



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL CASE NO. 15 OF 2012

REPUBLIC.....PROSECUTION

VERSUS

JOHNSON MWANDOE MUDAMU.....ACCUSED

JUDGMENT

The accused **JOHNSON MWANDOE MUDAMU** faces a charge of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE**. The particulars of the offence were that:

“On the 18th day of March, 2012 at Mwachabo Location, Mururi/Maganga Sub-Location within Taita Taveta County murdered STANLEY MWASINGO KADEGHE.”

The accused entered a plea of ‘*Not Guilty*’ to the charge and his trial commenced in the High Court at Mombasa on 27th June, 2012. The Hon. Lady Justice Grace Nzioka heard the evidence of all the ten (10) prosecution witnesses. She later delivered a ruling placing the accused on his defence. At that point the Hon. Judge became unavailable to continue with the trial. I took over the case and recorded the sworn defence of the accused. The matter is now pending for judgment. **MR. JAMI** learned state counsel appeared for the State.

The brief facts of the prosecution case were as follows. **PW1 COSMAS MWANGOMBE** and **PW3 ELIAS MWAMBURI** both state that on 18th March, 2012 they together with the deceased **MWASINGO** were walking home from the posho mill at about 9.00 p.m. They met the accused **MWANDOE** on the way and greeted him. The accused and deceased engaged in a brief struggle but **PW1** and **PW3** separated them. In the process of the struggle the accused’s shoe got lost in the grass. As **PW1** and **PW3** proceeded with deceased, the deceased said he needed to go and borrow matches (light) from the home of his cousin **FRANCESCA MWARI PW5** [also known as Valeria]. They went to the house of **PW5** and deceased got the ‘light’. As they left a motor cycle came and parked outside the house of **PW5**. The deceased said that he was going back to check who was going to his cousin’s house at night. **PW1** and **PW3** did not go back with him. Suddenly they heard a scream and rushed back to the scene. They found the deceased lying on the ground with a deep cut on his neck. **PW2 JOHN MWACHERE MUDAMU** the brother of the deceased who was the rider of the motor-bike was also at the scene. **PW2** told them that it was the accused who had slashed the deceased. The matter was reported to the sub-chief who called in the police. The next day the body of the deceased was taken to the mortuary where an autopsy examination was conducted. After police concluded their investigations, the accused was arrested and charged with the offence of murder.

As stated earlier the accused was at the close of the prosecution case called upon to give his defence to the charge. He opted to give a sworn statement in which he denied any and all involvement in the death of the deceased. the matter is now for this court's judgment.

Section 203 of the Penal Code defined 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.”

From this definition there arises four crucial ingredients all of which must be proved beyond a reasonable doubt in order to sustain a charge of murder.

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

In this case there exists sufficient evidence to prove the first two ingredients. **PW1, PW2, PW3** and **PW5** all testify that they saw the body of the deceased lying on the ground with a deep cut to the neck. All these witnesses who knew the deceased very well identify him as ‘*Stanley Mwasingo Kadeghe*’. Aside from their testimony there is also the evidence of **PW10 SERGEANT DAVID CHEGE** the officer who developed the photographs taken at the scene. He produced the six (6) photographs in court **Pexb1**. They depicted the body of an adult man lying on the ground with a deep cut to the left side of his neck.

Evidence on the cause of death was adduced by **PW6 DR. MACHARIA EMMANUEL** who was by then a medical officer attached to Wesu District Hospital. **PW6** confirmed that upon examination he noted that the body had a deep cut on the left side of the neck which cut had severed great blood vessels. His opinion was that the cause of death was due to “*Acute massive haemorrhage from severed (cut) great blood vessels of the left side of the neck.*” **PW6** filled and signed the post mortem report which was produced in the court as an exhibit **Pexb2**. Having thus proved the fact as well as the cause of death, the prosecution is required to go further and prove that it was the accused who cut and fatally wounded the deceased.

