



REPUBLIC OF KENYA



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**Republic v Chengo (Criminal Case 15 of 2020)
[2022] KEHC 13143 (KLR) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 13143 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL CASE 15 OF 2020**

**A. ONG'INJO, J
JULY 28, 2022**

BETWEEN

REPUBLIC PROSECUTION

AND

EMANUEL KAHINDI CHENGO ACCUSED

JUDGMENT

1. The Accused person was arraigned in Court for the offence of Murder contrary to section 203 as read with section 204 of the [Penal Code](#) Cap 63, Laws of Kenya.
2. Particulars of the offence are that on the 9th of July 2020 at Mwanda Village in Mwavumbo Location, Kinanago within Kwale County, Accused murdered Chizi Mbui Zinarewa.
3. The prosecution called nine (9) witnesses.

Summary of Prosecutions Case

4. PWI was Kazungu Katana (Pseudo name). She testified that on 9th July 2020 she was woken up by sound of unknown object. She found the Accused standing in the room that was about 9 by 9 Meters. When he saw her he ran out and she followed him but he ran into a maize plantation. She went back to the house and found Chizi crying out in pain and was bleeding from the nose and mouth and there was matter oozing out of her brain. She screamed for help and went to several neighbors houses namely; Kwekwe Ziro; Mkambe Ziro and Dama Chengo but their houses had all been locked from outside. She unlocked them. She then she went to the Accused's house and found him and his wife outside. Accused inquired as to what had happened and she told him that deceased had been attacked by an unknown person and she did not know what had been used to hit her. Accused called the Assistant chief, who came and called the police. The Police came to the scene and collected the body and took it to Kinango. She received a call from Chiti who instructed her to take a motorcycle to Samburu with Jangaa Chaka. She did as instructed and they went to Taru Police station. Jangaa and herself were arrested and put in



- police cell. The next day, the police interrogated her and she confessed as to what she had witnessed the previous day. She was categorical that she had seen Accused clearly and he was wearing a black trouser and was shirtless. She had used her flash light to look closer at the injuries of the deceased since she was facing down, however there had been solar light in the room where she was sleeping that enabled her to see the Accused who was standing about 3 meters from him. The Accused had previously said that the deceased was a witch she had wanted to take the deceased back to chigombero where she was married but she was killed before that happened. She did not tell the Assistant chief what had happened as she was afraid. She identified deceased from photographs shown to her.
5. PW2 was Mwachiti Francis. On 9.7.2020 he received a phone call from Tsuma Chiti Mwachiti that his mother had been killed. The next day he went to Kinango mortuary and recorded a statement at Taru police station. He found his siblings remanded at the police, that was; PW1; Jangaa and his wife. He identified the body. He knew Accused for more than a year as his Accused elder brother(deceased) had married PW1. He testified that Accused had had a dispute with Jangaa chaka over cattle and goats and they went to the police station but solved the matter internally.
 6. On cross examination he testified that he was not aware that deceased had differences with the Accused. His sister told him that she had witnessed the mother being cut by a panga. Jangaa his half-brother also had no dispute with the mother. He testified that in his police statement he had said he had suspected Jangaa of killing his mother as he had taken her to Mwanda. His sister had also refused to tell him what had happened to their mother despite the fact that they were sharing a bed and she also did not know what was used to hit the mother. On re- examination he said that no one had told him that they had seen the mother being killed.
 7. PW3 Kalu Chiti Mwachiti, deceased was the Grandmother. On 9.07.20 she received calls from PW2 that deceased had been killed. He proceeded to Kinango and identified the body of the deceased.
 8. PW4 Muupa Juma. On 8.07.2020 he was woken up at Midnight by PW1 who told him that her mother had been killed. His house was about 70 meters his house. He went to her house and confirmed that the Mother had died and he observed that deceased had an injury on the head but he didn't look closely as he feared. He waited till the police came to collect the body.
 9. PW5 is Umazi Jangaa Chaka. From Chigombero. On 9.7.2020 at 11pm she received a call from her husband Jangaa who told him that her mother in law had been cut by a panga. He said he had been informed with PW1, whom the deceased was visiting. Later the police took them and interrogated them about the murder. Later she was released.
 10. PW6, Kwekwe Zizo. On 8/9th July 2020 and they had supper together with her mother PW1 and Bendena her grandmother. Later she was awakened by her mother's cries but found that the door had been locked from outside. Her mother opened from outside and told her that her grandmother was bleeding. She went to her grandmother's house and was able to see the injuries on the deceased's head using solar light.
 11. In cross examination she said the light on the solar bulb had been dimmed but one could identify someone with the light. The mother told her she did not know what had happened to the deceased.
 12. PW7 was Jangaa Chaga. Accused is his in law and deceased was his mother. On 9.7.2020 he was at Mariakani when he received a call at midnight from his sister Kadzo Suo and informed him that the mother had been killed. It was during curfew so he went the next day at 4. am using his motorcycle and found that the body was already in the police car been taken to the mortuary and he went to Kinango hospital. When he returned home he proceeded to Taru police station where he recorded his statement. The deceased and Accused were cordial and he was also and he had also not deferred with



