



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA Criminal Case 18 of 2004**

**REPUBLIC.....PROSECUTION**  
**VERSUS**  
**MWERO MKALA..... ACCUSED**

\*\*\*\*\*

**RULING**

The accused person MWERO MKALA has been charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence read as follows:-

*“MWERO MKALA: On the 17<sup>th</sup> day of February 2004 at Tudor, Muhoroto within Mombasa District of the Coast Province, jointly with others not before court murdered MUTHENGI MUYA.”*

The accused was first arraigned before the High Court in Mombasa on 24<sup>th</sup> March 2004. However for one reason or another, mainly the failure of Assessors to attend court the hearing never really took off until 28<sup>th</sup> July 2009. By this time the Criminal Procedure Code had been amended to do away with assessors and therefore there was no reason for further delay. Mr. Onserio learned State Counsel prosecuted the case on behalf of the State whilst Mr. Chidzipha Advocate appeared for the accused.

The prosecution did call a total of four (4) witnesses in support of their case. The two eye-witnesses were MICHAEL MAITHYA KAVUVI, PW1 and MUEMA KAMANDO, PW2, both of whom testified that on the material date of 17<sup>th</sup> February 2004, a group of people who included the village elder (accused) pulled the deceased Muthengi Muya out of the house of his maternal uncle in Tudor Mombasa, accusing the latter of having stolen a radio. The men subjected the deceased to a severe beating lasting for over half an hour whereupon they piled tyres around his body. The accused then called for paraffin and poured it over the deceased after which he set the tyres alight. The deceased burst into flames. He ran out to the sea in an attempt to save himself but it was too late and he died. By this time police had been called to the scene. They arrested the accused and took him to the police station. Upon completion of investigations the accused was arraigned before court and charged.

At the close of the prosecution case the law requires that a prima facie case have been established by the prosecution to warrant the accused person being called upon to defend himself. There is no doubt at all from the evidence on record that the deceased met an excruciatingly painful death as a result of having been set on fire. Dr. K.N. MANDALIA the Pathologist at Coast General Hospital conducted a post-mortem examination on the body of the deceased. He noted deep and extensive burns over the upper torso of the deceased body which he classified as 55% burns over the surface area of the body. His opinion was that the cause of death was pneumonia due to severe burns. His report duly signed and filled is produced as an exhibit Pexb1. However to merely prove the death of the deceased is not sufficient to show a prima facie case.

In his evidence in chief PW1 told the court that the accused who was the village elder called for paraffin after the deceased had been

thoroughly beaten and tyres placed around his body. He goes on to state that the wife of the accused brought the paraffin which she gave to the accused and he proceeded to pour it over the deceased. However PW1 admits under cross-examination that he did not mention the aspect of the accused's wife supplying the paraffin in his written statement. He is unable to explain why he omitted this fact from his statement to the police. The evidence of this witness is therefore at odds with what he told the police immediately after the incident occurred.

More importantly PW2 who also claims to have witnessed events as they occurred does not mention the accused's wife at all. He has a totally different story on how the paraffin got to the scene. In his evidence-in-chief PW2 says –

*“The village elder [the accused] went to his house and returned with the paraffin which he poured on the boy”*

Therefore his story is that it was the accused who himself collected the paraffin and brought it to the scene. Which was which? PW1 and PW2 give diametrically opposed versions of the story and cannot both be telling the truth.

Yet another contradiction is evident in the prosecution case. PW1 told the court that after the deceased was set alight he removed his clothes and ran to the sea and jumped into the water as he tried to save himself. Again PW2 gives a totally different sequence of events. He states that when he was set alight the deceased ran into the village elder's house. He ran out again still on fire towards the sea. However PW2 is categorical that the deceased did not enter the sea. Instead he ran into an open house and hid under the bed from where the police rescued him. So whereas PW1 says –

*“The boy threw himself into the sea”*

Another eye witness PW2 says –

*“He did not enter the sea”*

This in my view is a major contradiction which cannot be glossed over. If PW1 and PW2 were both at the scene then they ought to have seen the same thing. Their evidence is not consistent and in my view cannot be relied upon. These contradictions remain unexplained at the close of the prosecution case. It would be prejudicial against the accused to call upon him to defend himself on the basis of this type of inconsistent evidence. That would be tantamount to calling upon the accused to fill in the loop-holes in the prosecution case.

Despite the accused having been allegedly apprehended by police officers at the scene of the crime, no such officer was called to testify. Likewise no evidence was tendered by an investigating officer in this case. This was a crucial witness who would have been able to explain how the police carried out their investigations and why they decided to charge the accused and no other person. In the absence of this evidence the thread of evidence is not properly tied up. As stated at the onset this is a very old matter which commenced in the year 2004. On 29<sup>th</sup> October 2009 this court gave to the prosecution a last adjournment and directed that all witnesses be present to testify on 3<sup>rd</sup> December 2009. Still the police witnesses were not in court. This is a case that originated from Tudor Police Station which is within Mombasa City. No reason nor explanation was given as to why these police witnesses were not in court. The only reason would be laxity on the part of the police, which acted as a detriment to the prosecution case.

Based on the foregoing I find that though the two eye witnesses were consistent in the involvement of the accused in the killing of the deceased, there are major contradictions in their narration of the sequence of events. Those inconsistencies in my view seriously weakens the prosecution case. The standard of proof required in criminal cases such as the present one are very high. The evidence tendered before me would not support a conviction if the accused elected to keep silent as provided by S. 306(3) of the Criminal Procedure Code. The upshot is that I make a finding that no prima facie case has been shown against the accused and I hereby enter a finding of “*Not guilty*” in accordance with S. 306(1) of the Criminal Procedure Code.

Dated and Delivered at Mombasa this 15<sup>th</sup> day of December 2009.

**M. ODERO**

**JUDGE**

Read in open court in the presence of:

Mr. Chidzipha for Accused

Mr. Monda for State

**M. ODERO**

**JUDGE**

**15/12/2009**