



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Criminal Case 23 of 2001

REPUBLIC PROSECUTOR

- Versus -

JUMA HASSAN MADASO..... ACCUSED

J U D G M E N T

JUMA HASSAN MADAZO alias TYSON (the accused) is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. It is alleged that on the 6th day of April 2000 at Vyemani Village of Shika Adabu Location in Mombasa District of Coast Province he murdered Stephen Mwiti (the deceased).

The prosecution case is that on the 6th April 2000 at about 7.00pm while the deceased, his friend Hesbon Amollo PW8 and another were taking coffee at a coffee shop near Third World in Mtongwe Mombasa three people went there and started beating them alleging that they were criminals harassing people around there. They took them out to the road where they were joined by other people who included the Accused and continued beating them. PW8 managed to escape but the deceased was not as lucky. He was beaten to death. Police received information and went and took the body to the mortuary. Investigations commenced which revealed that Accused was one of those who killed the deceased and he was charged with this offence. The accused denied the charge.

Of the nine prosecution witnesses who testified in this case it is only Thomas Olumu Oduor PW3 and Hezbon Amollo PW4 who went to the scene about the time of the deceased's murder. The father of the deceased, Paul Mutuiru PW1, and the deceased's brother, Patrick Gitonga PW2, learnt of the deceased's death several days later. The others were police officers who went to the scene after the murder.

Thomas Olumu Oduor PW3 is a vegetable and fruit vendor at Likoni. On 6th April, 2000 at about 7.00pm while at his shop he heard shouts of "mwizi" "mwizi" from the road near Third World. He went there and found a crowd of about 60 people surrounding a person who was lying down.

Then Accused, whom he knew as Tyson, started chasing people with a beer bottle. The witness went back to his shop. Later when he saw police going to the scene he returned to the scene and saw head injuries on the man who was lying down. He was, however, not able to identify him. A few days later Patrick Gitonga PW2 went to his shop and enquired about the incident of 6-4-2000. The witness told him what he had seen. In cross-examination this witness said he did not see Accused beat up the deceased.

Hesbon Amollo PW8 testified that on 6-4-2000 at about 7.00pm while at Mtongwe near Third World with someone he saw his friend Stephen Mwititi, the deceased in this case. He took the two into a nearby coffee shop and bought them coffee. While taking the coffee three people went there and started beating them alleging that they were criminals harassing people around. They took them to the road and continued beating them. At the road the three were joined by other people who included the Accused. When the beating intensified the witness tore himself away from the Accused who was holding him and ran away. He left the deceased being beaten. Later his sister told him that someone had been murdered at the spot and he knew that it was the deceased. The following day he sent for the deceased's brother and told him what had happened.

PW8 continued to state that on 28-6-2000 he was, with his cousin, arrested on allegations of robbery but he was later released after interrogation. In cross-examination he said that of the people who beat him and the deceased on 6-4-2000 he only managed to identify the Accused. Although he suffered injuries he said he did not go to hospital for treatment or report the matter to police for fear of being arrested on account of his cousin's robbery allegation. He also said that Accused hit the deceased with a rungu on the head.

When put on his defence Accused testified on oath and denied being involved in the killing of the deceased. He did not call any witness. He said that on 6-4-2000 at 7.00pm he was at his place of work – Keetman Videos preparing to show a video. At 7.30pm when he had started showing a video one of his workers told him that a thief was being beaten about 50m away. He left his workers showing the video and went there to find out what was happening.

On getting there he found a man lying down surrounded by many people. Someone told him he was a thief who was harassing people around. At that time nobody was beating him. After about five minutes police from Inuka Police Station came to the scene. They enquired but nobody told them from whom the man had stolen.

As people dispersed the accused was able to see the man a little more clearly. He saw injuries on his head but he was not able to identify him. He also left and went to his place of work.

