



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CRIMINAL CASE NO. 42 OF 2012**

**REPUBLIC ..... PROSECUTOR**

**VERSUS**

**1. NDORO MBEGA .....1ST ACCUSED**  
**2. GABRIEL MBEGA SHEHI ..... 2ND ACCUSED**

**JUDGMENT**

The two Accused persons are jointly charged with murder contrary to section 203 as read with section 204 of the Penal Code.

The particulars are that:-

***“On the 18th day of July, 2012 at about 19:30 hours (7:30 pm) at Egu village, Taru Location Kwale County, they murdered Tsuma Mbega”.***

In support of their case the prosecution called nine Wittinesses and the defence called three(3).

The Deceased and the Accused persons are relatives. The first Accused is a younger brother of the Deceased and 2nd Accused a nephew. A child of the first Accused was ailing and so was the wife of the second Accused. They blamed the Deceased for bewitching their dear ones.

Meetings had been called to discuss this issue whereby the Deceased insisted that he was not a Wizard but he had acquired charms to defend his family and property. He had agreed to seek the services of a witch Doctor to remove the said charms.

The wife of the Deceased (PW 1) testified in Court to the effect that on the 18th day of July, 2012 at about 7:00 p.m. She was in the company of her husband and a relative taking supper when they suddenly saw flash lights emerge from the darkness. She saw the two Accused persons who were armed with pangas. Upon seeing them her husband stood and started running towards a cattle shed but the two followed him and proceeded to cut him on the back and head severally and he fell down. She screamed for help while in the company of her co-wife. Neighbours arrived at the scene and one Ibrahim Ngoro proceeded to report the matter to the village elder who in turn called the police. When police arrived she informed them of what had taken place. She further told the Court that after killing the Deceased the two Accused persons went away but returned later. Police found them in the homestead as they stay in the same compound as the Deceased. She further told the Court that when her husband was attacked she was in the company of her co-wife who also saw what had transpired. The co-wife testified as PW 2 and told the Court that the Deceased had arrived home at about 7:00 pm and found her with her co-wife.

After supper she asked for a torch from the Deceased so as to take the children to sleep in the main house. Upon returning she heard the barking of dogs. She did not find her husband where she had left him but she saw his shoes and lessso. She went and reported the disappearance of her husband to his mother. They went searching for him and found his body lying near a cattle boma. He had cut wounds on the back, the head and the stomach. After finding the body they screamed for help.

Her co-wife was at the time hiding in the nearby forest. Police were later called at the scene. The Accused persons were present when police arrived.

The body of the Deceased was taken to the mortuary and post mortem examination was carried by Dr. Gabriel Mngola who formed the opinion that the cause of death was hemorrhagic shock.

In this case the offence of murder is said to have been committed on 18th July, 2012. The two Accused persons were arrested on 8th day of August, 2012 and were arraigned in Court on 9th August, 2012.

PW 1 testified to have seen the two Accused persons attack her husband that night while armed with pangas and further that she was in the company of her co-wife PW 2 who also saw the attackers. She is the prosecution star Witness as she is the only eye Witness.

Her evidence was contradicted by PW 2 who told the Court that at the time of the attack on the husband she was not present as she had taken her children to sleep in the main house. She further told the Court that upon return to where she had left her husband and co-wife she did not find them and decided to report the matter to their mother in law and a search commenced only to find the Deceased lying dead near the cattle boma. At the time of the recovery of the body PW 1 was nowhere to be seen as she had gone into hiding in nearby bushes.

### **Identification**

It is noted that the incident took place at night. PW 2 had to seek the services of a torch to take her children to the main house. The source of light was not positively authenticated and it was said that there was a lantern lamp and fire from the kitchen. I find the circumstances obtaining at the time did not afford a proper scenario for identification. PW 2 did testify that she did not see the attackers that night.

PW 1 testified to have seen the two Accused persons attack the deceased that night. That she saw them go away but later returned before the police officers arrived.

If the two Accused persons were the attackers would they have stayed at the scene awaiting the arrival of the police? Hardly.

PW 1 alleges to have seen the two Accused persons attack and kill her husband, yet she did not tell the police that night the alleged killers nor did she tell this to any of the other Witnesses who testified in this case. The Accused persons participated in the burial of the Deceased and were arrested two weeks later. Its highly unlikely that PW 1 had identified the killers that night, had she done so, the Accused persons would have been arrested the same night. The reason for their arrest appears to be the allegations of Witchcraft which they made against the Deceased. Those allegations by themselves are not sufficient proof that they are the ones that murdered the Deceased. This case has not been proved beyond reasonable doubt.

The two accused persons are acquitted of the offence of murder contrary to section 203 as read with section 204 of the Penal Code under Section 322 of the Criminal Procedure Code. They are set at liberty unless otherwise lawfully held.

**Judgment delivered, dated and signed this 6th day of October, 2015.**

.....

**M. MUYA**

**JUDGE**

**6TH OCTOBER, 2015**

***In the presence of:-***

Learned Counsel for the prosecution Miss Nandi

Learned Counsel for the defence Mr. Masila absent

Court Assistant Mr. Musundi

**M. MUYA - JUDGE**