



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CRIMINAL CASE NO. 19 OF 2004

REPUBLIC.....PROSECUTION

=VERSUS=

LUCAS KAHINDI MWATSUMA.....1ST ACCUSED
MALINGI DZOMBO MWATELA.....2ND ACCUSED
KATANA KEAH.....3RD ACCUSED
CHANDUGU EMMANUEL GUDI.....4TH ACCUSED
DZOMBO MWATELA.....5TH ACCUSED
SAMUEL MUNGA MWADZOMBO.....6TH ACCUSED

RULING

The six accused persons namely **LUCAS KAHINDI MWATSUMA** (hereinafter referred to as the 1st accused), **MALINGI DZOMBO MWATELA** (hereinafter referred to as the 2nd accused), **KATANA KEAH** (hereinafter referred to as the 3rd accused), **CHANDUGU EMMANUEL GUDI** (hereinafter referred to as the 4th accused), **DZOMBO MWATELA** (hereinafter referred to as the 5th accused), and **SAMUEL MUNGA MWADZOMBO** (hereinafter referred to as the 6th accused) have all been jointly charged with the offence of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE**. The particulars of the charge were as follows:

“On 30th day of March 2003 at Bokini Village in Kilifi District of the Coast Province jointly murdered KITI PEPO”

All six accused persons pleaded ‘**not guilty**’ to the charge. The prosecution led by the learned State Counsel called a total of nine (9) witnesses in support of the charge. Advocates **MR. KAMOTI** and **MR. CHIDZIPHA** defended the accused persons.

The brief facts of the prosecution case were that on 30th March 2003 at about 7.00 A.M. a gang of men invaded the home of the deceased **MZEE KITI PEPO**. These invaders set upon the deceased with **rungus pangas** and other crude weapons. They assaulted the deceased and killed him before all running away. The matter was reported to police who came and visited the scene. They later took away the body to the mortuary. After completion of police investigations all six (6) accused persons were arrested and charged with the offence of murder.

At the close of the prosecution case this court has to determine whether the evidence adduced establishes a prima facie case sufficient to warrant the accused persons being called upon to defend themselves.

At the heart of any murder trial is a death. Without a death there would exist no charge. The prosecution must prove beyond a reasonable doubt firstly the fact that the deceased is actually dead and secondly the cause of that death. In this case the fact of the death of Mzee Pepo is not in any doubt. Several witnesses including his close relatives testify that they saw his dead body. The police confirm having collected that body and taking it to the mortuary. Aside from proving the death of the victim the prosecution is also required to satisfy the court as to the 'cause' of death of the deceased. Although it has been alleged that the deceased was assaulted by a gang of men the court cannot assume that it was this assault which led to his death. The prosecution must show the effect assault had on the deceased and **how** this assault directly led to his demise. The best evidence regarding cause of death is medical evidence of a post-mortem examination. In the case of **NDUNGU –VS- REPUBLIC [1985] KLR 487**, the Court of Appeal in considering the question of cause of death held as follows:

“Though there are cases in which death can be established without medical evidence relating to its cause as where there are obvious and grave injuries, medical evidence should still be adduced in such cases of the effect of such injuries as opinion expert evidence and as evidence supporting the cause of death alleged by the prosecution”

In this case the prosecution failed and/or neglected to call evidence from a pathologist relating to findings on the cause of death of the deceased. Such an omission is in my view fatal one. This is more so in view of the fact that this case has been pending before the court since June 2006, and this court takes judicial notice of the fact that there is a pathologist based permanently at Provincial Coast General Hospital in Mombasa barely a few kilometers from the court precincts. How difficult could it have been to avail such a pathologist to testify? In any event there was no indication of any peculiar difficulty the State faced in bonding such a witness. Such an omission can only be ascribed to laxity by the prosecution and will not be excused by this court.

Even if medical evidence of an autopsy had been availed my assessment of the prosecution case is that it is still wanting. **PW1 KAHINDI KOSHOLO PEPO** a nephew to the deceased who claims to have witnessed the attack told the court that he saw the attackers very well and that they were persons well known to him. However **PW1** had problems identifying the accused persons in the dock. Though there were six (6) accused persons **PW1** pointed out a 7th man (who was **not** involved in this case) as one of those who attacked the deceased. I am mindful of the fact that over time memories may fade but if as **PW1** said he knew the attackers well, then he ought to have had no challenge in positively identifying them.

PW2 TABU KENGA was a daughter-in-law to the deceased who also allegedly witnessed the attack. In her evidence in chief **PW2** impressively identifies each accused person by name. However under cross-examination by Mr. Kamoti **PW2** admits that she did not give the names of the attackers to the police when she made her statement. If as she claims **PW6** knew the deceased's attackers, why did she not name them as she has done in court? As a court I cannot rule out the very real possibility that **PW2** has only named the accuseds because she has heard their names being called out in court.

PW1 and **PW2** suggest that the deceased was attacked and killed on the spot inside his homestead. However **PW3 FLORENCE KATANA** confuses matters when she states under cross-examination:

“I did hear the deceased say he is going to report to the police. I saw him (the deceased) leave after the attack to go to the police station. I did not go with him. I did not see who attacked him on the way to the police station. I entered my house and hid”

Here **PW3** appears to suggest that the deceased was attacked on two occasions. Once in his homestead and a second time while he was on his way to the police station to report the first attack. The obvious question that would arise is which attack led to the death of the deceased? Secondly the evidence of **PW3** directly contradicts that of **PW1** and **PW2** both of whom only spoke of one attack.

PW4 JUMWA KATANA KITI a son to the deceased also spoke of two attacks on the deceased. Whereas **PW4** identifies the accuseds in court, he admits that in his first statement to the police he only named one '**Malungu**'. It is curious that in his testimony several years **after** the incident **PW4** is suddenly able to recall that '**Samuel**' the 6th accused was also one of the attackers.

PW6 SALAMA LEWA an elderly gentleman who claims to have witnessed the attack and who told the court that he knew the attackers was totally unable to identify any of the accused persons. **PW6** was an old man who told the court that he had failing eyesight. If that is the case then there is reason to doubt whether he was able to see and identify the perpetrators when the incident occurred. His evidence on identification cannot be relied upon.

On the whole I find the prosecution evidence to have been confused and contradictory. The evidence of identification is less than reliable. In my view the prosecution has not established a prima facie case. As such I enter a verdict of '**not guilty**' and I hereby acquit all six (6) accused of the charge of murder 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 19th day of December 2011.

M. ODERO
JUDGE

In the presence of:

Mr. Kamote for 1st, 4th & 5th accused

Mr. Chidzipha for 2nd accused

Mr. Gioche for State