



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

**Criminal Case 10 of 2005**

**REPUBLIC.....**PROSECUTOR****

**VERSUS**

- 1. BENSON MGHANGA.....1<sup>ST</sup> ACCUSED**
- 2. ERICK KAMBALE .....2<sup>ND</sup> ACCUSED**
- 3. DICKSON CHOVI .....3<sup>RD</sup> ACCUSED**

**J U D G M E N T**

Benson Mghanga, Erick Kambale and Dickson Chovu being the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> accused persons herein, are before this court on information of the Attorney General jointly charged with the offence of murder contrary to the provisions of Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that on the 14<sup>th</sup> day of March 2005, at Marumane Village, Werugha location in the then Taita Taveta District within Coast Province, the trio jointly murdered Edward Mwanyondo Mwaropo.

The prosecution's case is supported by the evidence of seven (7) witnesses whereas the accused persons each gave an unsworn testimony in their defences. The deceased's brother, Charles Mwanjala Mwaropo, (P.W. 1) said that on 14<sup>th</sup> March 2005, he accompanied his deceased brother to the house of one Mwalukuku in Saghasa Trading Centre to collect some debt. The duo met Mwalukuku at a neighbour's house upon which they were told to go and wait for him at his shop at Saghasa. P.W. 1 said he left his late brother taking some soup as he left for home. P.W.1 further claimed that he slept until the morning of 15<sup>th</sup> March 2003 when he found his brother's door open while the deceased was asleep. He claimed that his brother told him that he had been assaulted by Benson Maghanga, Erick Kambale and Dickson Chovu, (the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> accuseds') using a jembe handle. He said he and his mother took the deceased to Makandenyi Dispensary for treatment and later to Wundanyi District Hospital where he died on 25<sup>th</sup> March 2005. P.W.1 said he retold what his late brother told him to his mother, the village elder, the police and the assistant chief. On cross-examination P.W. 1 said that he recorded in his statement with the police to the effect that his late brother had told him that he fell down the previous night while coming back home where upon he injured his head. He also stated that he left him to sleep until the next day when he took him to hospital. On Cross-examination he further admitted that he and his brother took alcohol between 5.00 p.m. and 9.00 p.m. when he left for home leaving behind the deceased. He also said he left in the morning without his late brother telling him that he had been injured the previous night. Wilson Mwamandu Tole (P.W. 2) said he met Benson Maghanga (1<sup>st</sup> accused) on 15<sup>th</sup> March 2005 who told him that he had assaulted the deceased for stealing his cabbages. P.W.2 claimed he was shown the land where the deceased was alleged to have stolen the cabbages. P.W. 2 said he met P.W. 1 on 16<sup>th</sup> March 2005 while he was on his way to the chief's office and that he told him that the three accused persons had assaulted the deceased. P.W.2 claimed that the deceased arrived at the chief's office where he said the deceased told him he had been assaulted by the three accused persons. P.W.2 said he advised the two brothers to book the report with the police. P.W.2 claimed he gave the police the names of the named suspects. On Cross-examination P.W.2 said he told the police what he was actually told by P.W.1. Henrick Maghanga (P.W.3) confirmed that the three accused persons had assisted him to harvest

his cabbages on 14.3.2005 and thereafter left for Malindi. He said there was no report of theft of his vegetables until 26.3.2005 when he heard such an allegation. P.C. Bernard Mikaye (P.W.4) told this court that on 17.3.2005 he received a report from Edward Mwanyondo Mwaropo (deceased) who was in company of two people that he was assaulted by Benson Maghanga on 14<sup>th</sup> March 2005 at Werugha Trading Centre. P.W.4 said he issued a P3 form to the deceased. Samuel Waithagu (P.W.6) said he arrested the accused persons upon being mentioned by the assistant chief (P.W. 2) and other relatives on 26/3/2005. IP Jonathan Wafula (P.W. 7) told this court that the Occurrence Book (O.B.) of 19.3.2005 shows that Edward Mwanyondo (deceased) made a report of assault at Wundanyi Police Station. According to P.W. 7, the deceased told the police that he was assaulted by people who were known to him. P.W.7 confirmed that P.C. Mikaye (P.W.4) had booked the report. Doctor Shem Pattah (P.W.5) performed the autopsy on the deceased's body. He formed the opinion that the cause of death was due to severe head injury resulting to left subdural haematoma.

When placed on their defence each of the accused persons gave an unsworn testimony. Benson Maghanga (1<sup>st</sup> accused) claimed he was fixed by the Area Assistant Chief Wilson Mwanandu Tole (P.W. 2) because he had a grudge against him which arose out of an incident in which his house was burnt by the Assistant Chief's children. On his part, Erick Kambale (2<sup>nd</sup> accused), denied committing the offence. He said he was arrested with others when they were found taking some illicit brew. He claimed the others were released while he was detained as a murder suspect. He accused P.W. 1 of telling lies to this court against him. Dickson Chovu (3<sup>rd</sup> accused), denied having committed the offence too. He said he was innocent. He claimed he even attended the funeral of the deceased and that there was no reason why he would kill the deceased.

