



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL CASE 3 OF 1996

REPUBLIC PROSECUTOR

- Versus -

- 1. SIMEON MRAMBA MWENI**
- 2. SAMSON SHAURI MJAPE**
- 3. WILLIAM KADENGE MJAPE**
- 4. STEPHEN KAHINDI MWADZANI**
- 5. ROBERT LUGO MJAPE**
- 6. THOMAS KAZUNGU KALUME.....ACCUSED**

RULING

The prosecution in this case closed its case after summoning fifteen (15) witnesses to testify. Submissions on both sides were recorded thereafter. Pursuant to Section 306(1) Criminal Procedure Code the court is enjoined to consider at that stage whether there is evidence that the accused persons or any one of them committed the offence. I now proceed to do so.

The statement of offence that the prosecution set out to prove, and prove beyond reasonable doubt, was murder contrary to Section 203 as read with Section 204 of the Penal Code. It was alleged that the six accused persons had jointly murdered one SWALEH MAHDI SWALEH on 3rd of December 1994 at Msabaha sublocation, Ganda Location in Kilifi District, Coast Province.

In order to discharge the onerous burden of proof placed on it by law, the prosecution must not only prove beyond reasonable doubt the fact of death of another person, but also the cause of death and that there was the intention by the accused person or persons to cause such death. There are elaborate provisions in Section 206 and 213 of the Penal Code relating to "Malice aforethought" (which is the intent) and "Causing death" respectively.

To prove the fact of death, the prosecution called ATIYA ABDALLA (ATIYA) (P.W.2) who was the second wife of the deceased. On the 3rd December 1994 at about 4 p.m. she accompanied her husband from their residence in Malindi Town and were driven to their Farm at Msabaha, by their driver. There they have a Farm and Farm workers. They also have a small shop or kiosk where they sell Farm produce and other provisions to the workers and other members of the public. They arrived at about 4.30 p.m. Her

husband went to open the shop while she proceeded to a store at the back of the shop to keep her "buibui". The driver was left outside. Just then gun shots rang out twice. Atiya ran to the shop, checked and found no one. But her husband was lying down inside the shop in a bad state bleeding from the chest. He could still speak and quickly told her to close the door of the shop, but as she was about to do so, two people pushed her from the back and hit her on the head. She lost consciousness. She was informed about the death of her husband when she came to in hospital later that evening.

The deceased's nephew who is a trader in Malindi Town received information about his uncle's death at 5 p.m. that day. He testified as (P.W.9) BARAK BAKHSWEIN (BARAK). He went to hospital and found the body there. He saw a shot wound on the chest and a cut on the head. He identified it as the deceased's body before a post mortem was carried out.

The Post Mortem was performed on the deceased's body by DR. MATHEWS ANDERSON EZEKIEL KAI (DR KAI) (P.W.I). However, although Dr. Kai testified that he performed the Post Mortem and took some notes, he did not complete the Post Mortem report or produce the Notes he took down. The Post Mortem Report Form P23A was completed by one DR. ATEYA, who was said to be stationed at Malindi District Hospital. It was only marked for identification awaiting the evidence of DR. ATEYA. However, he was not called as a witness and the Post Mortem report was therefore not produced in evidence. Be that as it may, Dr. Kai remembered having seen the body of the deceased which was identified by Police Officers and relatives. He saw a bullet wound on the left of the chest. The bullet had gone through and exited through the back touching the heart. He also saw a cut on the left side of the head which was caused by a sharp object. It was 4 cm long, 4 cm deep and 1 cm wide. Death was due to haemorrhage shock as a result of the wounds. In his recollection however, Dr. Kai saw the body at 3.30 p.m. which would put the timing behind the hour of shooting as narrated by Atiya. Atiya in her testimony however stated that she was only estimating the time as she had not looked at her watch.

SERGEANT PATRICK MWANGI (SGT. MWANGI) (P.W.11) was on duty at Malindi Police Station when he received a report at 5.30 p.m. that someone had been killed at Msabaha. He proceeded to the scene with other officers arriving at 6.30 p.m. They only found a lot of blood on the shop floor. The deceased had been taken to STATHOSPITAL Malindi where he died soon after arrival.

Finally IP ABDALLA WAFULA KERE (P.W.12) (KERE) was the Deputy OCS Malindi Police Station who took possession of the body of the deceased and supervised the Post Mortem process. When it was completed he released the body to the relatives to bury in accordance with Muslim rites. Despite the discrepancies on the times referred to by Dr. Kai and Atiya therefore, I am satisfied that the fact that one Swaleh Mahdi Swaleh died on 3.12.94 was proved beyond doubt. It was also proved that he died from haemorrhage shock as a result of a bullet wound on the chest and a cut wound on his head.