- the Accused. On cross examination he testified that he had differed with his brother Mwachiti Chiti but they reconciled and had never had differences with his mother and the Accused.
13. PW8 was Dr. Kisao Jimba Kalume from Kinango Sub County Hospital. He produced postmortem report dated 12.7.2020. His observations were that the right head of the deceased's skull was fractured and brown and white content was outside the skull and blood clots were oozing from the nose and mouth. In his opinion the cause of death was severe head injury secondary to depressed skull fracture which resulted in intracranial hematoma bleeding.
 14. PW9 was George Omondi attached to DCI Ngong. On 8.7.2020 he received a phone call that a woman had been murdered at Mwanda village in Kinango. Alongside IP Makoma they proceeded to the scene of the crime. They found the deceased body on the bed. She had injuries on the head. They processed the scene and then took the body to Kinango. They commenced investigations but they were never able to find the murder weapon. On 9.7.2020 they arrested three suspects; PW1, PW5 and PW7. On 11th July 2020 they arrested the 4th suspect the Accused. After conducting investigations for 14 days they decided to charge the Accused. The basis of this was that PW1 had told them that the deceased had been visiting her for three weeks and the Accused was displeased with this as he believed that deceased was a witch and he didn't want her in the village. The Accused had also wanted to have forceful sexual relations with her and the deceased presence hindered this. PW1 told them that she saw Accused in the room but he had run away and she had run after him for an explanation but he ran into the maize plantation. She had raised alarm but neighbors could not come as their houses had been locked from outside, a fact they realized in the morning.
 15. In cross examination he testified that house of the deceased was easily accessible by anyone as it lacked window shutters and door shutters. He further testified that no other member of the family had heard Accused claim that deceased was a witch or knew that Accused wanted to have sexual relations with PW1. PW1 told them that there was solar light that enabled her to see Accused but she used the phone torch to observe injuries of the deceased. She also said that there was a mosquito net on the bed that light could not penetrate. He testified that he found Accused and PW1 at scene. Witnesses were reluctant to record statements and PW1 only opened during arrest. He further testified that in recorded statements Accused said that he made phone calls to Assistant Chief and that PW1 had helped him open neighbor's doors that had been locked from outside.
 16. After close of prosecution's case Accused was found to have a case to answer and was put on his defence on 14th March 2022.

Summary of Defence Case.

17. Accused gave sworn evidence. He testified that on 8.07.2020 at 11pm at night he was in his house when he heard screams. He went outside and he met his sister in law PW1 who lived less than a minute from his house. PW1 told him that her mother had been attacked by Assailants. He accompanied her back to her house. Neighbors also responded. The house had windows and doors covered in bed sheets and PW1 was staying with her mother and her grandchildren aged 3 and 1 year and kept chicken and goats in the same house. He entered the house with another group of people and saw the body. The solar light in the house was dim. The right side of the deceased head was oozing blood. He went to his house and called the Assistant chief. PW1 told the Assistant chief that she didn't recognize the Assailant and when the police came she told them the same thing. On Saturday police came and asked him to go to the police station to record a statement and he was arrested and the three suspects released.
18. Accused further testified that PW1 house was light dimly he used his torch to see the deceased. He testified that not all houses were locked and it was not possible for PW1 to seek help from him if he



had indeed killed the Deceased. Accused said that Deceased used to visit PW1. Deceased used to visit even when his mother was alive and he never claimed deceased was a witch. He further said that he had slight differences with PW1 as he told his sister - in law she should shower and prepare for her husband as he was coming. His Daughter in law reported it to him and he told one of his sons to preside over the dispute. Accused testified that PW1 framed him.

