



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**

**Criminal Case 9 of 1995**

**REPUBLIC.....**  
**PROSECUTOR**

**VERSUS**

**1. SEBASTIAN MGANGA**

**2. MWAKALAMU KISHUSHU.....**  
**ACCUSED**

**JUDGMENT**

The Prosecution in this case set out to prove beyond reasonable doubt that on the 13th of August, 1994 at Mraru sub-location, Mbololo location in Taita Taveta District, SEBASTIAN MGANGA and MWAKALAMU KISHUSHU jointly murdered one MWAKESI MGANGA.

SEBASTIAN was the father of the said deceased, Mwakesi, while Mwakalamu was the deceased's uncle. The mother of Sebastian and the father of Mwakalamu share the same mother and father. They are first cousins. Mwakesi the deceased was one of Sebastian's seven children. He was staying with his parents although he was aged about 34 years, and was unmarried. Another son who was married also stayed with the parents. The wife of that son and their child, testified in court.

Out of the seven witnesses called by the Prosecution to prove their case, only two were presented as eye witnesses to what transpired on that fateful day. That was the evidence of P.W.3, MARIA MWAKE MGANGA (MARIA), the wife of Sebastian, and DALMAS MGANGHA (DALMAS), the 13-year old grandson of Sebastian. The other crucial evidence was led through P.W.7 Pc NELTON ALUGONGO (PcALUGONGO) in form of the alleged murder weapon and the Post Mortem report. That leaves four witnesses whose evidence can be quickly dealt with.

P.W.1 was the brother of the deceased who identified and accompanied the body for Post Mortem on 22.8.94. P.W.2 was the deceased's cousin who also identified the dead body of the deceased on 22.8.94 from Post Mortem. P.W.5, EVELYN NYAMBU, was the wife of the deceased's younger brother. She stayed away from home working in shambas the whole day on 13.8.94. She returned home at 6.30p.m. As she approached the home she heard people talking and on arriving there and asking what was happening she was told by the deceased that it was only his head that was hurting. Apparently she found the deceased on the ground as she said she helped him to rise up and he walked. She did not see any injuries on the deceased. The deceased, she said, looked drunk. He stayed overnight and when the hurting head did not recover, he was taken to hospital by Maria (P.W.3) and Sebastian (1st accused), who were his parents.

The Chief of Mbololo location ((P.W.6) testified that he is the one who called the police after receiving a

report from a village elder that the two accused had beaten up their son to death and lied to the hospital staff that he had fallen from a house he was building. There was no evidence from the said village elder or the hospital staff to confirm such an allegation. That evidence was therefore hearsay and inadmissible.

The first eye witness was a minor. A small boy of 13 years. As by law required, I carried out a preliminary examination of the minor to assess whether he was possessed of sufficient intelligence to give evidence and that he understood the nature of an oath and the duty of telling the truth. I was of the view that he was intelligent enough to testify but did not understand the nature of an oath or the duty of telling the truth. He therefore gave unsworn testimony. This meant that his evidence could not be relied upon on its own and has to be corroborated by other evidence for it to be of any use.

On a day and time he could not recall, he said, he saw the three people fighting behind the house. They were fighting with fists.

That was the deceased and the two accused. He did not seem to know what they were doing behind the house before they started fighting. He said it was Sebastian and Mwakalamu who were beating the deceased. They were using fists and nothing else. He shouted and his grandmother who was inside the kitchen came out. She started separating them. When she separated them the deceased fell down and he started talking slowly. His grandmother then carried him into the house on being cross examined Dalmas said he did not see the deceased drinking on the day of the fight. He did not know why they were fighting but the first time he saw the fight, the deceased was being held by the two on the ground. He did not know how the deceased ended up on the ground. the deceased, he said, looked drunk.

Maria (P.W.4) had also spent the whole day on 13.8.94 away from the house cultivating shambas. She returned home at 6. p.m. and started making tea. At home she found the two accused only, drinking alcohol.

While she was still making tea, she heard shouts from her son, the deceased. Apparently the son had been sleeping when she arrived and the father, Sebastian, had gone to wake him up. She rushed out of the kitchen and on going out found the two accused holding down the deceased, strangling him. She did not know how it all started but she joined in to separate the fight. She could not, because she was alone as the only other person nearby was Dalmas (P.W.3) who was only crying. She managed to make the deceased stand up. At that point the father picked up a hoe-handle and hit the deceased who fell down. She picked him up and took him inside the house. She led him by the hand into the house.

In the night the deceased started vomiting and when it became worse, she and Sebastian took him to Voi Hospital. He died one week later whilst undergoing treatment.

