



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL CASE NO. 7 OF 2010

REPUBLIC.....PROSECUTOR

VERSUS

OMARI BAKARI MUNANBO MALA.....ACCUSED

JUDGMENT

The Accused is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code.

The particulars being that:-

“On the 19th day of March, 2010 at Kibokoni area Mombasa County, jointly, with others not before the Court they murdered ISMAEL MOHAMED”.

The prosecution in this case called seven (7) Witnesses. The defence called one.

The prosecution had set out to prove a charge of murder against the Accused. The Deceased had allegedly stolen a side mirror of a car belonging to one of the suspects of murder. He attempted to escape but he was chased and arrested and beaten by the Accused in the company of other suspects and members of public. He was tied with ropes. While still alive put in a sisal sack, dragged along the road and later dumped into the sea. The body was later retrieved and identified and taken to Coast General Hospital for post mortem examination and later released to relatives for burial purposes.

Dr. Ngali Mbuko (PW4) conducted post mortem examination on the body of the Deceased. It was covered with sandy soil. The head was deformed with multiple fresh irregular cuts on both the upper and lower limbs, there were multiple bruises on the trunk and limbs. He formed the opinion that the cause of death was as a result of severe head injuries. In his defence the Accused testified that he was a watchman guarding vehicles for customers at Kibokoni. On the fateful day at about 4:00am the Deceased was seen stealing a side mirror from a car belonging to one Awadh. He was chased and arrested. It was decided that before being taken to police station the owner should be informed. He was left at his place of work. The following day Awadh told him to wash his vehicle as he was going to record a statement.

He denied having seen a Masai watchman beat the Deceased. He also denied having beaten the Deceased. That he later got information that the Deceased had been found dead by a police reservist by the name Fuad who told him that he was required to record a statement at the police station but upon

going there he was placed in cells where he found Philip Kiplagat (Tupac) and martin Muriithi. It was said that Awadh was out of the country. The Accused maintained that after handing over the Deceased to Awadh he left the matter at that.

This case has a chequered history. The Accused was arraigned in Court on 6th April, 2010. The first Witness Felix Kiplagat testified in Court on 10th May, 2012 which was more than a year later.

On 6th June, 2012 the investigating officer was placed on the dock so as to explain the reason for not bonding the Witnesses. He informed the Court that he was being frustrated by his superiors in the conduct of investigations in the case and of how he had been subjected to un called for punishment. He specifically told the Court that he had been summoned by the OCS Central at the time one Chief Inspector Eliud Njeru and informed that the OCPD one Tom Odero wanted to see him in his office with the file and of how he was informed that he was to stop looking for the other suspects in the case and in particular one Mr. Awadh. The Witnesses in the case were later arrested. They recorded their statements but were allegedly threatened by a Mr. Awadh. These Witnesses were (1) Chirchir Okoth, and Yusuf Hassan Yusuf.

In the cause of the proceedings an application was was made under section 33 (b) of the Evidence Act for the production of the statement of Martin Mureithi who was not willing to testify on account of the threats. Witness Chirchir Okoth Lang'a and Yusuf Hassan Yusuf did not avail themselves to testify in this case. These Witnesses would have thrown light in the role the Accused played after handing over the Deceased to Awadh, the owner of the stolen side mirror.

The Witnesses who testified in Court did not mention the Accused as one of the killers. The Accused is mentioned in the statements of Yusuf Hassan Yusuf and Churchil Okoth Langa but these Witnesses did not present themselves in Court to testify.

Their statements were therefore not tested in cross-examination and in the absence of other evidence pointing to the Accused's guilt it would be unsafe to wholly rely on them to determine the Accused guilt or innocence.

The investigations in this case were tampered with as alleged by the investigating officer himself by a Senior police officer.

The case has not been proved beyond reasonable doubt. Accused is found not guilty of the offence of murder contrary to section 203 of the Penal Code and he is acquitted accordingly under section 322 of the Criminal Procedure Code.

He is set at liberty unless otherwise lawfully held.

Judgment delivered, dated and signed this **12th** day of **October, 2015**.

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M. MUYA

JUDGE

12TH OCTOBER, 2015

In the presence of:-

Learned Counsel for the Director of Public Prosecution Mr. Masila

Learned Counsel for the defence Mr. Were

Court Assistant Musundi