There were three eye witnesses to this incident. **PW1** and **PW3** both told the court that they were in the company of the deceased on the material night. However they both testify that at that point in time the deceased had walked away from them back to his cousin's house to check who was on a motorcycle which had stopped there. Both **PW1** and **PW3** only said they heard a shout and upon rushing back found the deceased lying on the ground already fatally injured. Neither **PW1** nor **PW3** state that they saw who slashed the deceased. All they can state is that the accused had been involved in a struggle with the deceased earlier on that evening. This fact may place ‘*suspicion*’ upon the accused but in no way does it provide proof that he committed the act.

PW2 a brother to the accused was also at the scene. The other witnesses claim that they heard **PW2** utter words which would imply that it was accused who committed the act. **PW5** even goes so far as stating that **PW2** asked her to forgive him for ferrying the accused to the scene where he [the accused] perpetuated this deed – referring to the murder. However **PW2** denies that he ever uttered any words to implicate his brother and infact these specific words were not put to **PW2** during his testimony. **PW2** told the court that when they arrived at the scene the accused disappeared and that it was only **PW1** and **PW2** whom he found standing over the body. **PW2** says that he only screamed in order to call for help. In short **PW2** denied having seen the accused slash the deceased and denied having implicated the accused in the murder. At one point the state counsel did challenge **PW2** with regards to his statement to the

police but this line was not pursued. At no time did the State declare **PW2** to be a hostile witness and he was never cross-examined on his statement. Thus no contradictions and/or inconsistencies between the evidence of **PW2** before court and his statement to the police were ever brought forth. **PW7 AP SERGEANT DONAL KALAMA** told the court that on 18th March, 2012 at 11.30 p.m. he was at the Mwatate District Commissioner's Office when **PW2** came to report that his brother had murdered someone. **PW2** denies that he ever admitted this to the police – insists that he only went to the station to report that a man had been murdered. At no time in his evidence did **PW2** ever mention having **seen** the accused fatally slash the deceased.

PW7 went further to state that accused himself reported that he had killed a man using a panga and led police to where he had hidden said panga. Firstly such a statement would amount o to a confession and would only be admissible as against the accused if made in compliance with section 25A of the Evidence Act. Secondly, **PW7** claims that the accused led them to where he had hidden the panga found buried in the ground. The panga was allegedly recovered with blood stains on it. **PW8 GEORGE LAWRENCE OGUDA** a Principal Government Chemist told the court that he conducted an analysis of the blood found on the panga and found that the DNA profile corresponded with a blood sample taken from the deceased. The implication being that this panga was therefore the murder weapon. I have no intention of casting any doubt on the expertise of **PW8**. However I have serious doubts whether a panga found buried in the ground would still have on it blood stains capable of being properly analyzed. Would not have the dust/earth/mud contaminated the blood-stains I ask myself? **PW8** made no mention of having noted dirt or earth on the panga. This leads me to doubt whether this panga was actually unearthed from the ground as **PW7** alleged. On his part the accused in his defence categorically denies that he ever told police that he had killed the deceased or that he showed police where the panga was.

All in all I find that despite the presence of not less than four (4) people at the scene not a single one is able to confirm having seen the accused slash the deceased. The prosecution evidence on who committed this act is hazy and lacks cogency. There does not exist clear, unequivocal and irrefutable evidence pointing at the accused. There is a vestige of doubt left in the mind of the court. The benefit of such doubt must be accorded to the accused. I find that the *actus reus* of the offence of murder has not been proved beyond a reasonable doubt. For this reason I enter a verdict of '*Not Guilty*' and I acquit the accused of this charge of murder. The accused is to be set at liberty forthwith unless he is otherwise lawfully held.

Dated and Delivered in Mombasa this 10th day of November, 2014.

M. ODERO

JUDGE

In the presence of:

Mr. Wamotso for State

Mr. Owaga holding brief Mr. Tarus for Accused

Court Clerk Mutisya