



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CRIMINAL CASE NO. 4 OF 2014**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**EMMANUEL BARAKA GUNGA.....1<sup>ST</sup> ACCUSED**

**IBRAHIM YAA MANGI alias IBRA.....2<sup>ND</sup> ACCUSED**

**JUDGEMENT**

1. Emmanuel Baraka Gunga, the 1<sup>st</sup> accused person (A1) and Ibrahim Yaa Mangi alias Ibra, the 2<sup>nd</sup> accused person (A2) are jointly charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence, as per the information, disclosed that on 16<sup>th</sup> January, 2014 at Kanani Village, Watamu within Kilifi County they murdered Gunga Baya Thoya.
2. The prosecution's case is that on 16<sup>th</sup> January, 2014 Gunga Baya Thoya, the deceased was sitting at the veranda of his house when he was approached by two men who shot him on the face and fled. Present at the scene of crime during the incident were the deceased's daughter PW1 Rehema Gunga Baya and two of his wives; PW2 Dama Katana Kalulu and PW3 Kadzo Katana.
3. None of those present at the scene could identify the two killers. PW1's evidence on identification was that she heard the two men tell her father that they had been sent to him. As her father was asking who the sender was, she heard a loud bang. On looking she saw her father bleeding from the forehead. The two men fled away as she also took off in fear. She stated that the two men were of the same stature but she did not look at them carefully. Darkness was also setting in.
4. Cross-examined, PW1 stated that A1 is her brother and her father had not reported to her any dispute between him and A1.
5. The evidence of PW2 was that she had seen two men enter the compound but she never identified them. As she was in the kitchen she heard a loud sound like an explosion. She ran away with PW1 and when they came back she found her husband who had been sitting in the "baraza" had died.
6. PW2 talked of family disagreement over land. She stated that the deceased told her that Immanuel (A1) and Getrude who are his children would cause his death. PW2 was, however, clear that A1 and Getrude were not present when the deceased was killed.
7. PW3 stated that at the material time she was in the kitchen with PW2 making a meal for the deceased who was sitting in the verandah. She heard noise and found the deceased lying on the ground with blood. She denied knowledge of any grudge between the deceased and the members of his family. Her claim that there was no dispute in the family contradicted the evidence of PW2 who had stated during cross-examination that the deceased said on several occasions that his children had betrayed him and PW3 was present during one such occasion.
8. PW4 Reson Katana Kalulu, one of the sons of the deceased, stated that he was in Mombasa when he received information that his father had been killed. His evidence was that there was a dispute among the family members over the deceased's land which forced the deceased to involve government officials. He stated that on 18<sup>th</sup> December, 2012 the deceased in the presence of the chief sub-divided his land between his four wives. A1 was not amused with the deceased's action and stated so, going to the extent of telling the deceased that he hated him.
9. When cross-examined PW4 stated that A1 and Getrude were not happy about the sub-division of land by the deceased as A1 had sold some of the parcels of land without the deceased's consent and Getrude had occupied one of the pieces of land, also without the deceased's permission.
10. Benson Masha Kazungu, the Assistant Chief of Jimba Watamu sub-location testified as PW5. A summary of his lengthy testimony is

that the deceased called him and other elders as he wanted to divide his property among his wives. On 8<sup>th</sup> December, 2013 the deceased carried out the sub-division. A1 was not amused and the deceased wanted to beat him. It was then that the deceased claimed A1 would kill him as he was not his son. The deceased also stated that he was even ready for a DNA test to prove that A1 was not his son.

11. PW6 Emily Wakesh Mwanjala an employee of Post Bank based at Watamu testified that on 14<sup>th</sup> January, 2014 A1 went and withdrew Kshs.60,000 from his account. He wanted to deposit the money in his Mpesa account but his phone had problems. He then requested her to deposit Kshs.35,000 in the account of his sister, Getrude. She knew Getrude and as she could see her outside the bank she accepted A1's request and she deposited Kshs.35,000 in Getrude's account. A1 requested her to deposit the balance in the mpesa account of another person but she declined as she did not know the account holder. She identified in court the deposit she made in Getrude's account in a Safaricom Mpesa account statement shown to her. She also identified documents relating to A1's account with Post Bank.

12. PW7 Dr. Mohammed Hassan Mohammed performed post-mortem on the body of the deceased on 17<sup>th</sup> January, 2014. He formed the opinion that the cause of death was cardiopulmonary arrest due to fracture of spinal cord caused by a bullet wound.

