



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**

**CRIMINAL CASE (MURDER) NO. 21 OF 2010**

**REPUBLIC.....PROSECUTION**

**VERSUS**

**1. MOHAMMED DADI KOKANE alias GABO**

**2. ALFRED NJURUKA MAKOKO**

**3. SAMWEL MWACHALA MWAGHANIA**

**4. JAMES CHACHA MWITA**

**5. DANIEL MDACHI MNENE SULEIMAN**

**6. OSMAN ABDI HUSSEIN**

**7. CRISPUS MKUNGUZI MNGOLIA**

**8. REGEA OMAR SALIM.....ACCUSED**

**RULING**

The court is being asked to rule upon the admissibility of a ‘message book’ which was allegedly kept and maintained in the offices of Hon. Naomi Shaban who testified as Defence Witness No. 9 in this case. Mr. Ondari objected to the production of the register on the basis that the witness was not the maker of the same. **Mr. Kithi** counsel for the accused responded that the secretary who made the entries and maintained the book had left the employment of **DW9**.

The best evidence rule requires that a document be produced by its maker. No explanation has been tendered by the defence on what efforts have been made to trace and avail this witness. No allegation has been made that the witness is unreachable. Ordinarily the court would require that this secretary being the maker of said document appear and produce the same in court. However as pointed out by Mr. Kithi an extract from this message book was included in the defences List of Authorities which was filed in court way back on 15<sup>th</sup> April, 2011. This extract appears at pages 20 – 21 of the said list. This list was admitted into evidence by consent. Having consented to the admission of the document the prosecution cannot now turn around and object to the same. Any objection ought to have been raised in April, 2011 when the List of Authorities was filed. On the basis of the earlier admission of this document by consent I find the same is properly on record and I do hereby rule that the extract contained in the defence list of

documents filed on 15<sup>th</sup> April, 2011 is admissible as evidence in this case. For clarity, what is ruled admissible is the extract filed on 15<sup>th</sup> April, 2011 and **not** the entire message book.

**Dated and delivered in Mombasa this 5<sup>th</sup> day of September, 2014.**

**M. ODERO**

**JUDGE**

In the presence of:

Mr. Ondari for State

Mr. Gikandi for 6<sup>th</sup> Accused and h/b Mr. Kithi and Mr. Mwawasi for Accused 1, 2, 3, 4, 5, 7 and 8

Mr. Ouma h/b Mr. Murgor for Family

Court:

Hearing 29<sup>th</sup> and 30<sup>th</sup> September, 2014 for final submissions.

**M. ODERO**

**JUDGE**

**5<sup>TH</sup> SEPTEMBER., 2014**