



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL CASE NO. 23 OF 2011

REPUBLIC.....PROSECUTOR

VERSUS

1. DERRICK LAINI MWASARU
- 2 .MICHAEL MWAJUMA MWANG'OGO
3. GRACE WUGHANGA NYAMBU
4. MARY MBOGHO.....ACCUSED

RULING

The four accused persons **DERRICK LAINI MWASARU** (hereinafter referred to as the 1st accused), **MICHAEL MWAJUMWA MWANGOGO** (hereinafter referred to as the 2nd accused), **GRACE WUGHANGA NYAMBU** (hereinafter referred to as the 3rd accused) and **MARY MBOGHO** (hereinafter referred to as the 4th accused) have all been jointly charged with the offence of **MURDER CONTRARY TO SECTION 202 as read with SECTION 203 OF THE PENAL CODE**. The particulars of the offence are that:

“On the 10th day of July, 2011 at Mngalenyi village within Taita Taveta County murdered ROBINSON MWASARU.”

All four accused pleaded ‘*Not Guilty*’ to the charge and their trial commenced before Hon. Justice Grace Nzioka on 22nd February, 2011. The prosecution led by **MR. JAMI** learned state counsel called a total of nine (9) witnesses in support of their case. **MR. MUCHIRI** Advocate represented all four accused persons.

The prosecution case revolves around a cultural witch hunting ceremony which was being conducted by the family of the deceased in a forest on 10th July, 2011 in order to identify whether the deceased or his brother ‘*Jumbe*’ were witches. The ceremony was attended by relatives of the two who included the 1st accused who is a son to the deceased, the 2nd accused a brother to the deceased (who is blind), the 3rd accused a sister to the deceased and the 4th accused also a sister to the deceased. The witnesses who attended that ceremony told the court that it involved looking at and interpreting the intestines of two goats supplies by both the deceased and his said brother. The verdict was that neither the deceased nor his brother were witches. A disagreement arose as some of the parties were unwilling to accept this

verdict. As a result the deceased sustained serious stab wounds. He was rushed to hospital but unfortunately did not survive. Police were called in and they came and removed the body from the Ganze trading centre to the mortuary. Upon completion of investigations all four accused were arrested and charged.

At the close of the prosecution case the trial Judge found all four (4) accused persons to have a case to answer and each was placed onto their defence. They each opted to make an unsworn statement in defence and called one witness in support of their defence. Each accused person denied any involvement in the death of the deceased. Having taken the defence evidence the trial Judge Hon. Nzioka became unavailable to conclude the trial. The parties agreed that the judgment be prepared by myself as I had taken over the matter. It is against this background that I am now tasked with preparing the judgment.

The offence of murder is defined in section 203 of the Penal Code as follows:

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”

The prosecution must therefore adduce sufficient evidence to establish the following three ingredients of a charge of murder.

1. Proof of the fact and cause of death of the deceased.
2. Proof that the deceased met his death as the direct and proximate result of an unlawful act or omission on the part of the accused.
3. Proof that the said unlawful act or omission was committed with malice aforethought.

On the question of the fact and cause of death of the deceased there can be no controversy. There were several witnesses to the incident of fracas at which the deceased was attacked and injured. **PW1 LYDIA MWASARU** a widow of the deceased who was also present at the scene of the incident told the court that her husband was stabbed in the chest. She identifies and the other witnesses all of who knew the deceased well identify him as ‘*Robinson Mwasaru*’. **PW 6 PETER KIRAGU** and **PW9 CHIEF INSPECTOR HERBERT MWIGADA** were police officers who responded to the initial report of the incident. They both state that they found the dead body of the deceased with stab wounds to the chest lying dead on the ground at Ganzu trading centre. **PW6** produced photographs taken of the dead body. Therefore the fact of the death of the deceased has been sufficiently proved.

Evidence regarding the cause of death was tendered by **PW7 DR. KYALO WILSON**, who performed the autopsy on the body on 15th July, 2011. He confirms that he saw lacerations on the face and head of the deceased leading to a fracture and that he saw a deep penetrating wound on the chest. He gave the cause of death as “*cardio pulmonary arrest secondary to severe head injuries.*” This is expert medical evidence and was neither challenged nor controverted by the defence. It is therefore clear that the deceased met his untimely death due to a viscous assault on his person.

The next crucial ingredient requiring proof is that it was the four accused who so assaulted and killed the deceased. As stated earlier the four accused persons, the deceased and some of the prosecution witnesses were all participants in a traditional ceremony conducted in order to establish whether the deceased was a witch. At the conclusion of the ceremony it was concluded that the deceased was innocent of all allegations of witchcraft. Some of the participants were not happy with this outcome. A quarrel arose between the deceased and one ‘**Jumbe**’ who had also been ‘*charged*’ with being a witch. At this point the narration of events becomes unclear and somewhat confusing. **PW1** the deceased’s wife and **PW2 FREDERICK MWACHEMA** both testify that it was the four accuseds who fell upon the deceased and using bicycle spikes and a knife killed him. Indeed both witnesses insist that the 4th accused led the 2nd accused who was blind to where the deceased lay and the 2nd accused proceeded to lie on the deceased and stab him several times. This in my view is quite a far-fetched tale. Why would the 4th accused be so keen to ensure that the blind man participated in the attack? The normal thing would have been to remove the blind man from the scene of fracas in order to protect him from any danger.

PW3 MWACHOKA MUGENCHA and **PW4 MUFUKO MWAKINA** both of whom were present at the scene told the court that at the conclusion of the traditional ceremony the deceased started the fracas by beating ‘*Jumbe*’ with his stick. These two witnesses did not stay to witness events. They left (probably to protect themselves) and only later heard that the deceased had been killed. Thus neither is able to say who it was who attacked the deceased.

All the witnesses have mentioned a certain ‘*Jumbe*’ who was a key protagonist in this matter. The court was told that the said *Jumbe* ran away after the incident and has not been traced to date. It would appear that the incident involved a fracas in which nobody is entirely sure what happened and each party was out to blame the other. Under cross-examination by defence counsel. **PW6** the investigating officer admits this when he says:

“I have witnesses who said the 3rd accused did not beat the deceased and others state that she beat the deceased”

It is also telling that **PW3** and **PW4** were initially arrested and held as suspects. They were later released by police and treated as witnesses.

On their part the accused person called one witness **DW5 NGONYO MWAKIRETI** who testified that he was also present at the scene. He confirms that it was the deceased who first hit *Jumbe* with a stick. This caused the said *Jumbe* to react in kind and this caused the fight. **DW5** insists that none of the four (4) accuseds participated in assaulting the deceased. **DW5** also insists that he recorded a statement at the police station. If this was the case it is very curious why **DW5** was not called upon to testify. Why did police choose to ignore his evidence which they had? There exists the very real probability that the police decided to disregard the evidence of this witness because it would have been detrimental to their case. On the whole I find that the standard of proof has not been met in this matter. As such I do enter a verdict of not guilty and I hereby acquit all four accused persons of the charge of murder. All four (4) accused to be set at liberty forthwith unless they are otherwise lawfully held.

Dated and delivered in Mombasa this 6th day of November, 2013.

M. ODERO

JUDGE

In the presence of:

Mr. Ayodo for State

Mr. Mutiso h/b Mr. Muchiri

Court Clerk Mutisya