



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL CASE NO. 13 OF 2010

REPUBLIC.....PROSECUTION

VERSUS

1. BUNI MWATELA *alias* MAERE *alias* KABASELI

2. ALI JUMA MWANG'OMBE

3. JAVIS MWAMWAGA.....ACCUSED

JUDGMENT

The three accused persons namely **BUNI MWATELA MAERE alias KABASELI** (hereinafter referred to as the 1st accused), **ALI JUMA MWANG'OMBE** (hereinafter referred to as the 2nd accused) and **JAVIS MWAMWAGA** (hereinafter referred to as the 3rd accused) are all jointly charged with the offence of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE**. All three accused entered a plea of '*Not Guilty*' to the charge. Their trial commenced before me on 1st March, 2012. The prosecution led by **MS. MACHARIA** learned state counsel called a total of six (6) witnesses in support of their case. **MR. CHEBUKAKA** Advocate appeared for the 1st and 3rd accused persons whilst **MR. NGETICH** acted for the 2nd accused.

The brief facts of the prosecution case were that on 26th July, 2009 at about 7.30 a.m. the deceased '*Katama Ngoro Katama*' was found lying dead at his shop at Mianzini stage. The deceased had a gunshot wound to the chest. **PW3 MARIAMU WANJE** the wife of the deceased was called to the scene. She claimed that the deceased had on his person Kshs. 20,000/= which she alleged had been stolen from him. The body of the deceased was taken to the mortuary and after an autopsy was handed to the family for burial. Police also recovered one spent cartridge at the scene of murder and a bullet head was recovered in the body of the deceased during the autopsy. Both items were forwarded to **PW4** the Firearms Examiner **CHIEF INSPECTOR EMMANUEL LANGAT** for analysis and examination. In his evidence **PW5** stated that his examination revealed that the bullet and cartridge had been fired from a VZ 25 sub-machine gun serial No. 104628 which gun was also handed to him by police. Later on 30th September, 2009 police acting on a tip-off went to Kaloleni shopping centre and arrested accused 1 from a house pointed out to them. Accused 1 in turn led police to the home of 2nd accused who was also arrested. Then 1st and 2nd accused led police to the home of the 3rd accused in Tononoka. The 3rd accused led police to a locked toilet inside his compound where police recovered a Beretta pistol serial

No. 104628. Based on the report from the firearms examiner all three accused were charged with the offence of murder.

At the close of the prosecution case all three accused persons were found to have a case to answer and were placed onto their defence. They each made statements denying any and all involvement in the death of the accused.

In this case there was no eye witness to the murder at all. **PW2 NYAMVULA GONA** told the court that on 26th July, 2009 she was on her way to the shops to carry out her usual business of selling chapati's when she came across the body of the deceased lying dead outside his shop. **PW2** ran back to call the chief and relatives. All the other prosecution witnesses came to the scene after the deceased had been killed and none of them is able to tell who killed him.

The evidence used by police to link the three accused to the murder of the deceased is the spent cartridge recovered at the scene and the bullet head found lodged in the body of the deceased during the autopsy. Based on the evidence of **PW4** the firearms expert these two items were fired by the gun serial No. 104628 which was recovered hidden in a toilet in the compound of the 3rd accused in Tononoka. Neither 1st nor 2nd accused were found in actual possession of the gun in question. Their only role was to lead police to the home of the 3rd accused. It is therefore not clear why 1st and 2nd accused's were charged with murder. The mere fact that they may have known the location of the gun does not in any way implicate the two of murder. This alone is not enough. The police must have more evidence to implicate the 1st and 2nd accused.

With respect to the 3rd accused it is alleged that he was found in possession of the gun used to kill the deceased. Thus the police would be relying on circumstantial evidence as the basis for a conviction. In the case of **KARIUKI KARANJA VS. REPUBLIC 1986 KLR** it was held that

“In order for circumstantial evidence to sustain a conviction it must point irresistably at the accused and in order to justify the inference of guilt on such evidences 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 in the prosecution.”

The murder incident according to the witnesses occurred on the morning of 26th July, 2009. This gun according to **PW5** was not recovered until 30th September, 2009 almost two months later. Given the time lapse would it be reasonable to conclude that the 3rd accused was involved in the murder of the deceased. I think not. There is no proof that from 26th July, 2009 to 30th September, 2009 this particular gun was in the **exclusive possession** of the 3rd accused. The very real possibility that the gun may have passed through various other hands before it eventually landed into the possession of the 3rd accused has not been excluded by the prosecution. The very fact that the 1st and 2nd accused knew where the gun was means that others too may have known of its location. All that the prosecution have succeeded in proving is that the recovered firearm was the one used to kill the deceased. No tangible connection is shown to exist between the three accused and the murder of the deceased. In other words the *actus reus* of the offence of murder which is a crucial ingredient has not been proved against any of the three accused. As such the charge of murder must fail. I therefore enter a verdict of '*Not Guilty*' and acquit all the three accused persons. The three are to be set at liberty forthwith unless they are otherwise lawfully held.

Dated and delivered in Mombasa this 4th day of September, 2014.

M. ODERO

JUDGE

In the presence of:

Mr. Omwenga h/b Mr. Chebukaka for 1st and 3rd Accused

Mr. Muriithi for State

Court Clerk Mutisya