



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL CASE NO.36 OF 1998

REPUBLIC PROSECUTOR

VERSUS

SUMBUKO MULANDA KABWERE 1ST ACCUSED

DENNIS LEWA KIFOLA 2ND ACCUSED

RULING

The two accused stand charged with the capital offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars are that on 16/10 1997 at Mbaraka Chembe Kibaba Muche area within Watamu Location in Malindi District of the Coast province jointly murdered Konde Sawe hereinafter referred to as the deceased.

The prosecution evidence is that of PW.1, No.218636 Insp. David Mwangangi who testified that he took statements from both accused. These statements were rendered inadmissible after a trial within trial. The evidence of PW.2 was that he was sleeping in his house with his family when he was woken up by noise outside his house. He went out to listen and heard the voice of his neighbour saying "Wacha Uchawi Wacha Uchawi" He said it was the voice of Masumbuko his neighbour. He said he knew his voice. They had been neighbours for about one year. The witness Johnson Iha Yaa returned inside his house and slept until morning. On cross examination he said he heard the voice of Masumbuko on the night of 1/10/97, but did not see to whom he was speaking. He said he did not know who killed the deceased. There was also the evidence of PW.3, Jonathan who said he had a kiosk. On 14/10/1997 at 4.30 p.m. he was at his kiosk when the deceased came to purchase cigarettes. He did not have any and he directed him to another kiosk. He did not see him again and later he heard that he had died.

Also PW.4, Dama Mbambaya she was a seller of (pombe) traditional beer on 16/10/97 a man came to her and purchased some beer. She did not know him and he did not pay for the beer.

There is also the testimony of PW.5 Suleiman Katana. He was also residing in Chembe. On 10.10.97 he was sleeping in his house when he heard noise outside shouting "Wee Mchawi unaniroga" He did not leave his house but he said it was Kifola second accused because he knew him for about 1 year. This witness did not take any action as he thought the accused was drunk. It was on 14/10/97 at 9.30 p.m. when again he was in his house sleeping when the second accused opened his door and told him "I have beaten Konde". This witness said it was dark and he did not see the person who was taking. He slept out the night and in the morning when he was going away he met Sulubu who told him that the deceased was taken to hospital. This witness was arrested but released after interrogation. His evidence about how 2nd accused came to his house at night and what he said is unreliable. This witness even said that deceased

was known as a man who used to drink but no such evidence is disclosed by other witnesses. Further evidence was given by PW.6, the wife of the deceased, who said that on 14/10/97 she was away and returned at about 6.00 p.m. The children told her that the deceased had gone to buy cigarettes. Her husband did not return that night and at about 5.30 a.m. on 15.10.97 she inquired about whereabouts of her husband from neighbours. She was informed by wife of Charo that deceased had passed that way but had not returned. She followed the road to the shops and on the way she found shoes and cigarettes which she knew to be of her husband. There was blood stains in the area. She screamed and following a path saw his body on a pool of blood. She was alone. Arrangements were made to take the deceased to hospital. She said no weapons were found at the scene. Also there is evidence of PW.7, who was informed that his uncle (deceased) was at hospital. He later learned that he had died at Coast General Hospital. PW.8 was the pathologist who examined the body of deceased and testified that the cause of death was due to shock and hemorrhage due to head and chest injuries. Then there is evidence of officer Joel Monye who on 15/10/97 at Watamu Police Station he received the report of the assault of the deceased. He visited the scene and collected some stones which he said were blood stained. No photographs of the scene were taken and now at the time of testifying the stones did not show any blood stains. He was to visit the deceased at hospital to interview him but by the time he reached Coast General Hospital the deceased had already died. This witness also drew a sketch plan of the area of the crime. The sketch is exhibited. The prosecution closed its case after calling last witness Dr. Mwangome who testified that the accused were mentally fit to plead.

Upon the examination of the evidence it will be seen that on 1/10/97 – PW.2, Iha and on 10/10/97 – PW.5 both days after dusk the first accused and second accused are said to have been heard uttering words –

“Wee mchawi”

“Wee Mchawi”

“Umenioga”

There are several days before the night of the incident. The accused were not seen with eyes of witnesses but only recognized by voice. This evidence cannot be said to be sufficient circumstantial evidence to convict the accused persons. I have already said that evidence of PW.5 alleging that the 2nd witness said he

had beaten the deceased is suspect and unreliable on the ground that he was also a suspect.

There is therefore no evidence directly or indirectly which connects the accused with the murder of Konde Sawe alias Konde Masha. I find no case to answer against each of them. I therefore acquit them under Section 306 Criminal Procedure Code. The accused should be set free unless otherwise lawfully held.

Dated at Mombasa this 15th Day of May, 2002.

J. KHAMINWA

COMMISSIONER OF ASSIZE

Read in presence of: Ngombo and Accused.

Mr. Gumo State Counsel.

The assessors attending this case have been very helpful. The trial is now terminated and I wish to thank them and to order that they be discharged from serving for a period of 12 months.

Payment for today be made.

J. KHAMINWA

COMMISSIONER OF ASSIZE