



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL CASE NO. 9 OF 2009

REPUBLIC.....PROSECUTION

VERSUS

1. DAVID MOMANYI MATHEWS

2. PETER BADA KARISA.....ACCUSED

JUDGMENT

The two accused persons namely **DAVID MOMANYI MATHEWS** (hereinafter referred to as the 1st accused) and **PETER BADA KARISA** (hereinafter referred to as the 2nd accused) are jointly 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 31st day of December, 2008 at Maweni village in Diani Location, Msambweni District within the Coast Province jointly with others not before court murdered MARCO MOHAMED YUSUF.”

Both accuseds entered a plea of ‘*Not Guilty*’ to the charge and their trial commenced before me on 23rd June, 2010. **MR. MUSHELLE** Advocate appeared for the 1st accused whilst **MS. MAITHYA** acted for the 2nd accused. The prosecution led by **MR. ONSERIO** state counsel called a total of seventeen (17) witnesses in support of their case. The brief facts of the case were as follows. The deceased **Marco Mohamed Yusuf** was a single woman who lived in the Ukunda area of Msambweni. At the material time she was engaged in the construction of a house for herself. The 1st accused who was known to most people in the area as ‘*Mogaka*’ was her house-servant. **PW2 AUGUSTINE MULO KYAMBI** who worked at a security guard in a school in Ukunda told the court that on 31st December, 2008 (New Year’s Eve) he reported on duty at 6.00 p.m. As he was changing into his uniform he saw the 1st accused who told him that they had caught a thief stealing wood within their compound. At that point the deceased (who was commonly referred to as ‘*Mama Marco*’) drove by in her car with her driver. She questioned the 1st accused about why he had left his work place. The 1st accused told her that a thief had been caught in the compound. The 1st accused then left with the deceased.

PW6 HADIJA MOHAMED HAMISI and **PW9 MOHAMED OMAR IBRAHIM** told the court that the deceased was their neighbour. **PW6** testified that on 31st December, 2009 she received a call from a person known as ‘*Jameni*’ in Nairobi asking her to go and check on the deceased. She and her husband called Group 4 Security and rushed to the home of the deceased. **PW6** said her husband warned her not

to move closer as the body of the deceased lay in the compound. **PW6** phoned **PW9** who was also a neighbour. **PW9** testified that he received the call while he was at the mosque celebrating the New Year. He also rushed to the home of the deceased and found her dead body lying outside the house. Police were called and came to the scene. **PW12 PC (W) IRENE MWANZIA** was one of the officers who went to the scene on the material day at 10.00 p.m. She states that upon arrival they found the body of the deceased lying about 3m from the house. Next to the body was a blood-stained jembe, a white blooded pant and a pail with a plate inside. Police recovered the exhibits and removed the body to the mortuary. After the autopsy examination the body was handed over to the family for burial. Police commenced investigations into the matter. A mobile phone make Nokia 1110 said to have belonged to the deceased was recovered on **PW7 BENSON KIDUNGWA KALEMA**. **PW7** in his evidence told the court that the 2nd accused a fellow taxi-driver sold him the said phone for a sum of Kshs. 1,500/=. He led police and pointed out the 2nd accused who was arrested. Meanwhile the 1st accused who had left Diani on the date of the murder was terraced and arrested from his rural home in Gesubu Location of Kisii County. Upon completion of police investigations both accuseds were arraigned in court and charged.

At the close of the prosecution case both accuseds were found to have a case to answer and were placed on their defence. They both denied having any involvement at all in the death of the deceased. This court now must consider and analyze the evidence on record to determine whether the charge of murder has been proved as against both the accused persons beyond a reasonable doubt as required by law.

The offence of murder is defined by section 203 of the Penal Code as follows

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”

The law requires that the prosecution tender evidence sufficient to prove the following three ingredients of the offence of murder beyond a reasonable doubt

1. Proof of the fact and cause of death of the deceased
2. Proof that the deceased met his death as the result of an unlawful act or omission on the part of the accused
3. Proof that said unlawful act or omission was committed with malice aforethought.

With regard to the first ingredient there exists no controversy. The fact of the death of the accused is not in any doubt whatsoever. Several of the prosecution witnesses testify that they saw the body of the deceased lying dead outside her house in Ukunda. **PW6** and **PW9** who were neighbours of the deceased, who both used to visit her often and knew her well identify the deceased as ‘*Marco Mohamed*’. **PW11 SERGEANT MICHAEL ODUOR** a gazetted scenes of crime officer did attend to the scene and took several photographs which he has exhibited in court **Pexb2**. I have examined the said photographs which depict the body of a female adult of Somali extraction lying dead with a wound to the head. Therefore the fact of the death of the deceased cannot be of any doubt.

