



**REPUBLIC OF KENYA**

**HIGH COURT OF KENYA AT MALINDI**

**CRIMINAL CASE 21 OF 2003**

**REPUBLIC.....STATE COUNSEL**

**VERSUS**

**GAMBO MWANJE GAMBO**

**MWAGAMBO GAMBO TEMBO**

**PIRI MUNGA MWANGEMI.....ACCUSED**

**RULING**

The deceased Duncan Mbigu Gambo woke up in the morning of 23<sup>rd</sup> November 2002 and got ready to attend a funeral in the village be. In the company of his brother, Gambo Barawa, the deceased left for the funeral. According to his wife Irene Nyadzua Mwangulo, PW1, he did not return that night – and several nights later. But on the third night she became curious and asked Barawa who had left with the deceased what became of the deceased. Barawa who is also deceased, confirmed to her that on the night of 23<sup>rd</sup> November, 2002 he had left the deceased at the funeral. It was on 6<sup>th</sup> December 2002, two weeks later that the first accused informed the widow (PW2) that he had seen a decomposing body of the deceased. The matter was reported to the area Assistant Chief, Javan Ziro Pole – PW3 and later to the police at Kijipwa Police Station. The police led by PW7 Sgt Leonard Mbitsi collected the body and took the same to the Coast General Hospital.

Dr.K.N. Mandalia, PW8 performed post-mortem examination of the body. Back to the funeral of 23<sup>rd</sup> November 2002 where the deceased was last seen alive, PW1 stated how he got concerned when he saw the three accused persons serve t he deceased with more palm wine than they served themselves. But they dismissed her to mind her own business. Shortly after the deceased and the three accused persons, who were also in the company of a forth person by the Maurice Tengo, began to quarrel. The bereaved family and the Assistant Chief ordered that the three accused persons and Maurice Tengo be ejected.

Later there was a disco and the four sneaked back into the homestead and danced until about 4.00 am. Before leaving, the three asked the deceased to leave with them. Again in the company of Maurice Tengo, the three left with the deceased. The witness – PW1- decided to go to his home too at this time, walking behind the five. A short distance from the home where there was a funeral, the witness saw the three accused persons beating the deceased with sticks. He raised alarm but was warned by the three of dire consequences. Fearing for his life he returned to the home where there was a funeral and remained there until daybreak. On his way home he avoided the route where he had witnessed the deceased being beaten and used an alternative path. He did not tell any body what he had seen the previous night.

On 9<sup>th</sup> January 2003, while attending another funeral in the village, an argument arose on certain burial rites. The third accused had lost a paternal uncle. He warned the witness not to contribute to the discussion regarding these rites and ordered him to leave the homestead of the deceased. But when the witness showed no signs of leaving, the third accused ran towards his home. At this stage the witness sensed danger and complied by leaving. On his way out he met the 3<sup>rd</sup> accused who was holding a panga. The 3<sup>rd</sup> accused threatened to kill him. It was at this juncture that the witness resolved to reveal what had

happened on the night of 23<sup>rd</sup> November 2003. He made the report to the village Elder, Daniel Bokolo – PW6- who in turn directed that the matter be reported to the Assistant Chief – Javan – PW3.

That is the evidence offered by the State against the three accused persons. There is evidence that the deceased attended a funeral on 23<sup>rd</sup> November 2002 at Mzee Mwangolo's home. The deceased met his death, whose cause could not be established as the body had completely decomposed when it was discovered after 14 days. It is also observed that the deceased was the son to the second accused and a brother to the 1<sup>st</sup> accused. All the witnesses testified that the three- the deceased and the two first accused persons lived happily. The only evidence implicating the three accused persons is that of the first witness – Mzungu Mwadzombo Sanga. It is evidence that ought to be treated with utmost caution. It is unbelievable that after the three accused persons having been ejected from the homestead for being unruly returned and danced with the deceased until 4 am if there was bad blood between them.

Secondly, when the witness (Mzungu) saw the deceased being beaten by the three, Maurice Tengo who was with them simply stood by. The evidence of Maurice was of extreme importance – but the state did not find it prudent to call him if indeed he was present and witnessed the assault. Thirdly it is completely heinous on the part of Mzungu to have simply retreated when he saw the deceased being assaulted, merely claiming that the assailants had warned him. It is equally wicked that being a neighbour and a cousin to the deceased, he did not find it critical that whatever he had seen ought to have been reported to the family of the deceased or the village elder. On his way home he told a story that is equally fascinating. That he conveniently used a safe route from that where the deceased's body was. One and half months later when a less serious incident occurred, where the third accused threatened him that he decided to spill the beans – by reporting the threat to his life and the incident he witnesses regarding the deceased. He alleged that he made the report to the Village Elder who later took him to the Assistant Chief.

The two testified. The village Elder Javan said nothing about the incident of 23<sup>rd</sup> November 2002 or the threats to Mzungu's life by the third accused. The Assistant Chief, however, was categorical that Mzungu only report to him the threats that were issued by the third accused person on 9<sup>th</sup> January 2003 and no mention was made of the incident of 23<sup>rd</sup> November 2002.

Clearly, therefore, the only evidence linking the three accused persons with the murder of the deceased having been this discredited, there is nothing left against the three. I accordingly acquit the three accused persons, Gambo Mwanje Gambo, Mwagambo Gambe Tembo and Piri Munga Mwangemi of the charge of murder and set them free under section 306 of the Criminal Procedure Code forthwith unless lawfully held.

**Dated and delivered this 5<sup>th</sup> November 2004**

**W.OUKO**

**AG.JUDGE**