On 1-6-2000 while celebrating Madaraka Day with friends at Corner Bar about 50m from his place of work a fight broke out between him and Navy Officers. He was later rang and told that he was required at Inuka Police Station. He went there and was thrown into cells. On 8-6-2000 when he was about to be cleared of the assault charge he was taken from cells to the OCS's office. The OCS I.P Ramata told him to forget about the assault charge and instead to tell him about the murder of the deceased in this case. He told him what he had seen on 6-4-2000 at the scene of the deceased's murder. He specifically told him that he did not participate in the killing of the deceased and that he did not see anybody beating him. Asked if he could identify any of the people he saw at the scene he gave the names of some of the people he saw surrounding the deceased. He strongly denied beating PW8 or the deceased or having had a beer bottle as alleged by PW3. He said PW8 lied against him out of jealousy or perhaps because he had been denied entry into the video shop if he had no money.

The prosecution case is hinged entirely on the evidence of PW8. As I have said, save for PW3, the other witnesses came into the picture after the murder of the deceased. PW3 said he did not see the Accused beat the deceased. So the outcome of this case is dependent on the weight to be attached to the evidence of PW8.

Having carefully examined the evidence of PW8 and having observed his demeanor I have come to the conclusion that he is not a person who can be relied upon for several reasons. First, he said that when he escaped from the scene on 6-4-2000 and later learned of the deceased's death he sent for the deceased's brother Patrick Gitonga PW2 the following day and informed him what had happened. That cannot be correct for the reason that Patrick Gitonga himself testified that he learned of his brother's death on or after 13-4-2000. Gitonga said that on that day while in a friend's office at Mwembe Tayari one Dick called him and said his brother, the deceased, wanted to see him urgently. He went to the deceased's house at Likoni and found it locked. He looked for him all over and eventually found his body at Kilifi District hospital mortuary. According to Gitonga PW2, he met Amollo PW8 on 27-4-2000 who told him

how, while taking coffee with the deceased and another person on 6-4-2000 they were attacked by three people and that the three people were joined by the accused who hit the deceased with a stone on the head. I think that is why a stone was produced as the murder weapon in this case.

In his examination in chief Amollo never talked of any murder weapon. It is in cross-examination that he said that the Accused hit the deceased with a rungu on the head. In further cross-examination, contrary to what he had said in examination in chief that when he tore himself away and managed to escape he had been held by the Accused, he said he was at that time being held by someone else. The other reason why Amollo cannot be believed is his conduct after allegedly escaping from the hands of the Accused and his confederates. He did not report to the police the assault on him or the killing of the deceased or go to hospital for fear of being arrested on account of his cousin's alleged robbery. Apart from the fact that a person with such conduct should not be trusted this also contradicts, what he had said earlier. In examination in chief he had said that he was, with his cousin, arrested on 28-6-2000 almost three months later. Besides these contradictions, I do not believe Amollo's evidence that he went home for a funeral and was unable to come back to Mombasa because he had no bus fare. In my view the truth of the matter is that he went hiding himself at his rural home because of his criminal activities in Mombasa.

The Accused's advocate Mr. Kabebe made heavy weather of the postmortem findings and said that the evidence of Dr. Mwadena is totally unreliable and should be rejected. I do not think that is a fair criticism. I think Dr. Mwadena was only being honest when he said in cross-examination that he was not quite sure of his opinion that the cause of death was cardio pulmonary arrest due to severe bleeding secondary to head injuries. This is because the body had completely decomposed and all he was able to see were multiple fractures on the skull. He said the fractures could have occurred after the date of death. However, given the evidence of PW3 and the police witnesses including that of the Accused himself that they saw injuries on the head of the deceased at the scene, although Dr. Mwadena was not quite sure of his opinion I nonetheless find it to be correct. The deceased died of cardiopulmonary arrest due to head injuries. The question is who inflicted those injuries.

As already stated the Accused testified on oath. He did not deny being at the scene on the fateful night. He went there out of curiosity as other members of the public like PW3 did. In spite of intense cross-examination he was not shaken. I believe him. He took himself to the police station on 1-6-2000, about two months later, when he learnt that police were looking for him on assault charges and was later charged with this offence.

I find and hold that the deceased was murdered by any or all of the three people who attacked him when he was taking coffee with PW8 and another or other members of the public who joined the fray at the road. Consequently, I agree with the Assessors that there is no credible evidence to implicate the Accused with the murder of the deceased. I therefore acquit him of the murder of Stephen Mwiti the deceased in this case and order that he should be set free forthwith unless otherwise lawfully held.

DATED and delivered this 6th day of December 2005

D. K. MARAGA

JUDGE