>rd</sup> day of December 2011.**

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

In the presence of:  
Mr. Were holding brief for Mr. Opullu  
Ms. Macharia for State