Summary of Submissions

19. Accused person through his advocates filed submissions dated 28th June 2022. In a nutshell they submitted that PW1 was not a reliable witness. PW1 gave evidence that she saw the Accused and recognized him as a solar light. However, she later said that she could not be able to see the deceased well and had to use flash light from her phone to see injuries that deceased had sustained.
20. It was further submitted that PW4 evidence was of no probative value in regards to him testifying that the reason why Accused was charged was because he was a witch yet this claim made by PW1 was uncorroborated.
21. It was further submitted that Accused persons defence was corroborated by PW1 who said that she had met him and his wife when she came to notify him of the attack.
22. Reliance was placed on Nairobi Criminal Case No 67 of 2012 *R vs Cliff Macharia Njeri* [2017] for all submission arguments.

Analysis and Determination

23. I have considered the evidence presented before the court both by the prosecution and the defence and in my opinion, the main issue for determination is whether the prosecution proved the case against the accused to the required standard and which standard has been held to be that of beyond any reasonable doubt.
24. In the instant case therefore, the questions that I must answer is whether the prosecution proved: -
 - a. That there was the death of the deceased and the cause of the said death.
 - b. That the death was caused by unlawful acts or omission of the Accused person.
 - c. That the accused had malice afore thought
 - d. Conclusion/ what orders the court ought to make.

Death of Deceased and cause of death

25. Both the prosecution witnesses and Defence attested to the death of the deceased. PW8, Dr. Kisao Jimba Kalume, produced the postmortem report dated 12th July 2020. He testified that the cause of death was severe head injury secondary to skull fracture which is caused by intracranial hematoma.
That the death was caused by unlawful acts or omission of the Accused person.
26. From evidence given by PW1, it is clear that Deceased was attacked while sleeping with an unknown object and her death was caused by an unlawful act.
27. PW1 in her testimony averred that she was able to see the Accused who was well known to her because of the solar light next to her bed. She observed that he was shirtless and had worn black trousers. PW6 also testified that she was able to see the injuries of the deceased using the solar light. She further testified that though the solar light was dim it was enough to aid in identifying someone. Accused



person however discounted this as he testified that he had to use his torch to see the deceased as solar light was not adequate. PW1 also testified that she used her torch on her phone to observe injuries of the deceased closely and because she was lying down.

28. In the case of *Maitanyi vs Republic*[1985]2 KAR 75, the court of Appeal held: -

"Although a fact may subject to well-known exceptions, be proved by the testimony of a single witness, it was necessary to test the evidence of a single witness respecting identification with the greatest care especially when the conditions favoring a correct identification were difficult."

29. It is clear that there are two discounting testimonies on the adequacy of the lightning and the Court must assess the credibility of the witnesses to come to a decision.

30. In *Ndungu Kimanyi v Republic*(1979) KLR 282 the court of appeal held: -

"The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence".

31. In the case herein doubts were cast as to the credibility of PW1 testimony. In my considered opinion, PW1 testimony was not completely believable for several reasons. First and foremost, PW1 said that she ran to the house of the Accused for help and explained to him what had happened despite knowing that he was the one who attacked her mother. She also failed to alert her neighbor's as to what the Accused had done and even told the Assistant Chief that she did not know the Assailant and told PW3 that she had seen him being cut by a panga. That she had seen the deceased being cut by a panga. It was also only after her arrest that she said it was the Accused who had attacked her mother. Her claim that the Accused had called her mother a witch were also uncorroborated. The claims had also been made a year prior the death of deceased. As it stands the evidence of PW1 was uncorroborated and the defence of the Accused created doubt in my mind as to whether he was the one who committed the murder.

32. There is no doubt that the person who murdered the deceased had malice aforethought having purposely locked the neighbor's doors from the outside and hit her on the head with a blunt object. However, I am not convinced to the required standard that it is the Accused person who committed the murder.

33. Having carefully considered the entire evidence adduced by the prosecution and the defence in this case, I find that the prosecution has been unable to prove on the standard beyond any reasonable doubt that the accused persons were in any way responsible for the death of the deceased. I have given the accused persons the benefit of the doubt and I consequently acquit them under Section 306 of the *Criminal Procedure Code*.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 28TH JULY 2022.

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of: -

Ogwel- Court Assistant.

Accused present in person.



Counsel Mutuku- Advocate for Accused person.

Ms Kambanga for state.

HON. LADY JUSTICE A. ONG'INJO

JUDGE

MS Odinagi: We request for copy of the judgment.

Court: Copy of the judgment to be supplied to State and Defence.

HON. LADY JUSTICE A. ONG'INJO

JUDGE

28.07.2022

