



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CRIMINAL CASE NO. 1 OF 2007**

**REPUBLIC** .....

**PROSECUTOR**  
**VERSUS**

**KIDANGU KUTSUKA RUWA Alias ALI** ..... **1<sup>ST</sup>**

**ACCUSED**

**MTONDOO MWAGUYA RUWA** ..... **2<sup>ND</sup>**

**ACCUSED**

**JUDGEMENT**

The two accused persons **KIDANGU KUTSUKA RUWA** alias **ALI** and **MTONDOO MWAGUYA RUWA** were jointly charged with the offence of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE**. The particulars of the offence were that

***“On the night of 13<sup>th</sup> December 2006 at Kawelu Village, Ndavaya Location within Kwale District of the Coast Province, jointly murdered KURERA KUTSUKA alias DOGO”***

Both accuseds entered a plea of **‘not guilty’** to the charge and their trial commenced for hearing on 26<sup>th</sup> November 2009. The prosecution led by the learned State Counsel called a total of seven (7) witnesses before closing their case on 21<sup>st</sup> October 2010. **MR. MUSHELLE** Advocate who appeared for both accused submitted that the State had failed to establish a prima facie case and urged the court to enter a finding of **‘not guilty’**.

Murder is defined as the unlawful killing of a person with malice aforethought. It follows therefore that in order to prove a charge of murder it must be proved that somebody was unlawfully killed. In this case the victim is named in the charge sheet as one **KURERA KUTSUKA alias DOGO**. How and when did this deceased meet his untimely demise? This question still remained unanswered even at the close of the prosecution case. The only witness who comes close to showing when the deceased died was **PW4 DZOMBO MNDALU MWERO**. He told the court that on the night of 13<sup>th</sup> December 2006, he, the deceased and one **‘Tsuma Ruwa’** left to see their cousin **‘Kidanga’** about a healing ceremony to be performed on their aunt. According to **PW4** they did not reach the home of Kidanga. On the way the deceased parted ways with them saying that he was going to a nearby stream to bathe. They waited for the deceased but he never returned. **PW4** only said that he later heard shouts **‘Uwa’ ‘Uwa’** or **‘Kill’ ‘Kill’** and out of fear he left the scene and ran back to his home. Although the deceased was a cousin to **PW4** and was therefore well known to him, **PW4** did not tell court that he recognized the voice calling out as that of the deceased. Under cross-examination by Mr. Mushelle **PW4** states that the voice he heard was saying **‘Muue kabisa huyo Dogo’** or **‘Kill that Dogo completely’**. This contradicts what **PW4** himself told the court in his examination in chief. Further **PW4** admits that he did not tell the police that he heard the

name of '**Dogo**' (the deceased) being mentioned. This appears to be an afterthought or an attempt by **PW4** to embellish his evidence so as to link the voice he heard that night with the death of the deceased. Given the contradictions in his evidence **PW4** cannot be taken as an entirely honest and truthful witness and in my view his evidence is not entirely reliable.

No other prosecution witness was able to tell the court with certainty how or when the deceased met his death. Indeed the evidence of **PW1** and **PW2** is in my view totally irrelevant to this case as they had no useful information to impart concerning this case. All the court is told is that the deceased went missing on 13<sup>th</sup> December 2006. On 19<sup>th</sup> December 2006 some bones were recovered at a location in Ndavaya Village. Ordinarily the fact of death would be conclusively proved by recovery of a body. In this case no dead body was recovered. **PW7 INSPECTOR KIPKURUI**, told the court that it was the 1<sup>st</sup> accused who led them to the scene and pointed out the hole where some bones and skull were dug up beneath a simmering fire. There is no evidence to prove that these bones were the remains of the deceased. No autopsy could be conducted because there was no body. None of the witnesses was able to positively state that the recovered bones were in actual fact the remains of the deceased. No link is shown to exist between those bones and the deceased person. **PW7** told the court that he did forward the bones and other exhibits to the Government Chemist for analysis. Despite the court bending over backwards in allowing adjournments to secure this crucial evidence, the Government Chemist failed/refused to appear to testify as to the results of his analysis. Without such evidence the prosecution case effectively falls flat on its face. **PW7** also told the court that the 1<sup>st</sup> accused did confess to the crime before Hon. Adika Magistrate. The Honourable Magistrate was not called to testify and no statement made by the 1<sup>st</sup> accused was produced as an exhibit. The court cannot assume that merely because 1<sup>st</sup> accused was a suspect, and he pointed out some bones to the police, this is proof that those bones were the remains of the deceased. The prosecution has a duty to prove the death of the deceased beyond reasonable doubt. As it is a lot of doubt abound. Were the bones human remains? If so were they the remains of the deceased '**Kurera Kutsuka**'? These crucial questions remain unanswered.

With respect to the 2<sup>nd</sup> accused, I can see absolutely no reason why he was arrested and charged. No connection is even alleged much less proved, between this 2<sup>nd</sup> accused and the death of the deceased. None out of the seven (7) witnesses made any mention of the 2<sup>nd</sup> accused at all. There was no reason to arraign him in court on this charge.

This is a case where the 2 accused were brought to court on 16<sup>th</sup> November 2006. Four (4) years later in September 2010 the prosecution have been unable to avail proof of the most basic fact in a murder trial – that the deceased died. They have failed dismally in showing a prima facie case, not to mention wasting valuable judicial time. I find no evidence against either accused and I hereby enter a finding of '**not guilty**' in respect of the 1<sup>st</sup> accused and 2<sup>nd</sup> accused persons under S. 306(1) of the Criminal Procedure Code. Each accused to be set at liberty forthwith unless they are otherwise lawfully held.

**Dated and Delivered in Mombasa this 7<sup>th</sup> Day of December 2010.**

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

Read in open court in the presence of:-  
Mr. Obara holding brief for Mr. Mushelle  
Mr. Onserio for State

**M. ODERO**  
**JUDGE**  
**7.12.2010**