



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CRIMINAL CASE NO. 44 OF 2004**

**REPUBLIC .....**  
**.....PROSECUTOR**  
**VERSUS**  
**CHONGONGWE MUGUNYA MENZA**  
**MENZA MUGUNYA MENZA.....**  
**.....ACCUSED**

**R U L I N G**

The two accused herein were charged on 1<sup>st</sup> November 2004 with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. They pleaded not guilty. The particulars, of the offence were that the said two accused person on 20<sup>th</sup> July 2004 at Mbuyuni Village Mwanda Location in Kwale District within the Coast Province, jointly murdered MOHAMED HAMISI MENZA.

The prosecution called 7 witnesses. The case was heard initially by the Honourable Justice Maraga until he was transferred. I took over the case on 28<sup>th</sup> October 2009 to the time the prosecution closed its case on 10<sup>th</sup> November 2010.

It is now the duty of the Court to determine if a case has been made out by the prosecution against the accused persons sufficiently require them to make a defence under Section 306 of the Criminal Procedure Code. Both counsel did not make submissions and left the court to decide on the evidence on record.

P.W.1 was a wife of the deceased. She testified that at about 7.45 a.m. on 20<sup>th</sup> July 2004, she prepared herself to go to work. She was with the husband and their 3 children. Her husband was the headmaster of Maweni Primary School while she was a teacher at Gwasheni Primary School. Before noon a colleague told her that there was a call from her husband that she should go home. She requested for permission and left for home. On the way she met a lady called Mulongo who was the wife to her brother in law. She told her that her husband had been murdered at Mbuyuni area. She collapsed and lost consciousness.

She did not witness the incident leading to her husband’s death. She told the court about a dispute between her husband and the two accused persons. They claimed that the deceased had bewitched their mother and they had threatened to burn his house, should their mother die. The accused’s mother died on 3/6/2004. Her husband told her that on 4/6/2004 that he had an argument with the accused person at the Assistant Chief’s office. They disagreed on where the mother was to be buried. He said that the 1<sup>st</sup> accused removed a knife and attempted to stab him. That he was rescued by the Assistant Chief and elders. That the two boys then ran away. The Police were sent to track them down.

P.W.1 did not witness the murder of her husband. She did not accuse the two accused persons or

allege that they had killed her husband.

P.W.2 was a Councilor and the previous Assistant Chief of Mwavumbo-Location. He said that on 20<sup>th</sup> July 2004 at Mariakani while attending an Agricultural show, he received a phone call that Mohammed Menza had been murdered. He conveyed the information to the Chief. He went to the scene of the murder. He said the body which had head injuries. They made a report to Samburu Police Station.

P.W.2 referred to the dispute between the deceased and the 2 accused persons who were related. He said that accused's father and the deceased were brothers.

P.W.2 did not witness the murder of the deceased and he did not make any allegations, against the accused persons in connection with the death of the deceased.

P.W. 3, testified about the dispute between the deceased and the accused. He testified about the fight between the 1<sup>st</sup> accused and the deceased on 4<sup>th</sup> June 2004.

P.W.4 was a student at Samburu Secondary School. He is a son of the deceased. He testified having seen his father's body at the scene. He said he had earlier seen the 1<sup>st</sup> Accused going toward Maweni Primary School. P.W.4 did not give any evidence connecting the accused with the death/murder of the deceased.

P.W.5 is a nephew of the deceased. He is a carpenter and mason. He said that on 20<sup>th</sup> July 2004 at about 9 a.m. he heard noises coming from the deceased compound. He was told that he had died. He went to the scene and saw the body of the deceased. He had also witnessed the fight between the deceased and the 1<sup>st</sup> accused at the Assistant chief's premises. He said that the two accused were the sons of the deceased's brother Mgunya Menza. They had the same father but different mothers. He stated that the accused's mother used to call the deceased a witchdoctor. They did not see eye to eye. He did not give any evidence of how the deceased died.