The body had already been released for burial when the funeral ceremony was stopped at the last minute for a postmortem to be carried out. It was carried out on 22.8.94 by a DR. IMBAYA who thereafter left the country for further studies and had not returned by the time of this trial. His post mortem report was produced by the investigating officer who was present when the postmortem was conducted. This is permissible under S. 77 of the Evidence Act. Nevertheless, the investigating officer, is only a Police Officer and was not in a position to expound on the medical findings recorded in the report. In the opinion of the Doctor, the cause of death was Cardiac arrest due to head injury (Subdural haematoma) due to blunt injury caused by a heavy object.

The Prosecution says the heavy object was the hoe handle which only Maria, P.W.3 saw and said it was used. One week later she gave it to Pc Alugongo who produced it as an exhibit.

There was no evidence from these eyewitnesses as to the genesis of what they saw as a fight for the first time. They did not testify on the state of the accused's sobriety or any words that may have been spoken by the accused persons or exchanged between the persons present throughout. The scenario at that point was that two old men set upon a drunken looking young man and battered him to death using a heavy object with the intention of doing or of inflicting grievous harm.

Against this background presented by the Prosecution, there was evidence on oath given by the two accused persons. Sebastian was 75 years old when he testified while Mwakalamu was 56. The deceased was 34 years old when he died.

The two of them had spent the whole morning assisting Mwakalamu in cultivating his shamba. At about 2 pm, they had lunch and proceeded to Sebastian's home to drink some traditional liquor which had been prepared by Sebastian. It was 5-litres. They all partook of that liquor up to about 6.30 p.m. No one else was in that home except perhaps Dalmis (P.W. 4) and his sister who was not called as a witness.

The younger man (the deceased) is the one who had been distributing the liquor, but at one point he disappeared into the house and his father (Sebastian) went to look for him. He found him sitting in bed drunk. Sebastian then went out of the house but immediately. The deceased came out of the house carrying a hoe (Hoe/axe) intending to strike Sebastian. Mwakalamu saw it and caught the deceased. He wrestled the Hoe away from him and went to hide it away. The deceased then grabbed his father and wrestled him to the ground. Mwakalamu moved in to assist the old man but the deceased threw him to the ground also. It was at this point that the mother of the deceased came and grabbed the deceased but she could not manage to restrain him. He was struggling and dragging the mother along. That is when Sebastian picked up a small stick from the ground and knocked him on the head straightly asking him why he was behaving that way the stick was not the one exhibited in court he said. Sebastian then sat down and the deceased was taken into the house by the mother. the deceased started vomiting in the night and had hiccups in the morning. That is when Sebastian decided to take him to hospital. He stayed with him in the hospital throughout until he died one week later. He said he loved his son and they had never quarrelled before this grateful day. On that day, he and the others were fairly drunk. He was staggering as he walked but not too drunk to know what he was doing. He denied having provoked the deceased in any way before the deceased came rushing out with a "Jembe/Shoka" (Hoe/axe) to hit him.

Mwakalamu supported that evidence in material particulars. Particularly the evidence that it was the deceased who went to pick up an axe to cut his father. It is Mwakalamu who saw the deceased lunging at Sebastian and caught him before the axe came down. He went to hide it behind the house but found the two wrestling on the ground when he returned. He tried to separate them at which point

Maria also appeared and joined in separating them. He was told by Maria to leave and he left and went to his house. He did not see the exhibit said to be the murder weapon. He confirmed the good relationship between Sebastian and his son saying that he loved his son.

It was the totality of such evidence that the assessors were directed to consider in light of the law as explained to them.

They were directed to consider whether it was Sebastian who hit the deceased on the head with the object exhibited in court and inflicted the grievous harm. If that was so they were directed to consider whether he did so in self defence and whether he used sufficient force to repel the attack on him by the younger man. If the force used was more than necessary in the circumstances then the offence would amount to manslaughter. The issue of common intention was also put to the assessors for consideration. Common intention is when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another and in the prosecution of such purpose an offence is committed of such nature that its commission was a probable consequence of the prosecution of such purpose. If that happens then those persons are considered to have committed the offence. The intention may either be a pre-arranged plan or it may develop in the course of events though it might not have been present to start with. Was there a common intention by Sebastian and Mwakalamu at any state to cause the death of grievous harm to the deceased?

Between the date of close of the trial on 7.5.97, and the summing up to the assessors on 4.6.97, it was reported that Sebastian had died whilst undergoing treatment at Shimo La Tewa Prison Hospital on 29.5.97. The case against Sebastian therefore abated and no findings were necessary with respect to him.

