



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL CASE NO. 4 OF 2009

REPUBLIC.....STATE COUNSEL

VERSUS

ERUSTUS GUNGA MAGUNGA

ANDERSON BAYA NYANJE.....ACCUSED

RULING

The two accused persons namely **ERUSTUS GUNGA MAGUNGA** (hereinafter referred to as the 1st accused and **ANDERSON BAYA NYANJE** (herein referred to as the 2nd accused) have jointly 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 given as follows:-

*“On unknown date between 10th and 12th day of December 2008 at unknown place within Malindi District of the Coast Province murdered **KATSOPI CHONDO KARISA**”*

Both accused persons entered a plea of ‘**NOT GUILTY**’ to the charge. The prosecution led by **MR. ONSERIO** learned State Counsel called a total of twelve (12) witnesses in support of their case. The two accused were represented by **Mr. Matheka Advocate**. The brief facts of the Prosecution case were that on 10/12/2008 two police officers namely **PC OMAR BAKARI (PW5)** and **PC LEONARD NGEWA (PW6)** arrested the deceased person from his home purportedly in execution of a warrant of Arrest issued in respect of a Civil Case at the Malindi High Court. The alleged complainant in the Civil Suit ‘**CHRISTOPHER KARISA**’ (is the 1st accused in this case and he remains at large to date) accompanied police on this arrest mission. **PW5 & PW6** claim that after arresting the deceased, they all spent a night in the home of ‘*Karisa*’. No reason is given for this sojourn. The next day the officers claim that they went to Malindi High Court and left the deceased at the Civil Registry. The family of the deceased who were by then looking for him went to the Malindi High Court to try and get information about the Civil Case for which the deceased had been arrested. Not only did they find that the cited Civil Case did not involve the deceased at all, they also were told that the deceased had **not** been delivered to the Civil Registry there as alleged. Later on 12/12/2008 a dead body was recovered in Makongeni sub-location. **PW7 MACDONALD MWARINGA NGOWA** the local chief told the court that he received the information at about 6.30 p.m. He went to the scene and in some nearby bushes found a body burnt beyond recognition with a tyre round his waist. **PW7** alerted the police who came and took away the body. DNA test conducted later revealed that the burnt body was that of the deceased ‘**KATSOPI**

CHONDO KARISA' Police launched investigations into the murder of the deceased's. They arrested the two accused persons. Accused 1 was said to have been the driver of the motor vehicle KAU 331J Mitsubishi Pajero which was being used to ferry the deceased after his "arrest" whilst accused No. 2 is the one who had hired the said vehicle on 9-12-2008 from **PAUL TAURU NDORO PW2** the owner. The 1st accused '**CHRISTOPHER KARISA**' the alleged complainant in the Civil Case which led to the arrest of the deceased has absconded and remains at large to date. The prosecution closed their case after their twelve (12) witnesses had testified. It is now the duty of this court to examine the evidence on record with a view to determining whether a prima facie case has been established so as to warrant the two accused persons to be called upon to give their defence.

Having critically examined the evidence on record, I find that the role of the police officers in this incident leaves much to be desired. The two accused were arrested on the basis that they were the last persons known to have been in the company of the deceased before he died. The evidence against them is purely circumstantial given that no person saw them attack, kill or burn the deceased. There is no evidence that the 2nd accused even knew the deceased. In order for circumstantial evidence to suffice it must provide the only possible explanation of how the deceased met his death. Circumstantial evidence must be inconsistent with any other possible and/or logical explanation. As I will proceed to demonstrate this is not the case here. With respect to the 1st accused, he is said to have been driving a vehicle in which the deceased was ferried. In the case of the 2nd accused he is the one who hired the vehicle registration KAU 331J. These actions lead to a suspicion of their involvement in the death of the deceased but it is well established legal tenet that suspicion alone does not suffice to prove guilt law. It appears that the mastermind of the whole incident was '**CHRISTOPHER KARISA**' the 1st accused who is at large. It was he who went to Diani police station seeking police assistance to arrest the deceased purportedly in respect of a civil case at the Malindi High Court. In the absence of this 'Karisa' several gaps remains in the prosecution case. The question on what clear role the two accused played or what grudge they may have had against the deceased is not revealed. There is every possibility that their only role was to hire a car (in the case of accused No. 2) and to drive it (in the case of 1st accused). No evidence is adduced to show that the two were involved in any plan to kill the deceased or that they actually perpetrated the murder.

