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

**Criminal Case 34 of 2002**

**REPUBLIC…….....……PROSECUTOR**

**VERSUS**

**JUSTUS OPONDO OWUOR…….....……ACCUSED**

**JUDGMENT**

The Accused, JUSTUS OPONDO OWUOR, is charged with murder contrary to section 203 as read with Section 204 of the Penal Code. It is alleged that on 25th day of March 2002 at Gana Hola Village Mikindani in Mombasa District of the Coast Province, jointly with others not before the court he murdered FRANCIS MATOGO WAMUCHANA (the deceased). The prosecution case is that the deceased who hailed from Western Province had come to Mombasa to visit his sister Isabella Bulanga who is also now deceased. On the 25th March 2002 at about 8.00 p.m. the deceased left his late sister's house apparently to go where he was to sleep. Shortly thereafter the late Isabella Bulanga heard shouts of "thief" "thief" and on going out she found the Accused and other people beating up the deceased. She was warned to keep away. It is at that time that PW1, Anthony Oliver Budabe who was walking home from his place of work, stumbled on the deceased being beaten by the Accused and one Evans *alias* Baba Brian. Budabe and a sister of the deceased Mary Atitua (also deceased) were like the late Isabella threatened with dire consequences if they went to the deceased's rescue.

The deceased was on the following morning found lying unconscious on the side of the road. Officers from Changamwe Police Station to which the matter had been reported went to the scene and rushed the deceased to Coast General Hospital but he was pronounced dead on arrival. After investigations the Accused was charged with this offence. His alleged confederate, Evans *alias* Baba Brian, disappeared and has since not been traced.

Of the seven prosecution witnesses called only PW1, Anthony Oliver Budabe said he witnessed the beating of the deceased. The other people who witnessed the beating were the deceased's sister Isabella Bulanga and Mary Atitua Ojiambo, both of whom unfortunately have since died. Prior to their deaths, however, they had recorded statements at Changamwe Police station which were produced under Section. 33. of the Evidence Act by the Investigating Officer IP Michael Tarus PW6. I shall later in this judgment advert to those statements.

The evidence of Anthony Oliver Budabe PW1 was that on the 25th March 2002 at 8.30 p.m. as he walked

home from his place of work he stumbled upon two people beating up a third one with sticks shouting "mwizi" "mwizi". As there was moonlight he said he was able to identify the three people. The one being beaten was Francis Matogo Wamuchani the deceased in this case and his assailants were Justus Opondo the Accused in this case and one Evans *alias* Baba Brian. He knew the three well as they lived in the same area; the deceased for about a year and the Accused and Evans for about six months.

At that time he saw the deceased's late sister Isabella and one Mary Atitua as well as other people standing nearby. They were not screaming or doing anything about the deceased's beating. His attempt to rescue the deceased was repulsed by the Accused and the said Evans who chased him. The following day he learnt of the deceased's death and reported the matter to Changamwe police station.

As I have said the statements of the deceased's late sister and another were produced by the Investigating Officer PW6. They basically corroborated the evidence of PW1 though they themselves said that the deceased was being beaten by a mob who included the Accused and Evans.

In her statement the late Isabella Bulanga said the deceased had come to Mombasa to visit her. On 25th March 2002 she escorted him out of her house and left him to go apparently to where he was going to sleep. A short while thereafter she heard shouts of "thief", "thief". She went out and found the Accused, Evans and one Sabina beating the deceased. In no time members of the public joined the fray. She was threatened not to get near. Scared off she went back to her house and slept. The following morning she learned of her brother's death and traced his body to Coast General Hospital. The late Mary Atitua Ojiambo said basically the same thing in her statement.

The other material evidence is that of the police officers who went to the scene after receiving the murder report and Dr. Mandalya who performed the post mortem examination. The Investigating Officer IP Michael Tarus PW6 testified that while on duty on the 26th March 2002 he received a phone call at about 5.00 a.m. that there was someone lying unconscious beside the road at Gana Hola. He went there with PC Nzioka and rushed the unconscious man to Coast General Hospital but he was pronounced dead on arrival. After taking the body to the mortuary he went back to scene where he found three people who said they were relatives of the deceased. Two of those were the late sister of the deceased and the late Atitua. They pointed out to him the house of Evans who had alleged that the deceased had stolen from him. He went there but did not find him. He has since not been traced. Upon his transfer to Nairobi he handed over the investigations of the case to PC Araya, PW5.

At the request of Changamwe police station Dr. K. N. Mandalya, a pathologist at Coast General hospital performed a post mortem examination on the body of the deceased on 8th April 2002. It was identified to him by PW2 and one Peter Ouma. He said externally the body had extensive bruising of the face and neck and superficial cuts and bruises on the chest and abdomen. It also had fractures of the clavicles and left knee joint. On opening it he found evidence of haemorrhage in the chest cavity and abdomen. The 10th and 11th ribs were also broken. Though there were fractures on the head it, however, had diffused subdural haemorrhage and swelling of the brain. He formed the opinion that the cause of death was haemorrhagic shock due to chest and liver injuries. He also opined that those injuries were caused by blunt objects.

