REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL CASE NO. 16 OF 2012

REPUBLIC……..…….……PROSECUTION

VERSUS

EMMANUEL NYANGE MWADOE…….....……..……ACCUSED

JUDGMENT

The accused **EMMANUEL NYANGE MWADOE** has been charged with the offence of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE**. The particulars of the charge were that

"On the 4th day of September, 2011 at Kwahola area in Mombasa District within Coast Province, jointly with others not before court murdered SAMUEL BAUNI KINGORI."

The accused entered a plea of *'Not Guilty'* to the charge and his trial commenced before me on 21st June, 2012. The prosecution led by **MR. TANUI** learned state counsel called a total of eight (8) witnesses in support of their case. **MS. ODHIANG** Advocate acted for the accused.

Briefly the facts of the case were as follows. **PW4 JOSEPHINE WAMBUI** the widow of the deceased told the court that on 4th September, 2011 a Sunday she spent the day at home with the deceased who was her husband. At 6.00 p.m. the deceased left the house saying that he was going out to meet a friend called Gitau. He returned home at 10.00 p.m. after the gate had been locked. **PW4** heard a knock on the gate and went to open. She found the deceased leaning on the wall badly injured. His body and clothes were full of blood. As soon as **PW4** opened the gate the deceased fell down. **PW4** shouted for help. Neighbours came and helped her lift up the deceased. He had two cuts on the head which were bleeding heavily. They got a taxi and rushed him to Coast General Hospital where he was admitted. The following day the deceased succumbed to his injuries at about 2.00 p.m. The deceased died without uttering a word thus he did not say what had happened to him or who had attacked him. **PW4** realized that the deceased's mobile phone was missing. She reported the incident to the police.

The police took up the matter and commenced investigations. They tracked the phone number of the accused and managed to trace the handset. The phone handset was recovered on the accused who was traced in Kibokoni area of Mombasa on 21st March, 2012. He was placed in custody and charged. The mobile phone which was recovered from the accused and which was identified by **PW4** was produced in court as an exhibit **Pexb1**. The accused was thereafter arraigned in court and charged.

At the close of the prosecution case the accused was found to have a case to answer and was placed on his

defence. He gave a sworn defence in which he stated that he purchased the phone from a trader in Mwembe Tayari. It is now upon this court to decide whether the prosecution has proved its case beyond a reasonable doubt.

Section 203 of the Penal Code defines the offence of murder as follows:

> **"Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder."**

The prosecution must therefore prove the following three crucial ingredients in order to prove the charge of murder. These are:

1. Proof of fact as well as the cause of death of the deceased.
2. Proof that the death of the deceased was caused by an unlawful act or omission on the part of the accused.
3. Proof that the said unlawful act or omission was committed with malice aforethought.

The fact and cause of death of the deceased are both very straightforward. **PW4** the widow of the deceased told the court that on 4th September, 2011 her husband went out at 6.00 p.m. He returned home at 10.00 p.m. badly injured with two deep cuts to his head. She rushed him to hospital but he died the following day. **PW1 NORMAN KARIUKI GITONGA** a cousin to the deceased and **PW2 SIMON NDUNGU MATHENGE** also a relative to the deceased both went to witness the autopsy on the body of the deceased. Both witnesses who knew the deceased well identify him as '*Samuel Bauni Kingori'*. They both testify that they saw deep cuts on his head.

Evidence regarding the cause of death is provided by the testimony of **PW7 DR. GABRIEL MNGOLA** a medical officer attached to the Coast General Hospital. **PW7** told the court that he conducted the autopsy on the body of the deceased. He confirms that he saw a large cut on the head and that the skull had been fractured. He opined that the cause of death was **"traumatic head injury"**. He filled and signed the postmortem form which he produced in court as an exhibit **Pexb5**. This was expert medical evidence and was neither controverted and/or challenged by the defence. It is clear therefore that the deceased met his untimely death as the result of an unlawful attack on his person.

Having proved both the fact as well as the cause of death the prosecution must go further and prove that it was the accused who by an unlawful act or omission caused the death of the deceased. No witness who testified in court witnessed the actual attack on the deceased. **PW4** his wife can only confirm that when her husband left their house at 6.00 p.m. to go and meet a friend he was well and healthy. He returned a few hours later badly bruised and injured. **PW4** has no idea who assaulted the deceased. Since there was no eyewitness to the assault the prosecution seeks to rely upon circumstantial evidence in order to prove their case. Circumstantial evidence is that evidence which though not direct is sufficient to prove a fact in issue. In the case of **REPUBLIC VS. KIPKERING arap KOSKE & ANOTHER [1949]16 135**, the Court of Appeal for Eastern Africa held that

> **"In order to justify on circumstantial evidence the inference of guilt the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt, and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused."**

