



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**Criminal Case 33 of 2002**

**REPUBLIC.....APPLICANT**

**VERSUS**

**NYALE NYAWA MWACHITI.....RESPONDENT**

**RULING**

**NYALE NYAWA MWACHITI**, the Accused in this case is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on the 24<sup>th</sup> day of October 2001 at about 11.00 a.m. at Matumbi Village – Mwatate Location in Kwale District of Coast Province he murdered Mbeyu Mkala (the deceased).

At the close of the prosecution case after the prosecution had called a total of 14 witnesses, Mr. Anyanzwa, counsel for the Accused submitted that the prosecution has not made out a prima facie case to require the Accused to be called upon to enter his defense. He submitted that the body that was exhumed from near the Accused's home was not established to be that of the deceased. Of all the witnesses called, he said, it was only the deceased's cousin PW 7 who claimed to have been able to identify the body as that of the deceased. The other witnesses, he said, were unable to identify the body as it had decomposed beyond recognition.

Mr. Anyanzwa further submitted that PW 7's evidence that he was able to identify the body by the lesso he had bought for her cannot be relied upon as the lesso was so soiled with mud and fluids from the body that one could not even tell what colour it was. He said as there is no evidence at all to connect the Accused with the murder of the deceased it will cause him injustice to require him to defend himself. In support of that proposition he cited the authority in the case of **Murimi – Vs – Republic [1967] EA 542** and urged me to find that the Accused has no case to answer and acquit him.

On behalf of the prosecution Mrs. Mwangi, the Assistant Deputy Public Prosecutor, submitted that the prosecution has made out a prima facie case against the Accused and that he should be put on his defence. Although there is no direct evidence against the accused, she said that the circumstantial evidence adduced by the prosecution points to the guilty of the Accused. The Accused had had long standing strained relations with the deceased which had been discussed by elders umpteen times without any solution. She said the deceased had complained of neglect and mistreatment in that the Accused did not buy her clothes or build a house for her and her children. While he lavished his second wife with new clothes the accused occasionally bought *mitumba* (second hand clothes) for the deceased. The matter was discussed by the elders several times. Each time the Accused promised to build a house for the deceased and buy her clothes but he did not. As a result the deceased used to walk half naked prompting PW 7 to buy for her a lesso.

On the identification of the deceased's body Mrs. Mwangi submitted that the evidence of PW 7 should be relied on. This is because as a police officer he is trained to notice certain things ordinary people cannot.

He identified the lessor with which the deceased was buried as the one he had bought for her.

Finally Mrs. Mwangi submitted that because the deceased was nagging the Accused for clothes and a house when an opportunity arose on 24<sup>th</sup> October 2001 he seized it and killed her. She said that the post mortem report shows that the deceased was hit on the head as the pathologist noted fractures on the skull.

I have considered these submissions along with the entire evidence adduced in this case. As nobody saw the Accused kill the deceased, the prosecution is relying on circumstantial evidence.

The law on circumstantial evidence is long settled. In order to justify the inference of guilt the inculpatory facts adduced in the circumstantial evidence must irresistibly point to the guilt of the Accused and be incompatible with his innocence and incapable of explanation upon any other hypothesis than that of his guilt. Authorities on this are legion. Suffice it to cite **Kariuki Karanja – Vs – Republic [1986] KLR 190** and the old one of **Rex – Vs – Kipkering Arap Koske (1949) 16 EACA 135**.

The facts in this case are fairly simple and straight forward. The deceased was the Accused's first wife with whom he had two children. For a long time the deceased and the Accused had had problems. The deceased complained that whereas the Accused fed and lavished his second wife with new clothes he left the deceased in tatters scrounging for food. While the second wife slept in the comfort of a bed, the deceased and her children slept on the floor snuggling to each other as they had nothing to cover themselves with. She made known to her family her tribulations and the matter was discussed several times by elders of both sides. Each time the Accused made promises he did not honour. He never built a house for the deceased or buy her clothes leave alone giving her money for food.

On the 24<sup>th</sup> October 2001 at about 11.00 a.m. the deceased left her children with her mother in law, Mwaka Nyawa PW 4, and went to her shamba about half an hour's walk away to collect palm tree leaves. At that time the Accused was not at home. By 1.00 p.m. she had not returned and the children started crying. PW 4 looked for her around in vain. About a week later, on information received, a body was exhumed from a thicket about 2 ½ km from Accused's house.

Apart from the deceased's cousin, Chitembwa M. Said PW 7, all the other witnesses, including the clinical officer PW 8 who supervised the exhumation, said the body had decomposed beyond recognition. With the exception of Dr. Mandalya the other witnesses also said it was impossible to know its gender. PW 7 said he was able to identify the body as that of the deceased because of the lessor that he had bought for her which was found in her grave. That lessor together with other items like sandals also found in the grave were not produced. They were lost in the mortuary.

The evidence adduced by the prosecution has not established that the body exhumed from a grave in the thicket near Accused's home was that of the deceased. The items of clothing found with it in the grave could have identified it if there was evidence that they belonged to the deceased. Save for PW 7 all the other witnesses said the lessor was so soiled with mud and fluids from the body that one could not even tell its colour. I find the evidence of PW 7 unreliable as he did not point to any mark on the lessor that made him associate it with the deceased.

The Accused's family assumed that the body was that of the deceased and took and buried it. It was not ruled out that the body of a woman which two witnesses said was found not far away about the same time could not have been that of the deceased in this case.

True the Accused had had problems with the deceased and may very well have killed her to get her off his back remembering that some evidence in the form of a confession was excluded. There is, however, no evidence on record to justify that finding.

It is trite law that at the close of the prosecution case if the evidence adduced against the accused cannot found a conviction the accused should not be put on his defence and instead he should be acquitted. See **Ramanlal Bhatt – Vs Republic [1957] EA 332**.

There is no evidence in this case connecting the Accused with the murder of the deceased. I therefore agree with Mr. Anyanzwa that to call upon him to enter his defence will occasion a failure of justice – **Murimi – Vs – Republic [1967] EA 542**. In the circumstances I find that the Accused has no case to answer and I accordingly acquit him and order that he be set free forthwith unless otherwise lawfully held.

DATED and delivered this 9<sup>th</sup> day of May 2006.

**D. K. MARAGA**

**JUDGE**