At the close of the evidence both Mr. Monda, learned State Counsel and Mr. Maosa learned defence Counsel gave detailed submissions. It is the submission of the learned State Counsel that the evidence of P.W.1 proved that the accused persons assaulted the deceased on 15<sup>th</sup> March 2005 and that Benson Maghanga (1<sup>st</sup> accused) had told P.W.2 that he had assaulted the deceased for having stolen his cabbages. Mr. Monda urged this court to admit the statements made by the deceased before he passed away. It is further submitted that the deceased's statement was corroborated by the evidence of the other witnesses. The learned State Counsel concluded his submission by stating that the prosecution's case is entirely dependent on circumstantial evidence.

Mr. Maosa, learned advocate for the accused persons urged this court to acquit the accused persons because the prosecution had miserably failed to prove its case against the accused persons to the standard of beyond reasonable doubt. Mr. Maosa pointed out that P.W. 1 gave contradictory evidence hence his testimony should be believed.

I have considered the evidence tendered plus the oral submissions tendered by learned counsels. Two elements must be established in order to sustain a conviction for murder. First, is the element of actus reus. Secondly, is mens rea. There is no doubt that Edward Mwanyondo Mwaropo, deceased died as a result of a head injury he sustained in the night of 14<sup>th</sup> and 15<sup>th</sup> March 2005 as per the evidence contained in the postmortem report prepared and produced by Dr. Shem Pattah (P.W.5). The question which remains to be tackled is who inflicted these injuries? The prosecution has stated that the circumstantial evidence shows that the three accused persons are those who committed the vice. Mr. Monda has urged this court to find that malice aforethought is manifested by the kind of injuries inflicted on the deceased. I have already stated that the prosecution relies entirely on circumstantial evidence. In such cases the prosecution must tender evidence of facts from which the guilt of the accused may be inferred. The law is well settled that where the prosecution's case depends on circumstantial evidence, first that the circumstances from which the inference of guilt is sought to be drawn must be established by cogent evidence. Secondly, that those circumstances should unerringly point to the guilt of the accused. Thirdly, that when the circumstances are taken cumulatively they should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else. A critical look at the evidence of P.W. 1 will reveal that he materially contradicted himself in many respects. To begin with he told this court in his evidence in Chief that the deceased told him that he had been assaulted by the three accused persons during the night of 14.3.2005. On cross-examination

he said his late brother had told him that he fell down and got injured while on his way back home. The other contradiction which dented P.W.1's evidence is that he claimed in his evidence in Chief that the deceased told him about the assault in the morning before he left. P.W.1 changed the story on cross-examination and said that he left until the evening of 15.3.2005 whereby the deceased was able to tell him the truth. In fact he said he left home that morning without knowledge of the deceased's injuries. I observed the demeanor of P.W.1 as he testified and I noted that he was not a credible witness. P.W.2 gave a detailed story of how he met P.W. 1 and the deceased on 16<sup>th</sup> March 2005 while the duo were on their way to the Chief's office. P.W. 2 claimed he met Benson Maghanga on 15.3.2005 whereupon he told him that he assaulted the deceased because the deceased had stolen his cabbages. On being cross-examined, P.W. 2 said that all what he recorded in the police statement and later retold this court were stories given to him by P.W.1. It is obvious that if the evidence of P.W. 1 is found to be incredible then the evidence of P.W.2 can be no better.

The only evidence which tended to connect the 1<sup>st</sup> accused with the offence is that of P.W. 4 who stated that he booked a report from the deceased on 17.3.2005 to the effect that the deceased was assaulted by Benson Maghanga on 14.3.2005. However the evidence of P.W. 4 is contradicted by P.W. 7 who said that the deceased's report was recorded in the occurrence book of 19.03.2005 and not 17.3.2005. The overall picture created is that there is doubt created in my mind. The law enjoins me to give the benefit of that doubt in favour of the accused persons. Even if one was to infer that the accused persons participated in assaulting the deceased, the element of malice afterthought has not been established against the accused persons. What emerges from the evidence is that there is strong suspicion that the accused persons may have committed the offence. Unfortunately in law suspicion however strong cannot be substituted for proof.

In the end I find Benson Maghanga, Erick Kambale and Dickson Chovu the accused persons herein, not guilty. They are hereby acquitted. They should be released forthwith unless lawfully held.

**Dated and delivered at Mombasa this 5<sup>th</sup> day of June 2008.**

**J.K. SERGON**

**J U D G E**

In open court in the presence of Mr. Obara h/b Maosa for the accused person .

N/A for the learned state Counsel.