Evidence regarding the cause of death of the deceased was tendered by **PW17 DR. KEVIN KINYUA** who was by then the District Medical Officer at Msambweni Hospital. He told the court that on 1st January, 2009 he performed an autopsy examination upon the body of the deceased. Externally he noted the following injuries

- Fracture of cervical bone on neck
- Laceration on the head above the ear
- Depressed skull fracture

PW17 opined that the cause of death was the skull fracture. He filled and signed the post-mortem report which was produced before the court as an exhibit **Pexb12**. This was expert medical evidence and was neither challenged nor controverted by the defence. It is clear therefore that the deceased met her untimely death due to a blow to the head which caused a fracture to her skull.

Having proved the fact and cause of death of the deceased the prosecution must go further to prove that the act leading to the death of the deceased i.e. the blow to the head was delivered (committed) by both of the accuseds or by one of them. There is no eye-witness to the events leading up to the death of the deceased. In other words there is no witness who saw either of the two accuseds deliver the fatal blow to the deceased. As such the evidence which the prosecution seeks to rely upon to prove the guilt of the accused is largely circumstantial. In **'WILLS'** on **CIRCUMSTANTIAL EVIDENCE** it is stated that

“In order to justify the inference of guilt, the exculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.”

In the case of **TEPER VS. REPUBLIC [1952] AC** at page 489 it was held

“Circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on anotherIt is also necessary before drawing the inference of the accused’s guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.”

Finally, in the case of **KARIUKI KARANJA VS. REPUBLIC [1986] KLR** the court held as follows

“In order for circumstantial evidence to sustain a conviction, it must point irresistibly to the accused and in order to justify the inference of guilt on such evidence the inculpatory facts must be incompatible with innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The burden of proving facts justifying the drawing of that inference is on the prosecution.”

With this in mind I will now proceed to analyze the evidence first against the 2nd accused and then against the 1st accused.

The reasons for the arrest and charging of the 2nd accused revolves around a mobile phone said to belong to the deceased. **PW7 BENSON KALEMA** told the court that he works as a taxi driver in Voi. He stated that he knew the 2nd accused well as a fellow taxi-driver. The evidence of **PW7** is that on 28th January, 2009 he and the 2nd accused were together waiting for clients. **PW7** mentioned to the 2nd accused that his phone had a problem. The 2nd accused replied that he had two phones and offered to sell one to him. **PW7** chose a Nokia 1110 phone. They agreed on a price of Kshs. 1,500/= to be paid in installments. **PW7** paid 2nd accused Kshs. 750/= that day and was to pay the balance of Kshs. 250/= later. Then on 13th February, 2009 police tracked **PW7** to his home in Mwatate. They asked for the phone and checked the serial number. The police told **PW7** that the mobile phone belonged to a lady who had been murdered and demanded to know where he had obtained the phone. **PW7** led police to the 2nd accused who had sold him the phone. The 2nd accused was then arrested. The mobile phone in question was produced in court as an exhibit **Pexb7**.

PW14 PC NORMAN MUSYOKA was the officer who tracked the mobile phone and found it in the possession of the 2nd accused. In his testimony **PW14** states

“The DCIO instructed me to accompany PC Collins Ojowo to Taita Taveta to trace a mobile phone Nokia 1110 serial No. IMEI [particulars withhekld] belonging to the deceased Marco Yusuf.”

No evidence at all is produced to prove that this mobile phone actually belonged to the deceased. No receipt was produced. No witness was able to identify the mobile phone as one they saw the deceased regularly use. No document linking this particular mobile phone to the deceased is produced in court. How then did the DCIO conclude that this mobile phone belonged to the deceased? Under cross-examination by defence counsel **PW14** states

“We had the serial number of the handset. The Crime Intelligence Unit officers gave us the serial number. The Crime Intelligence Unit Officers co-ordinate with the mobile provider safaricom. They are the ones who can confirm that the handset recovered belonged to the deceased”

Under further cross-examination **PW14** says

“The handset details were obtained from Safaricom Limited. I saw the document from Safaricom showing the data of the phone. I do not have the said documents with me. The CIU [Crime Intelligence Unit] officer kept it.”

