



**Republic v Katama & another (Criminal Case 19 of 2017)  
[2023] KEHC 19371 (KLR) (29 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19371 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CRIMINAL CASE 19 OF 2017**

**A. ONG'INJO, J  
JUNE 29, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**CHAI MUNGA KATAMA ..... 1<sup>ST</sup> ACCUSED**

**CHIVATSI CHAI MUTENGO ..... 2<sup>ND</sup> ACCUSED**

**JUDGMENT**

**Background**

1. The accused persons are jointly charged with the offence of murder contrary to Section 203 as read with Section 204 of the *penal code*.
2. Particulars are that Chai Munga Katama & Chivatsi Chai Mutengo on the morning of 3<sup>rd</sup> October 2016 at Mwakuhenga village, Chonyi Sub-County within Kilifi County in the Republic of Kenya jointly murdered Hammiton Chivatsi Katama.

**Prosecution's Case**

3. PW 1 the wife of the deceased testified that on 3<sup>rd</sup> October 2016, she was on the way to the farm with her husband, the deceased, when they were attacked by Chai Munga Katama, A1 her husband's Cousin, Chivatsi Chai Mutengo – A2 son to her husband's elder brother and Chai Nyawa who wrestled her down as the other 2 attacked the deceased while armed with small axes and pangas inflicted multiple cuts on her husband and he died.
4. PW 2 Moses Mwanyanje said that on 3/10/2016 he was on the way to his farm and when he got to the bridge he saw something unusual. He saw 2 people had a scuffle with the deceased and they cut the deceased using panga and axes. He said he was about 30 meters away when he saw the incident take place.



5. He said he identified the assailants as Chai Munga and Chivatsi Chai Mutengo who were known to him as they come from the same village. He said the incident shocked him and he hid in a thicket and started crawling away from scene. He said that as he ran away he heard an alarm being raised. He said the incident took place at 6.00am in the morning.
6. PW 3 Bernard Otieno Oduor – Clinical Officer at Kilifi County Hospital produced Postmortem Report prepared by Dr. Yunis who examined the body of the deceased and was of the opinion that death was caused by severe head injury with blunt object.
7. PW 4 P.C. Dennis Isemek testified on behalf of P.C. Kelvin Wafula who had taken over investigations from the late Sargent Winston Kadzomba. He produced statement of the late Sgt. Winston Kadzomba.

### **Defence Case**

8. When the accused persons were placed on defence, the 1<sup>st</sup> accused gave sworn statement and said the deceased was his cousin, a son to his elder uncle. He said the deceased died on 3/10/2016 while he was going to work as a motorcycle rider. He said that he went to the stage and got a customer who wanted to go to Tezo. That on the way he got several calls from his brother but he did not pick. That when he arrived at his destination in Tezo he called his brother back and he was informed that Hammiton had been killed by unknown people.
9. He went back home and found the body of the deceased had been removed to the mortuary. He said the deceased was his friend and they used to assist each other & he had been fabricated for his murder. He said he had not differed with the deceased.
10. A2 also gave sworn statement and said that his father was born in Mwakuhenga village but he later bought land and moved to establish his home in Mabirikani. He said A1 was brother to his father. He said that on 2/10/2016 he attended church with his family and on 3/10/2016 he proceeded to Dzitsoni Market in Kilifi as he was a 2<sup>nd</sup> hand clothes dealer.
11. He said that he left his home at 8.00am and when he was in the market at 1.00am he received a phone call from his mother and he was informed the deceased who is his uncle had died. He said he got affected as the deceased is the one who brought him up as the father died when he was very young. That he closed early at 3.00pm and went home. That in company of his siblings they went to Mwakuhenga to join their relatives there in mourning to make funeral arraignment. He said he attended the burial of the deceased.
12. He said he was arrested on 10<sup>th</sup> June 2017 long after the deceased had been buried. He said that his home in Mabirikani to Mwakuhenga where the deceased was killed is about 10km and he used to visit occasionally whenever there was an issue. He said that the relatives in Mwakuhenga and the family in Mabirikani had no differences. A2 said the allegations against him were false.
13. He said that the last time he saw the deceased alive was a month prior to his murder. He said the wife of the deceased was forced to testify against him. He said the witnesses were placed in cells and forced to testify against them. He said the witnesses were threatened to testify.
14. Gilbert Kitsao – DW 3 said the deceased was his neighbor in Mwakuhenga. He said on 3/10/2016 he heard screams at 9.30am and he went to see what was happening. He found screams were at Hammiton's home and his wife had fainted. He also learnt Hammiton had been killed on his land where he had gone to spray his plants. That there was a sprayer at the scene as well as panga.



