



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**Criminal Case 29 of 2002**

**REPUBLIC ..... PROSECUTOR**

**Versus**

**HAMISI MWINYI ..... ACCUSED**

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

Hamisi Mwinyi, the Accused in this case, is charged with the offence of murder contrary to section 203 as read with section 24 of the Penal Code. It is alleged that on the 26th day of March 2002 at Denyenye village in Ngombeni Location within Kwale District of Coast Province the Accused murdered Munyi Hamisi Mwashambi.

The prosecution case is that the deceased, Munyi Hamisi Mwashambi, was on the 26th March 2002 at about 12.00 noon resting under a mango tree outside his house. His granddaughter was lying beside him. They both fell asleep. The Accused, a son of the deceased who was not in good terms with him was at home. He asked his younger sister, Fatuma Munyi P.W.1, to get a lessa and cover the child who was sleeping next to the deceased. While P.W.1 was in the house looking for a lessa she heard someone scream outside. On getting out she saw the Accused hit the deceased on the head with an axe and go away. She removed the axe which had stuck to the deceased's head which she dropped as she rushed to her grandfather's house screaming. Soon thereafter people went to the deceased's house and rushed him to hospital but he died on arrival. A post mortem examination carried out the following day gave the cause of death as cardio-respiratory arrest due to the head injury. The Accused who had run away returned to his house on 29th March 2002. On 2nd April 2002 he was arrested and later charged with the murder of his father

The prosecution called ten witnesses and upon being put on his defence the Accused chose to give an unsworn statement. After summing up the case to the assessors they gave a unanimous opinion that the Accused is guilty of the offence of murder as charged. The Assessor Mr. Jeremiah John Tawa who read their unanimous opinion said that according to P.W.2 the relationship between the Accused and the deceased was not good and that the deceased had fears that the Accused was going to kill him.

On the evidence of P.W.1, the assessors were of the view that she is a grown up who knew what she was talking about. They dismissed the Accused's defence that she had been coached to testify against him as having no basis. The assessors wondered why the Accused was not bothered to find out who killed his father. They rejected his alibi for failure to call the friend he said was with during the material time as his witness. Although they found that the police should have dusted the axe for finger prints and compared the blood stains on it with that of the deceased they nevertheless opined that the Accused was guilty of the murder of his father as charged.

Before I consider this opinion I wish to review briefly the evidence adduced in this case.

Fatuma Munyi P.W.1 is a 16 years old daughter of the deceased in this case. She testified without being sworn as after *voire dire* examination I was of the view that she did not understand the meaning of an oath. She said that on the 26/3/2002 she was at their home with her brother Hamisi Mwinyi, the Accused in this case with her siblings as well as her father. Her mother was, however, not at home. She further stated that at about 12.00 noon while her father was sleeping under a tree, Accused called her to get a lesso and cover her sister's child who was sleeping beside her father. While looking for a lesso in the house she heard someone screaming outside. She rushed out and saw her brother the Accused stepping on her father who was lying down on his stomach. Accused was holding an axe. He hit the father with it and left it stuck to his head and went away. She said she went and removed the axe and ran to her grandfather's house screaming. She was so hysterical that she could not tell him what had happened. The grandfather rushed to their home leaving her behind. Later many people went to their home.

In cross examination this witness was firm that she saw Accused cut her father once. She said that when her father came from the Provincial General Hospital he gave money for food which was prepared and they all including the Accused ate it. She said she knew of no quarrel between the deceased and the Accused. To the contrary the relationship between them was good.

Mwalimu Hamisi Shambi P.W.2 is a brother to the deceased. On 26/3/2002 at about 3.00 p.m. he heard people crying at the deceased's home. He went there and found the deceased lying down. He saw a deep cut on the left side of the head from which the brain was oozing out. The deceased was still alive but he was not able to stand. He reported the matter to Diani Police Station and went looking for a vehicle to take him to hospital. By the time he got one another vehicle had taken him to hospital. He followed to hospital but on arrival he was told that the deceased had died. They buried the deceased the following day. He said the Accused was not around and that P.W.1 told him what she had witnessed. In cross-examination he said that the relationship between the deceased and the accused was strained without giving details or the basis for the strained relations

Mohamed Ali Bakari P.W.3 is a cousin to the deceased. On 27/3/2002 he identified the deceased's body to the doctor at Msambweni Hospital mortuary for post mortem.

