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Case Action:	Judgment
Judge:	Nicholas Randa Owano Ombija
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Advocates:	-
Case Summary:	-
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County:	Nairobi
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Case Outcome:	-
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Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
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THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL CASE NO. 6 OF 2011

REPUBLIC.....P

ROSECUTOR

VERSUS

DAVID GATEMBO

MBETI.....ACCUSED

JUDGMENT

The accused person herein, **David Gatembo Mbeti** [hereinafter referred to as David and (A1) interchangeably) is charged with the offence of murder contrary to **Section 205** as read together with **Section 204** of the **Penal Code**.

The **particulars** of the charge are that on the 8th day of January, 2011 at Nation Media Area in Embakasi within Nairobi Area Province jointly with others not before the court, murdered Antonius Odhiambo.

The prosecution called five (5) witnesses in support of the charge.

Absalom Agesa Otieno (PW1), is a welder. At about 7.00 pm on 8th November, 2011 he was in the company of his workmate. They were on the way to Pipeline Estate, Embakasi. Towards that end they boarded a matatu from Mulolongo to Pipeline Embakasi.

The conductor asked for fare of sh.20/=for each one of them. He gave the conductor sh.200/=. He expected change of sh.160/= but the conductor returned 60/= instead.

An argument ensued which developed into a confrontation. The conductor hit him on the head with his fist. The conductor then pulled a screw-driver and stabbed the deceased on the leg. The matatu crew then claimed that they were car-jackers. They decided to alight. In the process of alighting the conductor stubbed him with the said screw-driver once again.

At that point in time the conductor had 2 screw-drivers on both hands. Each one of them ran in different direction. At the time of the commotion the interior lights of the matatu were on. Visibility was thus not impaired. He did not see the deceased again that night.

The following day about 6.00 am on an anonymous caller, using the cell-phone of the deceased, identified himself as a policeman stationed at Embakasi Police Station. He asked him to report to the said station. At first he thought the deceased had been arrested. However, the policeman divulged him that the deceased had passed on. That his body had been recovered on the road near City Cabanas. He identified PW1 as the one who stabbed the deceased with a screw-driver.

He came to learn that the accused and the driver had been arrested and locked up in the cells. Later on he viewed the body of the deceased at the mortuary. The body had injuries.

In re-exam he testified in part thus:-

George Ouma Odunga (PW2), testified that the deceased was his cousin. Both of them were welders employed by Kay Construction as turners. They used to stay together at the site. Their houses were adjacent.

On 8th January, 2011 the deceased was on duty. They left work at 7.00 pm. The deceased bathed and changed his clothes. He told PW2 that he was going to Co-operative Bank of Kenya Ltd, Mulolongo Branch using the company bus. However, he never returned.

In the morning the guard at the gate told him that one Absalom wanted to talk to him on phone. When he activated his phone the guard asked for the deceased. PW2 then narrated to him that they had been attacked by a conductor and driver of a matatu they board from Mulolongo. That they decided to go to Embakasi Police Station to check whether the deceased had been arrested. Instead they came to learn that the deceased had died. Inside the vehicle they had boarded the previous night there was a lot of blood. Subsequently he went to the City Mortuary and viewed the body of the deceased. The body was then released to the family for burial after post-mortem.

Maurice Onyango Olalo (PW3), is the elder brother of the deceased. On 9th November, 2011 while at home he received a message, from one Odhimabo, that the deceased was at Embakasi Police Station. He then placed a call to George Ouma (PW1) who disclosed to him that the deceased was dead – murdered. That his body was at the City Mortuary. He then traveled to Nairobi where he identified the body of the deceased for purpose of identification on 13th January, 2011. He arranged for the body to be taken home for burial.

Sgt. Francis Kaimenyu (PW4), was based at Embakasi Police Station as at 9th January 2011. He learnt from the report office that a matatu, Nissan KAC 455A, plying between Kitengela – City Centre picked two passengers the previous night. That a disagreement arose between two passengers and the conductor over change. That the other passengers hit and injured the deceased with a bottle. When he rushed to the scene where the matatu was parked he found the body lying outside the vehicle at a place near KAPA.

He observed that the body had injuries *inter-alia* on the front of the head, the right leg, at the thigh which had a deep cut. Inside the vehicle was a lot of blood. He searched inside the vehicle and found a screw-driver. He ordered the vehicle to be driven to Embakasi Police Station. He identified the screw-driver in court. He confirmed having recovered it from the front seat. It was a flat screw-driver. He facilitated the taking of the body to the City Mortuary. The conductor and driver were then locked in cells. The matatu was detained at the said station as an exhibit.

