



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CRIMINAL CASE 36 OF 2003

REPUBLIC.....PLAINTIFF

VERSUS

MAGANGA MSAGHA MWADIME.....DEFENDANT

RULING UNDER THE PROVISIONS OF SECTION 306 CPC

On 5th November 2003, the AG informed this court that accused Maganga Msagha Mwadime did on 26.9.03 at Chinga-Unga village in Taita Taveta District murder George Siano deceased contrary to Section 203 read with Section 204 of Penal Code. Plea was taken on 20.11.03.

The trial commenced on 1.12.2004. the prosecution witnesses gave evidence against the accused PW1 stated that on 25.9.03 at about 8.00 pm he heard a whistle Maganda was blowing. He stopped him. PW1 was in the compound of Mama Lela. He could see well what was going on. Mwashimba and Mwafusi took Maganga outside the boma. Outside there Mganga hit Mwashimba. PW1 saw accused hit with a stone. Mwashiganga took a piece of wood. He hit the deceased on the head. Deceased fell down on left side of the head (temple). There was blood flowing from his head on left side. The witness and others took the deceased from the compound to his house.

They then waited until morning on 26.9.03 at which time when they found deceased already dead. The matter was reported to the police. The police took the body. PW1 asserted that Mganga is the one who hit the deceased. He was arrested by village elders.

On cross examination he said that in that boma of Mwashimba with Mwafisi Kikolio and George and deceased were present. There was house of Mama Lela. This witnesses work was to protect cattle. There was no torch or electric light or moon light. The accused came blowing whistle and was present just there waiting to beat those present. Accused took deceased outside and when deceased came back he had injuries on the head. He saw a piece of wood being thrown and it hit deceased. This witness did not see who had thrown the piece of wood which hit deceased but he thought it was accused. In the house of Lela is made pombe but on this day he did not see pombe (liquor) being sold.

PW2 is Rose Lela who testified that on 25.9.02 at 8 pm she was at her boma with other persons mentioned above including George Siano deceased. From the inside of her house she heard whistling. She went outside. She enquired from some children. She said it was not very dark. She knew accused very well. She asked Mshimba to take accused out. He did so. After a short time she heard noise then deceased was holding onto his face. He fell down on his stomach. There was blood flowing from his head. He was hit on the side of his head. The village elder was called. She took deceased to her house and put him on the bed of her worker where the deceased slept. In the morning, she was to call for

vehicle to take deceased to hospital.

The deceased was still alive at about 7.30 am. But he died at 8.00 am. Matter was reported to police who came to the scene at 1.00 pm that day. On cross examination she said the 5 people she had noticed were sitting outside by the fire and were not drinking beer. Mshimba was a brother of accused.

PW3 was businessman and farmer and the village elder. On 25.9.03 he was at house at 9.00 pm. He received some report and he went to the house of Lela. He found deceased on bed sleeping. There was fire outside. He, with others decided to stay the night there because of the animals. In the morning it was found that George was dead. He arrested accused only. Police were informed and they and they arrived at the scene and took the body away.

PW4 identified the body.

PW5 was called on 15.2.05. He is Dr Shem Patta. He was MOH in Taita Taveta District hospital. He is a surgeon. He performed post mortem examination on deceased body on 7.10.03. He described the injuries found on the body. He testified that in his opinion death was caused by severe head injury. He produced the post mortem report as exhibit 2.

PW6 was police officer who escorted relatives to the mortuary for the purpose of identifying the body.

PW7 was also a police officer who received report of death on 26.9.03.

He visited the scene and found the dead body inside the house on the ground. He collected the body for hospital mortuary and accused was taken to police station.

He observed that in that boma they used wood for cooking. This witness was the last for prosecution. The state counsel informed the court that his instructions are to close prosecution case.

Defence counsel informed court that he would make submissions under Section 306 CPC. On 23.3.06, Mr Gichana for defence said he did not want to make any submissions, “**court to rule**” he said.

I have considered the above prosecution evidence. The incident happened at night, at a place where there were at least 5 persons. There was no light at all but it appears the five persons were sitting outside in the compound of the boma of Lela in front of a fire. No evidence of the strength of the fire light was given. The witnesses say that the deceased was hit by a stone which fell on his left side of the head. He fell down. There is other evidence that he was hit by a piece of wood. There is no evidence as to who threw the stone. It is said accused hit the deceased with a piece of wood but no one saw as how he hit him. All witnesses said it was the accused who hit the deceased with a stone.

This kind of evidence is not satisfactory. It is mere speculation. The conditions at the scene were not satisfactorily to enable the accused to be positively identified. The best evidence given is that it was dark and there was some fire burning. This is not proof that any witness could have identified the person who threw the stone that is said to have hit the deceased.

I find no evidence that connects the accused with the offence and I make a finding of not guilty. The accused shall be set at liberty forthwith.

Dated at 16th may 2006

J KHAMINWA

JUDGE