No single witness from the Crime Intelligence Unit was called to corroborate this evidence and/or to explain how they came to link that particular mobile phone to the deceased. Neither did the prosecution bother to call any witness from the service provider safaricom to confirm that the deceased was the registered owner of the handset in question. Nokia 1110 is a very popular handset and is common across the country. Sufficient evidence must be tendered to prove that this particular handset in question belonged to the deceased. No such evidence was tendered. The chain of evidence is left incomplete. All the court has is a mobile phone said to have belonged to the deceased. This does not amount to sufficient proof that the phone did actually belong to her. The court is not even told how or where police recovered the phone. There is no evidence that the phone was recovered at the scene so as to lead to any inference that it belonged to the deceased. The possibility that the phone belonged to a person other than the deceased has not been positively excluded. Failure to tender concrete and tangible evidence to link the mobile phone to the deceased is a fatal omission in the case against the 2nd accused. Without such evidence no basis exists for any circumstantial evidence sufficient to link the 2nd accused to this crime more so since there is no evidence to show that the 2nd accused ever met the deceased or that he even knew her. I find that the prosecution have failed to prove any involvement by the 2nd accused in the murder of the deceased and I do acquit him of this charge.

I will now proceed to consider the evidence against the 1st accused. The 1st accused was a worker employed by the deceased as a house help cum watchman. The 1st accused in his defence readily concedes that indeed he was an employee of the deceased. There is no witness who saw the 1st accused attack and kill the deceased. Here again the evidence being relied upon is circumstantial. The fact that the 1st accused lived in the compound with the deceased may certainly cast suspicion his way. However, it is a basic tenet in law that *“suspicions however strong cannot provide a basis for inferring guilt which must be proved by evidence”* [see **MARY WANJIKU GICHIRA VS. REPUBLIC Criminal Appeal No. 17 of 1998 (unreported)**]. The fact that the 1st accused lived in the compound with the deceased certainly means that he had the ‘*opportunity*’ to commit the offence. However, evidence from several of the States witnesses is that the deceased was at the material time engaged in constructing a house in that compound. As a result there were several other people in the compound on daily basis being the construction workers. Any one of them had equal opportunity to commit the crime. **PW1 ABDUL ABDALLA MWAYOYO** who was a watchman in a neighbouring compound told the court that

“On 31st December, 2008 there was no construction going on due to the holiday.”

However, **PW2 AUGUSTINE MULO KAMBI** contradicts this evidence when he states

“On 31st December, 2008 it was a Saturday and the construction workers were on the site working”

This court takes judicial notice of the fact that in Kenya 31st December is not a gazetted public holiday. The official holiday falls on 1st January which is New Years day. Thus on 31st December, 2008 under ordinary circumstances construction workers would be on duty. **PW5 CHARLES OCHIENG** who was one of the construction workers told the court that

“On 31st December, 2008 I was on duty. Mogaka [the 1st accused], myself and a few other workers

were there. We finished at 5.00 p.m.”

Thus it cannot be assumed that the 1st accused was the only person in the compound with the deceased when the incident occurred.

PW12 PC LIVONE MWANZIA told the court that he was one of the first police officers to arrive at the scene. Next to the body of the deceased the police recovered a jembe whose handle was blood-stained. Police also recovered a white panty next to the body as well as a bucket and a plate. In order to zero in on the culprit the police ought to have caused an analysis and comparison to be done between the blood found on the jembe and a blood sample taken from the accuseds as well as all the other construction workers who were present in the compound. **PW12** in his evidence told the court that the blood-stained jembe was taken to the Government Chemist for analysis. The Government Chemist was never called to testify in this case and neither was any report on this analysis produced as an exhibit in court. **PW13 CHIEF INSPECTOR PETER KIEMA** was the first investigating officer who also visited the scene. This witness states as follows

“I saw blood-stains on the jembe. I handed over the exhibits to Kwale CID. I do not know if samples were taken for analysis.”

As stated earlier the final investigations were taken over by Kwale CID. There is no officer who has testified that he took the exhibits for analysis. **PW15** gave a narration of investigation which he conducted into this matter but he made no mention at all of having forwarded any exhibits to the Government Chemist for analysis. No exhibit memo form was produced in court. This aspect of the investigation remains uncertain. This failure to produce a report from the Government Chemist is a fatal omission on the part of the prosecution. This court is entitled to draw an adverse inference from this failure. Could it be that no such report was produced because it did not favour the prosecution case?

Evidence was adduced regarding certain statements allegedly made by the 1st accused to his sister about this incident. **PW3 NASIR RABI BALAI** told the court that he lives in Kajiado and that the deceased was his relative. **PW3** stated that he had employed in his home a sister to the 1st accused called ‘*Lillian Momanyi*’. He claims that on the material day the 1st accused phoned his sister and urged her to run away as he had done something bad. Firstly **PW3** initially stated that the 1st accused had called to inform his sister that they had been attacked by thugs. Later the witness states that the 1st accused had called to urge his sister to run away. Which was it? Given that as admitted by **PW3** the conversation between the 1st accused and his sister was being conducted in Eke-Gusii. **PW3** could not follow that conversation and has no way of knowing what was actually said. This alleged sister of the 1st accused was never called as a witness to confirm exactly what her brother told her. Thirdly the reference to the 1st accused having done something bad cannot be construed to mean murder. He could have been referring to having stolen from his employer or some such other ‘bad’ thing.