Who caused those wounds? (H) No direct evidence was offered by the prosecution. Atiya (P.W.I) never saw the person or people who fired the two gun shots she stated to have heard. She saw no one in the vicinity of the shop. Their driver Kateteh whom she said was present when they were attacked was not called as a witness and there is no knowing what he witnessed or did, if anything. Atiya said they had four workers in the house and 13 - 14 in the shamba. They were going to pay their wages. It is not clear where all the workers were at that moment in time, but two of them were called to testify. The Watchman in the shamba was NGUMBAO KATANA MBAE (P.W.3) (MBAE). 'He came from the shamba at about 4.30 p.m. and found his employer had arrived with his wife and driver. As he went into the store, to keep his tools he heard gun shots from behind the shop. He took one terrified look and started running away in the opposite direction towards the bush. As he did so he saw fleetingly some two black figures, one short the other tall. He could neither tell their features nor describe them in any way. When he returned later they were gone but the deceased was lying down in a coma.

The other worker who testified was MOHAMED SHULE GOLISHA (P.W.4) (GOLISHA). He was employed to sell water to the public from a water point which was about 30 yards from the shop. He was on his own at the time. He said he saw some two people standing at the window of the shop and he thought they were waiting to buy provisions. The shop is near the Malindi/Mombasa main road. All he could say however was that one was short and one was tall. He did not see their colour or whether they

were fat or thin. He never noticed their clothing. When he heard two gun shots ring out he took off towards the bush in the opposite direction to save his life. He was unable to recognise or identify anyone in connection with the offence.

The probative value of those two witnesses is thus virtually worthless. They made no mention of any description of clothing or physical features of the assailants and on their own candid confessions, they did not witness the killing or see the persons who did it.

It was therefore left for the prosecution to build up an unassailable case based on circumstantial evidence. That is evidence in which the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. I will now examine the evidence in that regard.

The strongest evidence was tendered through ANDERSON SHULELEWA (P.W.5) (LEWA). He was a KANU Youth Winger aged 47 years and came from Msabaha area. He was a neighbour to the second accused (SAMSON SHAURI MJAPE) (SHAURI). He found Shauri at a "Mnazi" (Palmwine) - drinking area with two strangers and he was invited for a drink. That was at about 2 p.m. on 3.12.94. The shamba of the deceased was two kilometres away between Msabaha and Malindi. Shauri, according to him, had told him he was taking the strangers to some place up the road and they would return by 5 p.m. But they did not. At about that time however, Lewa happened to be near the Malindi/Mombasa road when he saw two people running fast towards Mombasa direction. He tried to talk to them but they did not respond. They stopped a bus which they entered and went towards Mombasa. He recognised them as the two strangers he had seen earlier at 2 p.m. He also noticed what they were wearing. One, whom he pointed out in the Dock as 1st Accused (SIMEON MRAMBAMWENI) (MRAMBA) had black trousers and a black T-shirt. The other, whom he pointed out in the Dock as the 6th Accused (THOMAS KAZUNGUKALUME) (KALUME), had greenish trousers and also a greenish shirt. He also had a "Box" - style haircut.

On seeing those two strangers Lewa said he went straight to report to the Chief of the area. Shortly thereafter some people told him Swaleh had been killed.

Unfortunately for this witness, when the statement he gave to the Police when his mind was still fresh on 12.12.94 was put to him in cross-examination, he denied several material portions of it which were contradictory to the version narrated in court. His explanation was that the Police did not write down what he had told them or forgot to do so.

More importantly there was no identification parade held for this witness to test the description, if any, that he may have given to the Police about the two strangers when he recorded his statement. Dock identification carries no weight. He mentioned some items of clothing worn by the two strangers but none were shown to him for identification in court. The only items of clothing produced as exhibits in court were:

4(a) Blue Trousers

4(b) Green T-shirt

4(c) Black Cap

4(d) White pair of leather shoes

5(a) A green Jacket

5(b) A dark brown balaclava.

These items bear no relation to those seen by Lewa and were not recovered from Mramba or Kalume.

An attempt by the prosecution to support the evidence of Lewa that the two strangers were seen in the neighbourhood of Msabaha was frustrated when three other witnesses called went off on a tangent and denied having witnessed such fact. One was LUGO MJAPEKISI (P.W.6) (LUGO). He was a "Mnazi" seller and was presumably tendered to support Lewa's evidence that the two strangers were at this Msabaha Mnazi drinking club with Shauri, his brother.