Juma Mwinyi P.W.4 an uncle to the deceased is one of the people who rushed the deceased to hospital but he died on arrival.

Ali Bakari Shambi P.W.5 is a village elder in Denyenye whose home is about 100 yards from the deceased's. His evidence was that on 26/3/2002 at about 3.30 p.m. he heard screams from the deceased's home. He went there and found P.W.1 and other people crying. He did not talk to her. He picked an axe at that home which had fresh blood on it. He handed it to police who went to the deceased's home later that day.

P.W.6 PC Nancy Kavaya was on duty at Diani Police Station on 26/3/2002. At about 4.20 p.m. P.W.2 and another reported to her that the deceased had been killed. She booked the report and informed I.P. Magondu P.W.8. The following day, in the company of the deceased's relatives she witnessed the post-mortem examination on the body of the deceased. On 8/4/2002 she took a blood stained axe alleged to have been used in the murder of the deceased to the government analyst and later picked the report which she produced as an exhibit in this case.

Juma Muri Tella P.W.7 is a nephew to the deceased. On 26/3/2002 he heard of the incident and went to the deceased's home. He saw the deceased lying down with an axe next to him. He unsuccessfully tried to get a vehicle to take him to hospital.

I.P. Albert Magondu P.W.8 was the deputy OCS at Diani Police Station and the investigating officer in this case. Although he received the report of the murder at about 4.00 p.m. he was not able to go to the scene until 6.00 p.m. as he had no means. At 6.00 p.m. he went to the scene with PC Njue and PC driver Mwangolo. On arrival he was told that the deceased had been taken to hospital. The village elder P.W.5

showed him where the deceased had laid and handed over to him a blood stained axe which he produced as **Exhibit 1**. On 2/4/2002 he received a call that Accused had been arrested by members of the public. He went to Denyenye, re-arrested him and took him to Diani Police Station. He later charged him with murder. Later he instructed P.C. Dalo to escort the Accused to Provincial General Hospital for mental assessment. He produced Dr. Mwangome's report on the assessment as **Exhibit 2**.

In cross-examination he said he did not establish the motive for the murder. He also said he did not dust the axe for finger prints. P.W.9 Ali Mwinyi Haji Gakweli is a serologist at the Government Chemist. On 8/4/2002 he received a blood stained axe from P.C. Nancy Kavaya. He was required to ascertain if the blood stains on it were human blood. He examined it and confirmed that the blood stains were indeed human blood of group AB+. He prepared a report which he produced as Exhibit 3. In cross-examination he said he did not know whose blood that was as he had not been given any sample for comparison.

Dr. Mwaura Daudi P.W.10 is the medical superintendent at Msambweni District Hospital. He produced the post-mortem report which had been prepared and signed by his colleague Dr. Kisa who is away in Nairobi pursuing further studies and whose signature he is familiar with. He said that according to the report the deceased had a deep cut on the left hand side of the head. The cause of death was cardio-respiratory arrest due to the head injury. That is the evidence adduced by the prosecution against the accused in this case. At the end of the prosecution case I found that the Accused has a case to answer and I put him on his defence. He chose to give an unsworn statement.

In his unsworn statement the Accused denied killing the deceased. He said he had no reason to do that as he had no grudge against him. The relationship between him and the deceased was good.

The Accused said that on 26/3/2002 he woke up at 6.00 a.m. and found that both his parents had gone away to their places of work. He had breakfast with his siblings after which he told his brother he was going away to visit his friend Suleiman at Ujamaa in Likoni. At Likoni he found his friend who suggested that they go to Shimba Hills to buy oranges for sale. Shortly thereafter they left for Shimba Hills in a canter arriving there at 4.00 p.m. They were not able to get enough oranges until the following day at 10.00 p.m. They came back to Mombasa on 28/3/2002 arriving at 3.00 p.m. At dawn on 29/3/2002 they started selling the oranges until 12.00 noon after he left for his home. When he arrived he found many people there who asked him where he had been for those days. He told them where he had gone and joined them in the preparations for burial. On 2/4/2002 two people, one in police uniform, went to his home and told him he was wanted at the police station to record a statement. He was taken to Diani Police Station and thrown into cells and later charged with this offence. He disputed the testimony of P.W.1 and said it was all false and that the witness was couched to testify against him.