15. That the deceased's wife was taken to scene on a motorbike while still unconscious. He said the wife of the deceased was not at the scene of murder. He said he did not see those who killed the deceased. He said scene was 1km from the home of the deceased. He said A1 was brother-in-law to PW 1.
16. DW 4 Idza Msuko Mbisi said A1 and the deceased were brothers and her brothers-in-law. She said that when they heard screams at the deceased's home and rushed there, they were informed the deceased had been killed in the farm. That by then the wife of the deceased was at home and she was carried on a motorbike and taken to the scene while unconscious. That she gained consciousness at the scene and viewed the body of her husband.
17. DW 4 said she didn't know who brought report of the death. She said that she saw PW 1 pass by the home going back to her home from the farm to fetch water and she saw her at home after she heard screams. She said she saw the deceased and PW 1 go to the farm at 7.30am.
18. Submissions were filed at the close of the defence case.

### **Analysis and Determination**

19. From the evidence of the prosecution and the defence the issues for this court to determine are whether the prosecution proved beyond all reasonable doubt that the deceased died as a result of an unlawful act committed by the accused persons and actuated by malice aforethought.
20. The accused persons were arrested and charged on 8<sup>th</sup> April 2017 for an offence that was committed on 3<sup>rd</sup> October 2016. Witnesses did not attend court to testify until when they were arrested and availed in court on 23<sup>rd</sup> June 2021.
21. PW 1 said that she saw A1 & A2 attack her husband when they were on the way to the farm while a third person Chai Nyawa wrestled her to the ground. She said when she heard her husband cry that he was being killed she fainted. This evidence is contradicted by evidence of DW 4 who said that by the time information of death of the deceased was received PW 1 was at home and that is when she fainted and was carried on a motorbike to the scene.
22. DW 3 also testified that he heard screams from the deceased home and on rushing there he found PW 1 had fainted and she was carried on a motorbike to go to scene and view the body of her husband. PW 1 didn't give the name of the suspects in her statement. Whereas PW 1 said that PW 2 went to the farm. PW 2 said he was hiding in a thicket 30m away when he saw accused persons attack and kill the deceased and he crawled away and ran from the scene past his home.
23. A1 testified that on the material day, he had gone to work and he transported a customer to Tezo from where his brother called to inform him the deceased had been killed and he went back home and joined the rest of the family in mourning and making funeral arrangements. The prosecution did not interrogate these allegations.
24. A2 said he learnt of the death of his uncle while he was at the market selling 2<sup>nd</sup> hand clothes and he returned home early and proceeded to his uncle's place in company of his siblings and joined the rest of the relatives to make funeral arrangements and even participated on the burial date.
25. Unfortunately, the initial Investigating Officer died and the one who took over was also not present to explain why it took from 3/10/2016 to April 2017 to arrest the suspects if indeed it is true they had been identified properly as the assailants. There was no evidence as to how the accused persons were arrested and charged with the offence of murder.



26. This court finds that the evidence of the 2 prosecution witnesses falls short of the threshold of beyond reasonable doubt and this court finds that the defence of the accused persons challenge the evidence of the 2 witnesses as to who committed the unlawful acts that led to the death of the deceased. It didn't also come out why the accused persons would have committed the unlawful act that led to the death of the deceased.
27. There is doubt raised in the prosecution case which this court resolves in favour of the accused persons and they are accordingly acquitted and set at liberty unless otherwise lawfully held.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,**

**THIS 29<sup>TH</sup> DAY OF JUNE 2023**

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

**In the presence of: -**

Ogwel - Court Assistant

Mr. Ngiri – State Counsel

Mr. Bwika Advocate for A1

Mr. Egunza Advocate for A2

A1 – present in person from Shimo la Tewa

A2 - present in person from Shimo la Tewa

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