Defence counsel Mr. Omwitsa submitted that the prosecution had not proved beyond reasonable that the

commission of the offence charged. There was no evidence that Mwakalamu inflicted grievous or any harm to the deceased. Such evidence as there was about anyone one striking the deceased related to another person. It was therefore necessary for the Prosecution to prove beyond doubt that there was a common conspiracy between Mwakalamu and that other person to cause the death of the deceased. There could not have been. The three persons had spent the whole morning together working. They had spent the whole afternoon together drinking and it was in evidence that the deceased in this case became so drunk that he lost control of himself. He is the one who attacked his father with a lethal weapon before it was snatched away from him by Mwakalamu. There was no proof of any previous misunderstanding between the deceased and his father or Mwakalamu and therefore no basis for inferring common intention to kill the deceased. Mr. Omwitas Cited the case of Robert Kinuthia Munjai Vs Republic where the Appellant shot the deceased younger man who was violent in order to immobilise him and the plea of defence of the person and prevention of a felony was upheld by the Court of Appeal.

In this case he submitted, the younger person was the more drunk and violent and intended to commit the felony of assaulting his father. Mwakalamu was only involved in preventing the commission of that felony. The incident happened out of the blue and was generated by the influence of alcohol on the part of those involved. Death was caused by Misadventure and the serving accused person should be acquitted.

submitted that the evidence of the two eye deceased P.W. 3, Maria and the Minor P.W.I Dalmas was sufficient to prove the case beyond reasonable doubt. The fact that the two accused persons were seen beating the deceased with fists when he was lying on the ground, according to Dalmas, and that they were strangling him, according to Maria, is proof of Common intention to kill or cause grievous harm. She relied on the definition of Common Intention under S. 21 of the Penal Code in support of that submission. She also cited the case of Wamerio vs Republic (1955) 22 EACA 521 in EACA 521 in support of her submission that although the intention might not have been there to cause death or grievous harm in the first place, this intention developed in the course of the struggle with the deceased and Malice aforethought under S.206 of the Penal Code was constituted.

In her submission, it was highly improbable that the deceased picked up any weapon to attack his father. That weapon was not seen by the eye witnesses. At any rate when the deceased was attacked by the two accused he had no weapon, as according to one of the accused persons, it had been snatched away. There was no reason to continue beating and strangling the deceased thereafter.

As for the allegations of drunkenness on the part of the two accused and the deceased, she submitted that none of them was too drunk to know what he was doing. The deceased had retired to his Bedroom, must have been provoked by the father. On the evidence on record, there was no fight between the three persons but evidence of two persons setting upon another, on whom they inflicted grievous harm which led to death. There was a common intention to do so and therefore Mwakalamu cannot escape culpability.

The two assessors who remained after one of them disappeared midstream, were that Mwakalamu was not guilty of either murder or manslaughter and that there was no common intention to commit any offence.

KENNETH NJUGUNA KIMANI the first assessor accepted the evidence that Mwakalamu was merely involved in restraining the deceased, Mwakesi, from committing the offence of assaulting his father. He believed such evidence because none of the Prosecution witnesses testified to having witnessed the beginning of the quarrel. HENRY KAHINDI NGARE believed the evidence that it was the deceased who took an axe to cut his father and Mwakalamu took away the axe after which the deceased who took an axe to cut his father and Mwakalamu took away the axe after which the deceased started wrestling his father to the ground. He believed that Mwakalamu came in to separate them and that is when the Prosecution witness Dalmas saw the three and concluded that it was the deceased who was being strangled. The mother, Maria, came in shortly after. For people who had spent the entire day together and were only having a drink for relaxation at the end of it, he saw no reason why the two older men would form a common intention to kill the younger man. If the father had intended to kill or assault the son, he would have done so when he went into the room where the son was resting in bed. Instead it is the son who followed the father outside the house where a struggle was witnessed. The deceased must have been the one

assaulting his father and Mwakalamu's role was to separate them. He should therefore be acquitted fully:

The opinions of these assessors are not binding on me in law but I find them well founded in fact and in law.

It is clearly the position that the prosecutions two key witnesses, Dalmas and Maria, came in at the tail end of the entire incident. None of them saw its genesis. As stated earlier, the evidence of Dalmas required corroboration in Law, but found none in material particulars. What he saw is not what Maria saw. Before they saw what each said they saw, a lot had happened could only have been narrated by those who were there. The two accused persons did narrate what transpired and they did so on oath. They were cross-examined.

I believe on that evidence, as the assessors did, that the deceased younger man had taken a Hoe/axe with which he intended to strike his old father before Mwakalamu intervened and snatched it away. I believe the younger man then set upon his father and wrestled him to—the ground and Mwakalamu joined in to separate them. I do not find Mwakalamu's involvement amounted to commit a felony with any other person. I make no finding on the actions of Sebastian as his case abated upon his death pending conclusion of the trial.

The case against Mwakalamu KISHUSHU has not been proved beyond reasonable doubt and I find him not guilty. He shall be set at liberty unless he is otherwise lawfully held.

Dated at Mombasa this 8th day of September 1997.

**P. N. WAKI**

**JUDGE**