P. C Maurice Mulcars Ingosi (PW5), was attached to Embakasi Police Station as at 9th January, 2011. The OCS, Chief Inspector Muriithi, instructed him to open a murder investigation file. The suspects were already in the cells. He did investigations which unearthed, *inter-alia*, that the deceased and PW1 boarded the matatu Reg. No. KAS 403 A from Mulolongo. The deceased gave the conductor 200/=. The conductor refunded sh.60/= instead of sh.160/=. Active disagreement ensued culminating in a fight. That PW1 ran away, in the course of the fight, leaving behind the deceased.

The driver Alexander Kironji reported the incident at Embakasi Police Station. The accused was then

arrested and a flat screw-driver recovered from inside the matatu. He tendered the flat screw-driver as exhibit no. 1. He compiled the report which he passed over to the Attorney General (A.G) who recommended that the accused be charged with murder. He attended the post-mortem at examination of the deceased body at City Mortuary on 13th January, 2011. He was given the filed post-mortem report for safe custody. He tendered the same in evidence as exhibit No. 2.

At the close of the prosecution's case, after carefully evaluating the evidence on record, I put the accused on his defence after duly complying with the provisions of **Section 306 (2)** of the **Criminal Procedure Code**.

In his unsworn statement the accused testified that at all material times he was a conductor of matatu registration number KAS 354 A TOYOTA SHARK plying between Mulolongo and City Centre. The driver was Alexander Kironji.

At Mulolongo stage 10 passengers boarded the matatu at about 11.00 pm. Two of the passengers were not co-operative. They seemed drunk. When he demanded fare from them, PW1 gave him Sh.100/=. He refunded change of sh.60/=. PW1 then claimed that he had not been refunded proper change. That he should have been refunded sh.160/=. A fight erupted. PW1 wanted to beat him but other passengers restrained him. Then the deceased held him by the collar of the shirt and tried to strangle him. One of the passenger hit the deceased with a bottle of soda. All this episode took place while the deceased was holding his throat.

The driver then stabbed the deceased with something. At that stage he released the accused collar. He then stepped back and the deceased fell down. He arranged for a taxi to take the deceased to Embakasi Police Station. The accused and driver wrote a statement at the said police station. Both of them were placed in cells. Later on the driver was released and he was charged with the offence of murder as the deceased had succumbed to his injuries. He denied owning the screw-driver and using it to stab the deceased. He denied the offence.

Against that backdrop, it is clear to me that the deceased and PW1 boarded matatu registration number KAS 354 A at Mulolongo. They were destined for City Cabbanas. Along the way an argument ensued over refunded of change. PW1 claimed the change was supposed to be sh.160/= as he had given the conductor sh.200/=. The conductor on the other hand claimed that he had received only sh.100/=. Hence the change refundable was only sh.60/=. Be that as it may. It is common ground that the accused was injured in the process and succumbed to his injuries. At issue is who caused the fatal injuries"

In my judgment, based on the evidence presented before me, I find as in fact that there was a fight between the deceased and PW1. The light inside the matatu was on at all material times. In that scenario PW1 saw the accused stabbing the deceased with a screw-driver. Thereafter the matatu stopped and PW1 and the deceased ran in different directions.

The following day PW1 learnt that the deceased had not reached his house. One Absalom called him and disclosed to him that deceased had succumbed to his injuries. Accused in his defence claimed that it was the passengers who hit the deceased with a bottle of soda. That it is the driver who stabbed the deceased with something who then released his collar. That deceased then stepped backwards and fell down. PW1, on the other hand, testified that it is the accused who stabbed the deceased with a screw-driver. The screw-driver was recovered inside the matatu. There was a lot of blood also inside the said matatu.

Against that backdrop of evidence I am persuaded that the accused person stabbed the deceased with a flat screw-driver exhibit 1 inside the matatu. The driver was on the wheels when the fight broke out. This finding is based on the premise that accused person did strike me as a person who is economical with the truth. He gave me the impression that he was telling a lie to save his skin. I reject his defence. It is a hollow-Shem. It has no ring of truth.

I further find as a fact that the injuries that resulted in massive loss of blood was occasioned by a sharp object. I find as a fact that it is the screw-driver that accused had in his possession that caused the fatal blow to the body of the deceased. Given the force used the **malice aforethought** as defined in **Section 206** of the **Penal Code** is established.

Accordingly I find that the prosecution has proved its case against the accused beyond any reasonable doubt. I find the accused guilty as charged. I convict him accordingly.

Having taken into full consideration all the mitigating circumstances of this case, as presented to me by the defence counsel, I sentence the accused to suffer death as proscribed by the appropriate law.

Dated and delivered at Nairobi this 2nd **day** of April, **2015**.

N. R. O. OMBIJA

JUDGE



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