



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Criminal Case 13 of 2003

REPUBLIC.....PROSECUTION

VERSUS

JUMAPILI JUMA.....1ST ACCUSED

MBAYA CHONDO DZOMBO2ND ACCUSED

RASHID OMAR MKANYI3RD ACCUSED

MWAKULANI SALIM MWAKULANI4TH ACCUSED

ALI SULEIMAN KUYONGA..... 5TH ACCUSED

R U L I N G

JUMAPILI JUMA, MBAYA CHONDO DZOMBO, RASHID OMAR MKANYI, MWAKULANI SALIM MWAKULANI and ALI SULEIMAN KUYOGANGA are charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the charge against them are that between 5th September 2002 and 12th September 2002 at Mwapala Village, Majimboni Location in Kwale District of Coast Province jointly with others not before court they murdered Elizabeth Kavesu Anderea (the deceased).

The prosecution called seven witnesses none of whom saw any of the Accused persons kill the deceased. **JAMES MUKEKU WAMBUA, PWI** said that on 5th September 2004 at about 3.00 p.m. he saw the deceased, **ELIZABETH KAVESU**, at Mwapala Trading Centre. She was okay and healthy. On 12th September 2004 he met one of the deceased's relatives who told him that the deceased, who used to live alone, had not been seen since 6th September 2004. He decided to find out where she could have gone. At about 7.00 p.m. he went to the deceased's house and on arrival he saw some light in her house. He knocked but there was no response although he could hear some movement and some things falling in the house. He bolted the main door from outside and went to call for help.

When he returned with about 10 other people they found a lock on the door he had bolted from outside and the rear door broken. They broke into the house and found things scattered all over and some missing. They searched around the house but did not see anything.

As they were searching a strong stench smell came from the pit latrine about 100 metres away. They went there and on flashing torches they saw a human body in the latrine. Police were called and retrieved it. It was later identified as that of the deceased.

As police carried out investigations the deceased's chicken were found with Mwakulani Juma Mwakulani's wife. Some items like mattresses and bed sheets alleged to belong to the deceased were also found with some Accused persons. The Accused persons were accordingly arrested and later charged with this offence.

As I have said the prosecution called seven witnesses but none of them said he saw the Accused persons or any of them kill the deceased. The reason why Mwakulani Juma Mwakulani was arrested was because it was alleged he had had a disagreement with the deceased previously and some chicken alleged to belong to the deceased were found with his wife. That evidence alone cannot found a conviction against him.

The other accused persons were alleged to have been found with household items said to be those of the deceased. The witnesses however confirmed that the chicken and those household items had no special marks to prove that they exclusively belonged to the deceased. That piece of evidence does not take the prosecution case anywhere.

On the evidence on record it is clear to me that the accused persons were charged on mere suspicion. It is trite law that suspicion, however strong, is no evidence in a criminal case. See **Faith Lukas –Vs- Republic, Cr.App.No. 274 of 2006 (C.A.)** following **Sawe –Vs- Republic [2003] KLR 364 at p. 365-6**. Because of the age of this case with the Accused persons having been in remand since November 2002 and no reason at all having been given why the remaining witnesses did not come to court for the hearing on 13th May 2008, I refused to adjourn the hearing of this case. That shut out some evidence including that of the autopsy of the deceased's body. So we have no evidence as to the cause of death.

The law is also clear in such situation. Unless it is an act of decapitation or injury caused by the accused leading to unsuccessful treatment of the victim as stated in Section 213 of the Penal Code the cause of death cannot be attributed to the Accused person.

In this case, as I have said, there is no evidence of the accused persons having inflicted injury upon the deceased. The cause of death is therefore not known. Even if it had been established I do not think that would have made any difference in the absence of evidence pointing to the Accused persons or any of them as the killers of the deceased.

In the upshot I find that there is no evidence at all to connect the Accused persons or any of them to the death of the deceased. In the circumstances I find that the prosecution has not made out a prima facie case against the Accused persons to require them to be put on their defence. Consequently I acquit them under Section 210 of the Criminal Procedure Code. They shall therefore be set free unless otherwise lawfully held.

DATED and delivered this 15th day of May 2008.

D.K. MARAGA

JUDGE