After the Accused's unsworn statement Mr. Monda the State Counsel and Accused's lawyer Mr. Mwambi made submissions. Mr. Monda said that the prosecution has proved the case against the accused beyond reasonable doubt. He said the murder was committed in broad daylight at 12.00 noon when P.W.1 witnessed the Accused axing the deceased on the head. He said that the axing of the deceased twice is proof that Accused wanted at least to cause grievous harm which is proof of malice aforethought as defined by Section 306 of the Penal Code. The deceased according to the doctor died of head injuries.

Mr. Monda further submitted that the conduct of the Accused is inconsistent with his innocence in that he ran away from home. He said Accused's alibi was dislodged by the prosecution evidence and urged the court to find the Accused guilty of murder as charged.

Mr. Mwambi on the other hand submitted that the prosecution had failed to prove the case against the Accused. He further submitted that P.W.1 said the relationship between the Accused and the deceased was good. Accused had therefore no reason to kill the deceased and that P.W.8, the investigating officer, did not establish the motive for the murder. He said that the evidence of P.W.1 was that of a child of tender years who does not understand the meaning of an oath and testified without being sworn. Such evidence, he said, requires corroboration before founding a conviction which has not been provided in this case.

Mr. Mwambi further submitted that the evidence of the axe does not provide the required corroboration. It was not dusted for finger prints and the blood on it was not shown to be that of the deceased. He urged that the Accused be acquitted. From this evidence it is clear that, apart from the evidence of P.W.1, the prosecution case is based on circumstantial evidence. I would like to consider the evidence of P.W.1.

As already stated Fatuma Mwinyi P.W.1, is 16 years old child. At the material time she was 13 years old. On *voire dire* examination I formed the opinion that she did not understand the meaning of an oath and allowed her to testify without being sworn. Contrary to the Assessors' opinion that she is a grown up I agree with counsel for the Accused that hers is evidence of a child of tender years which requires corroboration before it can found a conviction. Is there such evidence in this case?

In cross examination P.W.2 stated that the relationship between the Accused and the deceased was strained. He did not give any details of that. He did not say how he came to know that.

The only other aspect of the prosecution case tending to incriminate the Accused is his absence from home from the date of murder until after the burial of the deceased. The assessors believing the evidence of P.W.1 dismissed the defence case remarking that it cannot have been a coincidence that the Accused was away from his home at the material time. Does the Accused's said absence provide the required corroboration of P.W.1's evidence?

In his unsworn statement the Accused denied killing the deceased and gave an alibi. He said that on 26th March 2002 he went with a friend, one Suleiman to Shimba Hills to get oranges for sale and did not return to his home until the afternoon of 29th March 2002. The assessors said the Accused should have called his said friend to prove his alibi. That cannot be. To require the Accused to prove his alibi will be shifting the burden of proof to him. It is the duty of the prosecution to dislodge the Accused's alibi and not the Accused to prove or establish it. An alibi raises a specific defence and an accused person who puts it forward as an answer to the charge preferred against him does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of the court a doubt that is not unreasonable.

In considering the defence of alibi however the court may consider whether or not the same was put forward early enough to enable the prosecution to challenge it or whether it is an afterthought – **Karanja Vs Republic [1983] KLR 501**. There is nothing in this case to suggest that the alibi was set up for the first time in the Accused's unsworn statement. Mr. Monda, learned state counsel submitted that it has been dislodged by the prosecution evidence and I take it that the same must have been set up early enough.

Having considered the evidence adduced in this case as a whole I find that the Accused's alibi has not been dislodged. The court is therefore left with the possibility that the Accused may very well have been away from home on the date of murder. I have also considered the rest of the circumstantial evidence in this case. It is not incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilt of the Accused – see **Bassan & Wathobia Vs R [1961] EA 521**.

In the circumstances I find that there is no evidence proving beyond reasonable doubt that the Accused committed the murder of his father, Mwinyi Hamisi Mwashambi, and I accordingly acquit him and order that he shall be set free at liberty forthwith unless otherwise lawfully held.

I have in this case had to differ with the opinion of the assessors but I want to register my appreciation for their assistance in the matter. DATED and delivered this 29th day of June 2005.

**D.K. MARAGA**

**JUDGE**