Upon being called to enter his defence the Accused testified on oath but did not call any witnesses. He denied the offence and said that on the 29th March 2002 on his way home from his place of work he decided to have a drink at the house of one Kilo. While there at about 9.00 p.m. PW1 went there and alleged that the Accused was after his wife. They fought over the issue after which he went to his home. The following day PW 1 went to his place of work at Mitchell Cotts with police who arrested him and took him to Changamwe Police Station where he was kept upto the 10th May 2002 when he was taken to the OCS's office and told he was being charged with murder. Asked why his lawyer did not put that to PW 1 the Accused said his former Advocate did not take instructions from him. In court he attempted to stand up and protest that PW 1 was lying but he was waved by his former lawyer Mr. Mulei to sit down.

After the evidence from both the prosecution and defence had been adduced, Mrs. Mwangi the Assistant

Deputy Public Prosecutor and Mrs. Kayatta who took over the defence of the Accused from Mr. Mulei made final submissions.

Mrs. Mwangi submitted that the prosecution had proved the case against the Accused beyond reasonable doubt. She relied on the evidence of PW 1 who said that on the 25th March 2002 at about 8.30 p.m. he found the deceased being beaten by the Accused and one Evan both of whom he knew. As there was moonlight he was able to identify them. That, she said, proved that the Accused and the other fellow were beating the deceased with sticks which ties up with the evidence of Dr. Mandalya who performed the post-mortem examination on the body of the deceased. She further submitted that soon after that incident Accused moved from where he used to stay. The other fellow Evans disappeared and has, since not been traced. She urged the court to find Accused guilty of murder or at least of the lesser offence of manslaughter.

On her part Mrs. Kayatta submitted that the prosecution had failed to prove the case against the Accused. She said that the evidence of PW 1 cannot be relied upon as there was no proof that there was enough moonlight that night. She also said the fact that Accused shifted from where he used to reside before is no evidence of ny guilty knowledge on his part.

It is clear from the prosecution evidence as summarized above that the prosecution case is hinged on the evidence of PW 1 and the statements of the deceased's sister and another who could not be called as they are dead. I would like to start with those statements.

Sections 62 and 63 of the Evidence Act Cap 80 require facts to be proved by direct oral evidence. That is the evidence of a person who saw, heard or perceived the fact being proved. So a statement made by a person not called as a witness, which is offered in evidence to prove the truth of the facts contained in the statement is hearsay and inadmissible. The rationale for this is not difficulty to find. It is elementary right of an accused person that a witness who is to testify against him should give evidence before the court trying the case which then has the opportunity of seeing the witness and observing his demeanor and can thus form a better opinion as to the reliability of that witness than is possible from reading a statement or deposition given by that witness in a previous judicial proceeding. There is however, an exception to this general rule which is stated in section 33 of the Evidence Act in the following terms:

"**Statements, written or oral, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured, or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable are themselves admissible in the following cases** ……..**"**

I have once again read the statements of the deceased's late sister and that of Atitua, also deceased. They cannot be relied upon. They did not say how they were able to see the Accused and the other fellow Evans. Infact that of Atitua talks of being able to identify the person who was being beaten as the deceased by recognizing his voice. She also heard other people talk. That means she was not able to see or to see well. The late Atitua's statement tends to suggest that PW 1 was among those who were beating up the deceased. She does not say how she was able to see the Accused. Like that of the deceased's sister, Atitua's statement does not make mention of the source of light although they both state that the deceased was being beaten by a mob who included the Accused and Evans. In the circumstances I cannot place any reliance on those statements.

That leaves us with the evidence of PW 1. Although his is evidence or recognition which was described in **Anjononi – Vs – Republic [1980] KLR 59** as: -

"… **more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon personal knowledge of the assailant in some form or other."**

I nonetheless find it unreliable for the fact that we are not told how bright the moonlight was. In a case of identification of an accused person at night when the only source of light is moonlight it is important to

know how bright the moonlight was; it is important to know the intensity of the moonlight before relying on identification or recognition by the aid of that light. In **David Masinde Simiyu & Another – Vs – Republic, Criminal Appeals Nos. 33 and 34 of 2004 (consolidated)** the Court of Appeal stated:

"**There was no inquiry as to the nature of the alleged moonlight or its brightness or otherwise or whether it was a full moon or not or its intensity. In the absence of any [such] inquiry, evidence of recognition may not be held to be free from error.**"

There was also no inquiry of the sort in this case.

In the circumstances I have no choice but to disagree with the opinion of the gentlemen the Assessors, which opinion I nonetheless respect. I find that there is no sufficient evidence to base the conviction of the Accused on the offence of murder or manslaughter as the Assessors opined and I accordingly acquit the Accused. He should be set free forthwith unless otherwise lawfully held.

DATED and delivered this 10th day of July 2006.

**D. K. MARAGA**

**JUDGE**