

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Criminal Case 19 of 2006

REPUBLIC :::::::::::::::::::::::::::::: PROSECUTION

VERSUS

PATRICK MAKOMBOLA MBISI ::::::::::::::: 1ST ACCUSED

MARTIN MBISI MWANGANGI ::::::::::::::: 2ND ACCUSED

R U L I N G

The two accused persons in this case are charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. It is alleged that on the 13th day of May 2006 at Mivumoni Village Mivumoni Location in Kwale District within Coast Province they jointly murdered Bahora Barisa.

Of the five prosecution witnesses who testified it is only Winnie Tito PW5 who gave material evidence. She claimed that she saw the two accused persons beating the deceased with sticks on 13th May 2006 at about 11.00 a.m. at her sister's home. In cross examination however that witness conceded that she had not told police that crucial aspect of her evidence and that was not in her statement to the police. She added that after that beating the deceased went away walking and talking. He was the following day found dead on the road he had taken from the place of beating.

The story of the other witnesses relates to the finding of the deceased's body and was therefore not material. When the body was taken to the mortuary for post mortem examination due to religious reasons the deceased's father restrained the doctor from opening it.

Due to the failure by the prosecution to avail other witnesses or explain why it failed to do so I refused its application for adjournment, thus shutting out other evidence. The other reason why I refused adjournment was because of the nature of the remaining evidence. In my view it would not have added value to the prosecution. It was the evidence of a psychiatrist who was coming to say that he assessed the mental state of the accused persons and found them fit to stand trial. The evidence of the pathologist, according to the post mortem report a copy of which is in the file, was going to be that due to the fact that he had been restrained by the deceased's father from opening the body the cause of death was "unascertainable". The last witness would have been the investigating officer who was not an eye witness and his evidence could not therefore have pushed the prosecution case a notch higher.

In my view even if the cause of death had been established, without evidence pointing to the Accused persons as the people who caused the death of the deceased they could still not be convicted.

Taking all these factors into account I find that there is absolutely no evidence on record to connect the Accused persons with the death of the deceased. In the circumstances I find that the prosecution has not made out a prima facie case against them to warrant them being put on their defence. Consequently I acquit them, under Section 210 of the Criminal Procedure Code of the offence charged and order that they be set at liberty forthwith unless otherwise lawfully held.

DATED and delivered this 15th day of May 2008.

D.K. MARAGA

JUDGE