13. The investigating officer Corporal James Mwaniki testified as PW8. He told the court that upon being instructed by the DCIO to investigate the death of the deceased, he proceeded to the scene. He found the body in a sitting position but leaning a bit. He interrogated PW1, PW2 and PW3. PW1 told him that she heard the two youthful killers tell the deceased that they had been sent to collect money but before the deceased could respond he was shot. He talked to other people present but they were not willing to talk as they suspected it was a family dispute.

14. PW8 visited the scene again the following day and retrieved a spent cartridge silver in colour. He later forwarded the same to a ballistics expert for examination.

15. According to PW8, he learned of disagreements between the deceased and A1. His investigation also revealed that on 14<sup>th</sup> January, 2014, two days prior to the incident A1 had withdrawn Kshs.60,000 from his Post Bank account and deposited Kshs.35,000 in the account of his sister by the name Getrude. Getrude had then sent Kshs.34,500 to one Pircilla Kenga who had in turn withdrawn the money and given the same to Getrude who gave it to A1.

16. When A1 was asked where he had been at that time he said he was not at Watamu but Safaricom records placed his mobile phone number 0729171084 at Watamu between 14<sup>th</sup> January, 2014 and 17<sup>th</sup> January, 2014. PW8 testified that when A1's sister Getrude Ingosi heard that the police were looking for her she disappeared. A1 was arrested and detained.

17. When the report on the spent cartridge that had been sent to the ballistics examiner came back, it disclosed that the bullet head was 9 mm caliber. At the same time, PW8 learned of investigations in police file No. 313/09/14 in which Ibrahim Yaa Mangi (A2), together with others, had been charged in Malindi Chief Magistrate's Court in Criminal Case No. 64 of 2014. Four spent cartridges recovered during the incident were submitted to the ballistics examiner. Through a report dated 23<sup>rd</sup> April, 2014 the ballistics examiner indicated that a Glock pistol had been used to fire the bullets. PW8 stated that that was the same pistol that had been used to kill the deceased. A2 was arrested and charged together with A1 for murdering the deceased.

18. PW9 Chief Inspector Alex Chirchir a ballistics examiner stated that he received a damaged bullet accompanied by an exhibit memo form from PW8 on 3<sup>rd</sup> February, 2014. He was requested to identify the calibre of the bullet, the type of firearm that can be used to fire it and whether the bullet could have been fired using any of the firearms that had been submitted to them for examination. Upon examination he found that the bullet was 9 mm caliber which could be used in a pistol. He could not however tell the type of pistol that could be used to fire the bullet. He indicated that since the bullet was damaged it was not suitable for microscopic examination. He also could not connect the bullet with any other examination they had already done. He prepared and signed a report dated 11<sup>th</sup> March, 2014 which he produced as an exhibit in this case.

19. PW9 proceeded to testify that on 31<sup>st</sup> January, 2014 he received a cartridge case marked "N2" accompanied by an exhibit memo form from Inspector Kipkemboi Rop. The request was to ascertain whether the cartridge was fired by a pistol. His examination of the cartridge disclosed that the cartridge was fired by a Glock type pistol. Upon microscopic analysis he found that the firearm that had fired "N2" had been involved in other incidents in Malindi. He prepared and signed a report on 5<sup>th</sup> February, 2014 and produced it as exhibit.

20. PW9 also examined four cartridges marked "X1-X4" accompanied by an exhibit form from Corporal Mwaniki. The request was to find out the caliber of the cartridges and their relationship to any previous examinations. He found that the four cartridges had been fired by the same Glock pistol which had fired the bullets in his 1<sup>st</sup> and 2<sup>nd</sup> reports. He prepared and signed a report dated 23<sup>rd</sup> April, 2014 which he produced as exhibit.

21. PW10 Quinto Odege an officer with the Directorate of Criminal Investigations seconded to Safaricom Law Enforcement Liaison Office produced a report prepared by his colleague Corporal Fazal Jama in compliance with an order issued in Malindi CM Misc. Case No. 23 of 2014 which required certain information.

