REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL CASE NO. 37 OF 2010

REPUBLIC……..……..……PROSECUTION

VERSUS

1. RUMBA NYAMAWI BEJA

2. KIWAYA NYAMAWI BEJA…….…….....……ACCUSED

RULING

The two accused persons **RUMBA NYAMAWI BEJA** (hereinafter referred to as the 1st accused) and **KIWAYA NYAMAWI BEJA** (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 are that

"On the 20th day of December, 2010 at Mwamanga village in Msambweni District within the Coast Province jointly murdered SHABAN NASSORO."

Both accuseds entered a plea of *'Not Guilty'* to the charge. The prosecution led by **MR. GIOCHE** learned state counsel called a total of seven (7) witnesses in support of their case**. MR. BOSIRE** Advocate represented the two accused. The hearing initially commenced before **Hon. Lady Justice Grace Nzioka**, who heard the first three (3) witnesses. Following the unavailability of then Justice Nzioka to proceed with the matter I took over the case and heard the remaining four (4) prosecution witnesses.

PW1 GALAMA KATANA told the court that he is a resident of Mwamanga village in Ukunda. On 20th December, 2010 at about 7.00 p.m. he was resting outside his house after the evening meal. The deceased suddenly stumbled into his compound and fell to the ground. **PW1** called for a lantern and when he checked he found that the deceased whom he knew as the child of Nassoro was bleeding heavily. **PW1** ran to call the village chairman and upon their return they found the deceased had already died. Police were called in. They came and removed the body to the mortuary.

PW4 ALI SAIDI JUMADARI and **PW5 PATRICK SHORE** both told the court that they witnessed a fight between the deceased and the two accused persons at a drinking den. Their evidence led to the arrest of the two accused who were eventually charged with this offence of murder.

At the close of the prosecution case this court must determine whether the evidence on record is sufficient to prove a *prima facie* case to warrant each accused person to be called upon to give his defence to the

charge. I have carefully considered the evidence on record and I find that several anomalies exist.

Firstly despite there being evidence of the fact of death from fellow villagers who knew the deceased person well no evidence was led to prove the cause of death. In any murder trial the prosecution is under an obligation to prove the cause of the death of the deceased beyond a reasonable doubt. The best and most reliable manner of proving the cause of death is by evidence of an autopsy report from a qualified medical practitioner. In this case no such medical evidence was tendered. There is no evidence of whether an autopsy was ever performed on the body of the deceased and if so what the results of such an autopsy were. In the case of **NDUNGU VS. REPUBLIC 1985 KLR 487** the Court of Appeal held as follows:

"Though there are cases in which death can be established without medical evidence relating to its cause as where there are obvious and grave injuries, medical evidence should still be adduced in such cases of the effect of such injuries as opinion expert evidence and as evidence supporting the cause of death as alleged by the prosecution."

In this case all that the witnesses are able to say is that they saw the deceased bleeding. They are not able to tell what caused the bleeding and they are certainly not able to state what effect such wound and/or bleeding had. In other words the court is left in the dark on to whether it was this bleeding that caused the death of the deceased of whether death was caused by another factor. This failure to adduce medical evidence is a fatal omission in the prosecution case. Despite having been granted several adjournments for this purpose the prosecution were unable to avail a doctor to testify. On this ground alone the murder charge would fail.

Even if the cause of death were proved which is not the case the evidence in my view still falls short of establishing a *prima facie* case. **PW1** was only able to state that the deceased stumbled into his compound, fell down and died. **PW2 BEJA NYAWA KOMO** heard **PW1** shout and rushed to the scene. He too can only state that he saw the deceased lying dead on the ground. **PW2** states in his evidence that:

"I heard people say the people who killed him [the deceased] were the accused herein one Rumba and Kiwaya. I heard from the mob justice……."

PW2 is unable to give the names of those who gave him this information. This therefore remains hearsay evidence and is not admissible as against the two accused persons. Similarly **PW3 SALIM SAID NDURUMO** another neighbour testifies that:

"I just heard people say that the deceased was at Mango - a place where people drink 'mnazi' and that a fracas occurred until he died. I heard he quarreled with one Nyamawi and Kiwaya."

Again **PW3** does not name those from whom he heard this information. This too amounts to inadmissible hearsay evidence.

PW4 ALI SAIDI JUMADARI and **PW5 PATRICK SHORE** were eyewitnesses to the events. **PW4** states that he witnessed a fight break out between the deceased and the 2nd accused. However **PW4** says:

"A fight ensued. I left to go to the shops. I left them fighting. After 30 minutes I returned to the scene. I found Shaban [deceased] lying on the ground dead. I do not know how he died."

PW4 did not see who assaulted and wounded the deceased. He left during the fight. He cannot tell if it was the 2nd accused or some other person who struck the deceased. **PW4** did not have an uninterrupted view of events because he left at some point to go to the shops. He is therefore incapable of testifying as to what may have occurred after he left. **PW4** confirms this very fact by stating:

"I do not know what happened after I left to the shops."

However under cross-examination **PW4** appears to contradict his own testimony. He states:

"I witnessed the fight until the deceased ran away……." PW4 goes on to state:

"I was mistaken when I said I left them fighting……."

Clearly this is a witness who is not certain about what he saw. **PW4** in my view is an unreliable witness and his evidence cannot be relied upon.

PW5 does not shed any clarity on the incident. He merely talks of witnessing a fight in the bar of which the deceased was the instigator. **PW5** states that deceased snatched the drink away from the two accused and a fight ensured. **PW5** made no mention of having seen either the 1st or the 2nd accused strike and injure the deceased.

PW7 HALIMA SHORO told the court that she heard shouts on the material evening. She came out of her house and saw the deceased running away. **PW7** states that she saw the two accused with blood on their clothes. She does not state if they were chasing the deceased. **PW6 CORPORA MORRIS KOOME** the investigating officer also testifies that he found the two accused in blood-stained clothes. No analysis of the blood was done to confirm if the blood was their own or whether it was the deceased's blood. Given that the two accused are said to have been involved in a bar brawl the presence of blood on their clothes is not totally unexpected. It could well have been their own blood. No evidence was called from an investigating officer in this case. Thus certain aspects of the investigation to link the chain of evidence are left out. The evidence is not cogent and in my view does not show a *prima facie* case. I therefore enter a verdict of '*Not Guilty'* and I acquit both accused of this charge of murder. Each accused is to be set at liberty forthwith unless otherwise lawfully held.

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

M. ODERO

JUDGE

In the presence of:

Mr. Wamotsa for State

Mr. Owaga holding brief Mr. Bosire for both Accused

Court Clerk Mutisya