



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL CASE NO. 19 OF 2008

REPUBLIC..... PROSECUTOR

VERSUS

**1. TSUMA CHIGUMBA GONDA
2. HAMISI MTWANA KABAAACCUSED**

JUDGMENT

The two Accused persons above mentioned are charged with two counts of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars in the first Count are that:-

“On the 4th day of February, 2008 at Bondeni – Mombasa County, jointly, murdered ESMAIL MOHAMED ABOO”.

On the 2nd Count the particulars are that:-

“On the 4th day of February, 2008 at Bondeni – Mombasa County they jointly murdered ZUBEDA ESMAIL ALI ABOO”.

Brief facts for the prosecution case.

A total of nine witnesses testified in support of the prosecution case. The defence called two. The two Deceased persons **ESMAIL MOHAMED ABOO** and **ZUBEDA ESMAIL ABOO** were Husband and wife and were staying together in a house at Memon flats Bondeni. They were an elderly couple. They were staying alone and had a casual house help by the name of **HAMISI MUTWANA KABAA** (2nd Accused person).

On the 4th day of February, 2008 the two were found dead inside their house a result of strangulation.

In the present case no Witness saw the two Accused persons kill the two victims.

From the evidence before the Court, Memon Villas comprises of four block of flats A, B, C, D. The couple were staying in one Block.

Ali Mohamed (PW 1) was a day watchman he did testify that on the 4th day of February, 2008 at 10:30 a.m. He was on duty. After some time he heard a sharp scream and he decided to go and find out what was wrong. While climbing the stairs of Block “C” he met the 2nd Accused who was working for the Deceased persons. He asked him where the screams were coming from but the 2nd Accused answered

that he did not hear any. He enquired from a lady nearby but she also told him that she had not heard any screams.

At about 11:45 am the first Accused went out being followed by 2nd Accused. At about 4:00 pm a house help by the name of Ngala (PW 3) told him that one Abdul Aziz had informed him that the two Deceased persons had been killed.

Abdul Azizi Salyani (PW 4) did tell the court that on the 4th day of June, 2008 at about 4:00 pm he was sent by his mother to go and check his grandparents (murder victims). He knocked at the door but there was no response. He opened the door and entered. There was nobody in the sitting room. The kitchen door was closed. In the master bedroom he saw the legs of Esmail under the bed. Upon further scrutiny he saw that the neck was tied with a lesso. He dashed down and informed security officers who went and confirmed that Esmail was already dead. They started searching for his wife.

The kitchen door was locked. They forcefully broke it while in the company of PW 1 and PW 4. They found the body of his grandmother who had been tied with a piece of cloth around the neck. The head was swollen. He reported the matter to his parents and police were called at the scene.

Mohamed Rafiq Abdul Azizi (PW 5) testified to the effect that at about 4:00 pm his son Abdul Aziz PW 4 called him and informed him that his parents had been murdered. He went to the scene and confirmed that the victims had been strangled with pieces of cloth. The 2nd Accused was nowhere to be seen. He was sought for and later arrested. He mentioned the 1st Accused who was also arrested and charged. The Witness also told the Court that on the day in question at about midday food was taken to the victims house by Yusuf and Hamisi but they returned it when they did not find the victims. He further told the Court that Hamisi had left the food on the table. Yusuf was working for a neighbour called Noorani. He also left the food on the table. He also testified that the 2nd Accused had said that he was going on leave and had taken a replacement there (1st Accused).

In spite of numerous adjournments, the investigating officer did not avail himself in Court to testify in this case.

None of the arresting officers did present themselves in Court to explain the reasons for arresting the two Accused persons.

The only police officer who testified was Corporal Wamalwa (PW 7).

He told the Court that the report of murder was received on 4th February, 2008 but they visited the scene on 6th February, 2008. No reason is given why police did not visit the scene on the day of the incident, and if other police officers had done so, there is no such evidence before this Court. If the police visited the scene on 6th February, 2008, it must have been greatly interfered with, and it must have been difficult to obtain forensic evidence.

The only reason why the 2nd Accused was arrested was because he was a casual house help for the victims and the first Accused because he was a relative who was to take over his duties while the 2nd Accused was on leave. There is evidence from PW 1 that the Accused persons left the premises at around 11:30 am. There is evidence from PW 5 Mohamed Rafiq Abdulaziz that at about midday one Yusuf and Hamisi had taken food to the house of the murder victims and left it on the table. These two Witnesses were not called to testify. It has not been ascertained how many more people had access to the victims house.

The evidence against the Accused persons is purely circumstantial in nature.

In the Court of Appeal Case of James Mwangi Vs Republic 1983 KLR page 327, it was held,

“In a case depending on circumstantial evidence, in order to justify the inference of guilt, the incriminating facts must be incompatible with the innocence of the Accused, the guilt of any

other person and incapable of explanation upon any other reasonable hypothesis than that of guilt.

(2) In order to draw the inference of the Accused's guilt from circumstantial evidence, there must be no other co-existing circumstances which would weaken or destiny the inference”.

In the present case apart from the two Accused persons, there were other persons who had access to the house of the murder victims and indeed two did visit the victims on the fateful day at around midday. These two Yusuf and Hamisi were not called to testify in this case. The exact hour of death was not captured in evidence, but the discovery of the dead bodies of the victims is given as 4:0 pm. There are numerous gaps in the prosecution case which create serious doubts on the guilt of the Accused persons.

In conclusion, this case has not been proved beyond reasonable doubt. The two Accused person are found not guilty on the two Counts of murder contrary to section 203 of the Penal Code and they are acquitted under section 322 of the Criminal Procedure Code.

They are set at liberty unless otherwise lawfully held.

Judgment, delivered dated and signed this **3rd** day of **November, 2015**.

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M. MUYA

JUDGE

3RD NOVEMBER, 2015

In the presence of:-

Learned Counsel for the prosecution

Learned Counsel for the defence

Mr. Odhiambo holding brief Mushelle and for the 1st Accused

Court Assistant Mr. Musundi

M. MUYA – JUDGE

3/11/2015