This means that in order for circumstantial evidence to suffice as proof of guilt – it must form the only possible explanation of events leading to the death of the deceased. Any other possible hypothesis must be positively excluded. In this case, the factor being relied upon as circumstantial evidence is the fact that a mobile phone suspected to have been stolen from the deceased at the time of the fatal attack was allegedly found in the possession of the accused. At the outset this supposition is beset with problems.
PW4 the wife of the deceased identifies a mobile phone make Nokia 1200 **Pexb1** as belonging to the deceased. She is unable to produce any document as proof of purchase of this phone i.e. a receipt and

she is equally unable to tell the court the serial number of her late husband's phone. **PW4** merely identifies the phone by its make and by the fact that some of the keys had faded. A Nokia 1200 is a very common phone to be found I dare say on hundreds if not thousands of Kenyans. The faded keypad cannot be said to be a unique mark. With continual use several mobile phones develop faded keypads and the numbers are rubbed off. Secondly the prosecution invites the court to assume that this mobile phone was stolen from the deceased at the time of his attack or in the course of the attack. The wife of deceased had indicated that he went out to meet a friend called *'Gitau'*. This Gitau who was a key witness was not called to testify. His evidence was necessary to confirm firstly if he did meet the deceased and secondly how, where and when they parted company. The failure to call this *'Gitau'* as a prosecution witness leaves a gap in the prosecution case. The possibility that this phone may have been stolen either before or after the accused had been fatally attacked has not been positively excluded. It must be remembered that the prosecution is under an obligation to prove each and every element of the offence beyond a reasonable doubt. The court cannot make a decision on the basis of assumptions.

The fact that led to the arrest of the accused was the investigations police carried out to track the phone line of the deceased through Safaricom, the service provider. **PW5 PC GABRIEL ICHAGE** told the court that he obtained the telephone number of the deceased from his wife. The telephone number was 0725-944467 a safaricom line. **PW5** then wrote to the safaricom liaison department seeking a printout for this number as well as an indication of the serial number of the phone being used with the line. He received a reply from safaricom dated 9th September, 2011 revealing that the serial number of the phone being used with that line was 3593380393044. **PW5** wrote again to safaricom to enquire which line was currently being used in the phone serial number 3593380393044. He received a reply dated 17th November, 2011 that the said handset was being used with a line number 0721-737228 which line was registered to one Emmanuel Mwadoe (the accused). Police then launched a search for accused and traced him in Kibokoni in Mombasa. Accused was arrested on 21st March, 2012 and the phone found in his possession was confiscated. **PW4** later identified the phone as that of her husband **Pexb1**. **PW5** produced as exhibits all the correspondences he made and received from safaricom **Pexb2** and **Pexb3.**

PW6 PC KARIUKI MWIKA is a CID officer who is attached to safaricom. He basically confirms the evidence of **PW5**. **PW6** further reveals that the line number 0721-737228 registered to the accused was inserted into the handset on 6th September, 2011 at 19.12 hours. The witness further reveals that the deceased's sim card for line number 0725-944467 was in the handset until 4th September, 2011 at 8.00p.m. From 17th October, 2011 to 25th October, 2011 the accused's sim card was in the handset. **PW5** produces the data which he extracted as evidence in this case **Pexb2**, **Pexb3** and **Pexb4**. Under cross-examination by defence counsel **PW5** admits that between 4th September, 2011 the day the deceased was attacked until 5th September, 2011 the handset had no sim card and was not in use. It was not until 6th September, 2011 that the accused's sim card was inserted into the phone. From the analysis of the documentation and the evidence of **PW5** and **PW6** there was a time lapse of two (2) days from the date when the deceased was attacked on 4th September, 2011 to the date when the accused's sim card was first detected in the handset said to belong to the deceased. The accused's defence is that he purchased the handset from a third party. Two (2) days is certainly enough time for the attacker/killer of the deceased to have disposed of the phone since mobile phones are fast moving items which are quickly and easily disposed of. In view of the fact that no eyewitness saw accused attack the deceased and in view of the two day time lapse before the accused's sim card was placed in the phone, the defence raised by accused is probable and cannot be dismissed as out of hand. No hypothesis is given (or even suggested) by the prosecution to explain where this phone was or in whose possession it was between 4th – 6th September, 2011. Failure to explain this time lapse leaves a gap in the prosecution case. It cannot be assumed that the handset was in the possession of the accused from 4th – 6th September, 2011 since nobody saw him with it. The very real possibility that the killer(s) of the deceased stole his phone and then sold it two (2) days later to the accused has not been positively excluded. As stated earlier circumstantial evidence will only suffice where no other possible hypothesis can be advanced to explain the facts. This is not the case here. The fact that the accused was unable to point out the person in Mwembe Tayari who sold him the phone does not negate his defence. The law does not require that an accused **prove** his innocence. Onus at all times is upon the prosecution to prove its case beyond a

reasonable doubt. The defence raised by the accused has in my view cast a doubt on the prosecution case. The benefit of doubt must be accorded to the accused. I am not satisfied that the circumstantial evidence points exclusively at the accused as the perpetrator of this crime. I therefore enter a verdict of *'Not Guilty'* and I acquit the accused under section 306(2) of the Criminal Procedure Code. Accused is to be set at liberty forthwith unless he is otherwise lawfully held.

Dated and delivered in Mombasa this 9th day of May, 2014.

M. ODERO

JUDGE

In the presence of:

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