Lugo said he knew Mramba (1st accused) in August/September 1994 when he was introduced to him by his son who is married to Mramba's sister. But at 2 p.m. on 3.12.94 he did not see Mramba come to his Mnazi-selling club with Shauri. Shauri was there at the time drinking but so were many other people. He was busy selling but he never saw Mramba that day.

The Prosecution hit a similar blank with (P.W.7) KATANA MJAPE and (P.W.8) ALFRED KENGA LUGO both of whose evidence had no probative value in this case.

That leaves the solitary evidence of Lewa, which as observed above was discredited.

Other circumstantial evidence that could have been developed in aid of other evidence but was sadly left in limbo by the investigators was the report on the live cartridge and blood-stained panga collected from the scene of crime by SERGEANT PATRICK MWANGI (SGT MWANGI) (P.W.11) and handed over to the scenes of crime Officer. No report was produced about them. Apart from photographs having been taken at the scene, which were also not produced, there was no evidence of any other kind of investigation having been done at the scene, including dusting for fingerprints or collection of any incriminating material. There was evidence of some incriminating letter having been recovered which was allegedly written by Mramba (accused 1) but no evidence from a handwriting expert was tendered to prove that it was so written.

The prosecution then fell back on extra-judicial statements made by some of the accused persons which allegedly amounted to confessions. They called three Police Officers in that endeavour.

The star witness among them was (P.W.15) CHIEF INSPECTOR JOHN BENJAMIN KADZAA (KADZAA) whose evidence I shall revert to presently. As some of the statements were retracted or repudiated, I shall restate the law relating to such confessions. It has been restated in many treatises on law and in decided cases, some of which were cited to me in submissions by learned Counsel for the accused persons Mr. Ngombo. But the common thread running through them was summarised in TUWAMOI -vs- UGANDA (1967) EA 84 which was followed by the Court of Appeal in Bakari Omari & John Martha Komora -vs- Republic (1982-88) 1 KAR 349; thus:

"We would summarise the position thus - a trial court should accept any confession which has been retracted or repudiated or both retracted and repudiated with caution, and must before founding a conviction on such a confession be fully satisfied in all the circumstances of the case that the confession is true. The same standard of proof is required in all cases and usually a court will only act on the confession if corroborated in some material particular by independent evidence accepted by the court. But corroboration is not necessary in law and the court may act on a confession alone if it is fully satisfied after considering all the material points and surrounding circumstances that the confession cannot but be true".

The court stated that it was dangerous to act upon such statement in the absence of corroboration in material particulars or unless the court after full consideration of the circumstances is satisfied of its truth.

The first extra-judicial statement was recorded by P.W.13 IP CHRISTOPHER MSHIMBA (IP MSHIMBA) from the fourth accused Stephen Kahindi Mwadzani. It was retracted and a trial within trial was held. I held, for reasons stated in my Ruling, that the statement was admissible. But IP Mshimba was never recalled to produce the statement in evidence. It is not part of the record.

P.W.14, IP ISAAC QNYANGO (IP ONYANGO) was summoned to produce the charge and caution statement of the 2nd accused, Shauri. Although it was at first retracted and a trial within trial followed

resulting in its admission as Exhibit 6, it turned out that the accused merely denied having been connected with the offence and pleading that he only helped Police to arrest one who was involved. There was also Exhibit 7 which was a Statement Under Inquiry recorded from the 3rd Accused, William Kadenge Mjape (William) by CI Kadzaa. It contains no inculpatory material and therefore amounts to no confession for the offence charged.

The most extensive of the extra-judicial statements recorded was from Shauri. Two of them were recorded on 31.12.94 and 4.1.95. Both by CI Kadzaa.

It is in those statements Under Inquiry that Shauri implicated the 5th accused, Robert Lugo Mjape (Robert), in the conspiracy to commit the offence charged. He also implicated the 4th accused Stephen Kahindi Mwadani (Stephen) and the 1st accused, Mramba in the commission of the offence.

The law on accused persons implicating co-accused persons in their extra-judicial statements has been stated in various cases. In Karava s/o Nionyi & Others (1953) 20 E.A.C.A. 324, the court held:

"It is incorrect to regard a confession made by the accused in an extra-judicial statement as a basis for a case against his co-accused and to hold that with some corroboration it is safe to convict. What is needed is independent evidence which when linked with and supported by the confession of the co-accused removes beyond any reasonable doubt the question of innocence".