22. In his defence A1 stated that on 16<sup>th</sup> January, 2014 he was at the car wash at Watamu when he received a call from his wife who informed him that an alarm had been raised near his home. She requested him to go home as she was fearful. He proceeded to his father's house as he had heard people wailing from that direction. He went and found his father with injuries on the mouth. Police officers had not arrived and they telephoned them. Police officers came and took the body to the mortuary. The next day they recorded statements at Watamu Police Station. On 18<sup>th</sup> January, 2014 his elder brother Mkutano called him to the police station. On arrival he was arrested and escorted to Malindi Police Station where he was interrogated. Two days later he was shown A2 who was with others in a room. He was asked if he knew him and he said he did not know him and neither did he know the other people in the room.

23. A2 opted for silence as his defence.

24. From the evidence of PW1, PW2 and PW3, it is clear that none of the two accused persons was present at the time the deceased was killed. Indeed these witnesses who knew A1 very well as he was a family member were categorical that A1 was not one of the two men who shot the deceased. The killers were unknown to the witnesses otherwise they could have identified them to the police.

25. The impression I get is that the prosecution links A1 to the crime based on what the deceased uttered and the Kshs.60,000 he withdrew from his Post Bank account at Watamu two days prior to the killing of the deceased.

26. As for A2, the prosecution's case appears to be that the bullet that killed the deceased was fired from a pistol recovered from him.

27. This being a criminal case, the prosecution has a duty to prove its case beyond reasonable doubt. The evidence adduced must connect each accused person with death of the deceased.

28. As for A1, the evidence is that he had a dispute concerning the manner in which the deceased distributed his wealth. The evidence of PW2 and PW5 points to the deceased complaining about A1 and Getrude. Indeed PW5 talks about the deceased wanting to beat A1 in annoyance. None of them talk of A1 threatening to kill the deceased. PW4 talked of A1 saying that he hated the deceased and refusing to assist PW4 in taking the deceased to hospital for treatment whenever he was sick. Again there is no mention that A1 threatened to kill the deceased.

29. Turning to the money withdrawn by A1 on 14<sup>th</sup> January, 2014, it is clear that part of the money was given to Getrude. PW8 talked of Getrude transferring the money to Pircilla Kenga who in turn withdrew it and gave it back to Getrude in cash. This evidence amounts to speculation as PW10 was clear that although Getrude did indeed transfer the money to Pircilla Kenga he was never asked to investigate the Mpesa account of Pircilla Kenga. There is therefore no evidence to show what happened to the money once it hit the account of Pircilla Kenga. No evidence was adduced to back the investigating officer's claim that Pircilla Kenga withdrew the money and gave it back to Getrude.

30. In any case, there is nothing to show that the money withdrawn by A1 was used to pay the killers of the deceased. A1, as he was legally entitled to, did not offer any explanation about the money. It was the duty of the prosecution to connect that money with the killers of the deceased. This was not done.

31. There is nothing to connect A1 with the killing of his father. The investigating officer's antenna may have been raised by the withdrawal of the money by A1 and the disappearance of Getrude once she realized police officers were looking for her. However, suspicion alone, however strong, cannot provide a basis for inferring guilt - see **Neema Mwandoro Ndurya v Republic [2008] eKLR** and **Sawe v Republic [2003] KCLR 364**. The prosecution had a duty to adduce evidence linking the money withdrawn by A1 to the killers of the deceased.

32. Concerning the evidence against A2, the same does indeed look strong upon a cursory glance. The bullet that killed the deceased, was, as per the evidence of the expert (PW9), fired from a pistol that had been used in other incidents in Malindi.

33. A closer look of the evidence however shows that the investigating officer (PW8) never adduced evidence to link the said pistol to A2. It was incumbent upon PW8 to produce evidence on the recovery of the pistol from A2. The fact that A2 had been charged with attempted robbery was not sufficient to connect him with the murder weapon. It is indeed on record that A2 had been arrested with others. How then can one say it was A2 and not the others who had the firearm?

34. No evidence on the circumstances leading to the recovery of the firearm was led by the prosecution. The evidence of PW9 was also contradictory. He initially stated that he did not know the type of pistol from which the bullet that killed the deceased had been fired from. However, when concluding his testimony he stated that another set of bullets marked "X1-X4" had been fired using the same pistol that had killed the deceased. No attempt was made to explain this contradiction.

35. From the above analysis it becomes clear that none of the two accused persons were positively linked to the death of the deceased by the prosecution. The case against each one of them fails. The result is that each accused person is acquitted and set at liberty unless otherwise lawfully held.

**Dated, signed and delivered at Malindi this 19<sup>th</sup> day of July, 2018.**

**W. KORIR,**

**JUDGE OF THE HIGH COURT**