The prosecution placed much reliance on a piece of paper found inside the deceased’s house and which contained entries allegedly made by the 1st accused. **PW15 SERGEANT SAMUEL SAKONG** told the court that he went to the scene on 4th January, 2009 (about four days after the murder). The paper was allegedly found amongst the 1st accused’s belongings was dated 1st January, 2009 and contained the following words

“Dear God please what we have done it is not good.”

“Me, Kamau, Ochieng I am forced to kill. I killed mama.”

“Please call me – I am in DRC.”

The said piece of paper was produced in court as an exhibit **Pexb8**. **PW15** stated that in his opinion the handwriting on the paper was similar to the handwriting on a notebook belonging to the 1st accused also

recovered at the scene. This paper together with a specimen of the 1st accused's handwriting was forwarded to a hand-writing expert for analysis. **PW16 ACP EMMANUEL KENGA** is an expert document examiner. He told the court that he made a comparison of the specimen handwriting of the 1st accused and that in the note and in his opinion they were written by the same hand. **PW16** produced his report as an exhibit in court **Pexb10**. This note alone cannot form the basis for a conviction of the accused. Taken in its literal context the note appears to amount to a confession to the crime of murder. The law regarding the admissibility of confessions is very clear. It is to be found in section 25A (1) of the Evidence Act. Section 25A (1) provides as follows

“A confession or any admission of a fact tending to the proof of guilt by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a Judge, a magistrate or before a police officer (other than the investigating officer) being the rank of Chief Inspector of police and a third party of the persons choice.”

It is only when a confession is made in compliance with the rules contained in section 25A (1) of the Evidence Act, that it can be deemed admissible as against an accused person. In this case the 1st accused did not make any confession before a Judge or a magistrate, neither did he make it before an officer of or above the rank of Chief Inspector of police. As such this piece of paper cannot be held to be an admissible confession and cannot amount to proof of the charge as against the 1st accused.

There is evidence from **PW9 MOHAMED OMAR IBRAHIM** that police had arrested a man known as 'Kamau' a suspect in the murder of the deceased. **PW6** told the court that the deceased had complained to her that this 'Kamau' had conned her of Kshs. 60,000/= in a contract for supply of building materials. She stated that her husband warned the deceased to be careful about 'Kamau'. The police has not explained why this Kamau was exonerated from the murder of the deceased. Given the misunderstanding with the deceased he was an obvious suspect and it appears that even the police considered him as a suspect which explains why they arrested him. No reason is given as to why he was eventually let off the hook. There is no evidence of any grudge, disagreement or misunderstanding the 1st accused had with the deceased which would have led him to kill her. The prosecution suggested that the fact that the 1st accused left the home of the deceased after her death is indicative of a guilty mind. In his defence the 1st accused states that the deceased had released him to go and spend the New Year vacation at his rural home. It is a common practice for many Kenyans to release their workers for Christmas and New Year festivities.

PW2 told the court that on the material date of 31st December, 2008 he saw the accused in Ukunda. They had a conversation in which the 1st accused told **PW2** that a thief had been caught in their compound. Therefore if indeed the 1st accused went away on home leave then he could only have left after 31st December, 2008. In view of the fact that nobody saw the 1st accused after the body of the deceased was discovered, it is likely that he did run away after the incident. This action could be termed suspicious but is no proof of guilt on his part. Further the 1st accused was found at his rural home by police. If he was truly seeking to abscond he would not have gone to such an obvious place as his rural home – he would have gone into hiding.

All in all I find that the prosecution did not fully investigate this case. Several crucial leads were left out and crucial pieces of evidence were not presented to the court. The circumstantial evidence does not suffice to lead to the conviction of the 1st accused. There is no evidence that the played any role in the murder of the deceased. The charge has not been proved beyond a reasonable doubt. I therefore enter a verdict of 'Not Guilty' and I do acquit the 1st accused of this charge of murder. Both of the accused are to be set at liberty forthwith unless they are otherwise lawfully held.

Dated and delivered in Mombasa this 12th day of September, 2014.

M. ODERO

JUDGE

In the presence of:

Mrs. Maithya h/b Mr. Mushelle for Accused 2

Mr. Masila h/b Mr. Mureithi