On the other hand very serious and crucial questions arise regarding the conduct and involvement of the two police officers in this saga. **PW5 PC Omar Bakari** and **PW7 PC Leonard Ngewa** definitely had a hand in the fate that befell the deceased. The two officers claim to have arrested the deceased on the basis of a warrant of arrest issued in a Civil Case by the Malindi High Court. No copy of the alleged warrant was exhibited in court leaving court to wonder whether any such warrant actually existed. It is a fact that warrants on Civil Cases are ordinarily effected by a court Bailiff accompanied by the police. Neither **PW5** nor **PW6** mentioned having been in the company of any Court Bailiff. The two were both police officers of several years standing. It is curious that they would accept and proceed to effect an arrest without a court Bailiff present.

There is yet more that raises eyebrows. **PW5 & PW6** claim that they arrested the deceased on 10-12-2008 at 7.30pm. They claim that they booked him in the OB at Diani Police Station (again the relevant OB extract was not produced as an exhibit in this trial). They then proceeded to take the deceased to Malindi court. However, they detoured and spent the night in the home of '**KARISA**' the so called judgment debtor. Why would experienced police officers having in the custody a suspect spend a night in the home of the person who had requested the arrest. **PW6** attempts to explain this by stating that deceased said he was unwell and asked to 'communicate' with Karisa. Firstly if the person in their custody was unwell then the proper action by police officers would be to take him to a public health faculty for treatment. Secondly even if the deceased as is implied requested to 'communicate' with the alleged judgement debtor then why would the police be involved and such discussion certainly would not necessitate the two officers spending the night in the home of this '**Karisa**'. In any event as it transpired this allegation that they spend the night in the home of '**Karisa**' has been proved to be an outright lie by the two officers. **PW8 SHAFFI KASSIM** told the court that he worked at a hotel in Malindi. On 10-12-2008 the 1st accused came to the hotel and booked two rooms for himself and his guests, **PW8** who was the receptionist wrote out a receipt for 2,000/= for the 2 rooms which receipt was exhibited in court

Pexhibit3. The person who were with Accused 1 at that date were the two police officers 'KARISA' and the deceased. **PW12 PC MICHAEL OKIKI** who was the investigating officer directly contradicted this version by **PW5 & PW6** when he states that the two officers spent a night at Bisbane Resort in Malindi. If the officers were truly on an arrest mission why would they spent a night in a hotel. That could not have been part of their duties. The allegation by **PW5 & PW6** that they delivered the deceased to the registry at the Malindi High Court is simply laughable. They are unable to name which officer in the registry took custody of the deceased. Further as experienced police officers **PW5 & PW6** were fully aware that upon executing a warrant of arrest, their duty was to deliver the deceased to the nearest police station and report to the OCS. Why did the officers not take the deceased to Malindi police station and report the arrest to the OCS. The answer is because they did not go anywhere near the Malindi High Court on 11/12/2008. Again **PW12** the investigating officer put its very clear when he states in his evidence.

“I discovered that the deceased was not handed over to any authority. They booked Room No. 1 & 2 for the officers”

The two officers purportedly arrested the deceased. They spent a night fully paid for at a hotel in Malindi and failed to deliver the deceased to any authority either to the court or to police at Malindi. It is very obvious and clear as day that the two polices PC Omar Bakari & PC Ngewa had a hand in and were fully complicit in the fate of the deceased. Indeed they facilitated the murder of the deceased by actively delivering him to his killers. The police action in charging the accused's is not genuine. This is an example of selective prosecution in an attempt to cover up the role the police played in this incident.

In my view those who ought to have has changed with this disappearance and eventual murder of the deceased were PC Omar Bakari and PC Leonard Ngewa. The two accused's are merely being used as scapegoats. The police in this matter conducted superficial investigations with the aim of clearing their own officers from any blame. No prima facie case has been proved as against either of the two accused persons. To put them to their defence would serve no purpose, since if the accused elected to keep silent in defence no conviction would be forthcoming based on the evidence adduced. I therefore enter a verdict of '*Not Guilty*' and I acquit both accused persons of the charge of murder. Each accused person is to be set at liberty forthwith unless otherwise lawfully held.

DATED and DELIVERD in MOMBASA this 6th day of October 2014.

M. ODERO

JUDGE

In the presence of:-

Ms. Ngige holding brief Mr. Matheka

Mr. Wabotso for State

Court – Ruling to be served on the Hon. DPP for any necessary action.

M. ODERO

JUDGE

6/10/2014