P.W.6 is a son of the deceased. He worked at Mariakani. On 20/7/2004 at around 3 p.m. while at work, he was told that his father had been killed. P.W.6 went to the scene and saw the body. It was near a forest. He said that his father had injuries on the head. The Police from Samburu took the body in their vehicle. That on 21<sup>st</sup> July 2004, he went to the Coast General Hospital. He identified the body at the hospital. A post mortem was carried out on 21<sup>st</sup> July 2007. They were then given the body for burial.

P.W. 7 was a retired Sergeant of Police. While on duty on 20.07.2004 but out of the office, he received a call on his mobile phone from the Assistant Chief, Mwanda sub-location that a primary teacher at Mavilivirini Primary School had been found murdered while he was on his way to work. The body was found along a footpath to the school. P.W.7 then arranged for transport to visit the place. He then called Police Constable David Munene was at the Police Post to meet him at the scene. He found the deceased body. It had multiple deep head cuts left face and left shoulders. P.W.7 made arrangements to remove the body to the Coast General Hospital. They used a motor vehicle belonging to KNUT to carry the body.

He testified that a post-mortem was carried out on 21.07.2004 under the supervision of P.C. David Munene who identified the body to the Pathologist. P.W. 7 made a report in the O.B. He then investigated the death. He said that he did not get any valuable information. He went to search for the suspects. The Assistant Chief gave a letter to P.W. 7 which was from the Accused to the deceased. It barred the deceased from going to their village to attend their accused's mother's burial. It was allegedly written by the 1st accused. However, the P.W.7 did not produce the letter. He did not know when the accused were arrested.

I have carefully considered the aforesaid evidence and testimonies. I do find and hold as follows:-

1. That none of the 7 witnesses gave any evidence connecting the 2 accused persons with the murder of the deceased.

2. None of the 7 witnesses were eye witnesses to the murder.
3. None of them saw the deceased with any of the Accused on the material date
4. No weapon was found on the accused or other incriminating evidence.
5. That none of the seven (7) made any single allegation against the Accused person regarding the murder or death of the deceased.
6. There is no evidence whatsoever which was placed before the court as to the killers of the deceased and all circumstances of the death.
  
7. This is not a case of whether the prosecution have presented sufficient evidence to place the accused on their defence but a case of total absence of any relevant evidence.

From the testimonies it is clear that the only reason why the two Accused were charged is because they had a dispute with the deceased. It was a family dispute and allegations of witchcraft against the deceased. The dispute or grudge culminated in an incident at the Assistant chief's office where the 1<sup>st</sup> Accused attempted to stab the deceased with a knife.

The offence herein has nothing to do with the alleged attempt by the 1<sup>st</sup> Accused to stab the deceased. That could only be the subject matter of another charge. The two accused could be possible suspects in and had a running family dispute with the deceased i.e. there is a possibility that they could have had some motive to harm the deceased. However, there is no evidence that this led to any action by the accused persons.

In the circumstances, they are innocent until they are proved to be guilty beyond any reasonable doubt. The result is that there is no case made out by the prosecution against the Accused persons sufficiently to require them to be placed on their defences. If the Accused chose not to speak if they were placed on their defences, there would still be nothing to hold against them.

It is extremely said that this case was ever brought against the Accused persons. The Police should not have been influenced by the allegations or emotions in the village for it now appears that the Accused were only charged to appease some family members and perhaps to cool down the anger of the villagers and in particular the family of the deceased. This is not the role of the police in prosecuting suspects or accused persons. The purpose of prosecution in law is clear in charge; the duty of the prosecution is to charge an accused person where there is reasonable suspicion and backed by credible evidence and belief held objectively and without fear or favour.

I do hold that it would amount to a monstrous injustice to place the accused on their defences. They were put through prosecution for six (6) long years during which they were held in custody at a time when the offence of murder was not bailable. This was so despite the fact that there was no evidence whatsoever on record to have them charged in the first place.

In the light of the foregoing, there is no case which has been made out against the Accused persons for them to be placed on their defence. I do hereby find that they are not guilty and acquit both accused persons of the charge of murder. They shall be released and set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

**Dated and delivered at Mombasa this 14<sup>th</sup> day of December 2010.**

**M. K. IBRAHIM**

**J U D G E**