There must therefore be other independent evidence against the co-accused implicated in the offence if the extra-judicial statement of Shauri should merit any serious consideration. I find no such evidence on record. The statements under Inquiry made by Shauri who it will be recalled, subsequently denied his involvement in the crime in his charge and caution statement, should be taken with utmost circumspection. It was submitted by Counsel for the accused that the statements should not have been recorded by CI Kadzaa. That is because CI Kadzaa was the investigating Officer in the case despite his denials that he was not. And on authority, an "investigating Officer should not record extra judicial statements. The Court of Appeal stated in Karura -vs- Republic (1982-88) 1 KAR 1165.

"We see the danger of the statement being recorded by investigating officers. The practice has always been that the statement is recorded by another officer who later would produce it in his evidence, but not the investigating officer in order to avoid (the allegation that the investigating officer could have tailored the appellants statement so as to suit the guilt of the appellant)".

In this case there was mention of an Investigating Officer named as IP CHERUIYOT KIRUI. At no stage of the case however was that officer produced or testified before the court. On the other hand CI Kadzaa who gave evidence at length and was cross examined in depth, appears to have delved into every aspect of the case with considerable zeal and did a starling job of it. He was only one day old at Malindi Police Station after being transferred there from Tana River when he was instructed by his senior, the DCIO, Mr. Waigwa, to assist in the investigation of the murder. That was on 11.12.94. No one had been arrested. He took the file and went through it then started interrogating suspects. He travelled with other officers to the scene of crime and to various other places where such suspects were said to have been. He made arrests of several people. Some were released without being charged. He himself recorded five statements from those he arrested. He denied that in that process he gathered enough material and information to concoct the statement he eventually attributed to Shauri on 31.12.94.

In the absence of any investigating Officer having been produced by the prosecution, the complaint would not be unfounded that CI Kadzaa held himself out as the Investigating Officer and ought not therefore to have been involved in taking down extra-judicial statements from Shauri.

Shown a Passport of Robert (accused 5) confirming that Robert was out of the country between 23.10.94 and 11.1.95 and could not therefore have been in any meetings as alleged by Shauri, or at the scene of the murder on 3.12.94, and being asked to explain why that information was not crosschecked during investigations, CI Kadzaa replied that he arrested Robert on 6.2.95 but the following day 7.2.95 he was transferred to Machakos and would not know why the information was not crosschecked.

It must be clear by now, that I am not satisfied that there was any independent, consistent and credible evidence to establish the burning question posed above, who killed the deceased?

The extra-judicial statement of Shauri stands alone and finds no corroboration in the rest of the evidence. Even items of clothing recovered from him bear no relevance to other independent evidence on record. Having so found, it would be unjust to call upon the accused persons to fill in the yearning gaps in the prosecution case. The court should be in a position to convict the accused if they exercised their constitutional right to silence. The evidence on record is incapable of sustaining the verdict that the case is proved beyond reasonable doubt.

Consequently it would be futile to proceed further and consider the issue of malice aforethought or intent which the prosecution sought to establish. Even if I was to consider it, I find on the evidence on record that it was not established beyond reasonable doubt. The motive that was touted by the prosecution to establish the intent was again stated in the extra-judicial statement of Shauri. It was that the deceased should be killed in order to resolve a land dispute between him and some of the accused persons. Although mention was made of some Civil Case pending hearing in the High Court, no effort was made to go beyond the mention to establish the nature of the dispute and those involved. Atiya (P.w.2) believed that the people who were squatting on her husband's land carried out the killing. She mentioned some discussions about buying land having been held 10 years earlier between her husband Shauri and William. She had no details of such discussions. She said some squatters left after being sued but only the six accused persons remained. She believed that there was a meeting held in a village at Msabaha which resolved that the deceased should be harmed. But it was only a rumour and she could not tell whether any of the six accused were present. Apparently all this information was not passed on to the Police.

Neither (P.W.3) MBAE, the Watchman, P.W.4 GOLISHA who had worked on the Farm for 7 years testified about the land dispute. Nor did any of the other prosecution witnesses give any details on the alleged land dispute that was the motive for the killing. Inclusive investigation does not appear to have been directed at that direction although it was a vital part of the prosecution case. Indeed CI Kadzaa stated that he did not follow the report of the land dispute between the deceased's family and squatters. And apparently no one else did.

The upshot is that the accused persons must be discharged as I find no evidence establishing beyond reasonable doubt that they, and they alone, jointly murdered the deceased. I record a finding of NOT guilty under Section 306(1) of the Criminal Procedure Code. The accuseds shall be set at liberty forthwith unless they are otherwise lawfully held.

Dated at Mombasa this 29th day of January, 1999

P.N WAKI

JUDGE