**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CRIMINAL CASE NO. 11 OF 2018**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**CHARO KADENGE KOMBE.....1ST ACCUSED**

**KARISA CHARO KOMBE.....2ND ACCUSED**

**Coram: Hon. Justice R. Nyakundi**

**Ms. Sombo for State**

**Ms. Marubu for Accused persons**

**JUDGMENT**

The two accused persons **Charo Kadenge Kombe** and **Karisa Charo Kombe** are jointly charged of murder contrary to Section 203 as read with Section 204 of the Penal Code. In a brief statement of the offence its alleged that on the 16.7.2018 at Chumani area, within Kilifi County, the accused jointly with others not before Court murdered **Kazungu Kombe**. The accused who are being represented by Learned counsel **Marubu** denied the charge. In support of the charge Learned prosecution counsel **Ms. Sombo** summoned two witnesses who had obscured view of the incident.

**Background evidence**

**PW1 – Kazungu Karisa** on oath testified to the effect that on 16.7.2018 he received information with regard to the death of the deceased. In particular **(PW1)** told the Court that within the village a child to the 1st accused had passed away. At one point it was being alleged that the cause of death was as a result of witchcraft administered by the deceased. This was about the reason why the accused persons took away the deceased as a revenge act for killing the young child. The witness testified that when the accused persons came for the deceased he happened not be at home nor at the scene of crime. He also referred to some letters circulating in the area mentioning the name of the 1st accused as the perpetrator of the murder against the deceased.

**PW2 – No. 74494 CPL Ambrose Wambua** gave evidence as the investigating officer of the circumstances surrounding the death of the deceased. Similar to **Kazungu's** testimony he stated that the evidence and inquiry conducted revealed that the deceased was killed by the accused persons. In addition, **Wambua** stated that prior to his death there were allegations of witchcraft involving the first accused's child. **Wambua** further testified that in the course of his investigations he came to learn that **PC (W) Lucy Okumu** and **PC Omar Hadhira** had earlier inquired into the alleged offence of threatening to violence against the 1st accused. However, at the end of it all no charge was preferred or an indictment at the conclusion of the investigations.

At the close of the prosecution case accused persons were duly placed on their defence under Section 306 (2) of the Criminal Procedure Code. The first accused **Charo Kadenge** gave a sworn statement from the witness dock stating that he never committed any unlawful acts of killing the deceased. He dwelt more on the details of his child sickness and subsequent death. The only other time anything between him and the deceased occurred, is during the issuance of summons by the area chief to mediate an alleged utterance of calling him a witch.

Simultaneously thereafter, the accused referred to an oath taking ceremony which appeared to point at the deceased as the cause of his child illness and subsequent death. It did not take long before he heard screams in reference to the deceased killing. Throughout the entire defence it was his evidence that he had nothing to do with the execution of the murder as alleged by the prosecution.

**DW2 – Karisa Charo** also gave sworn evidence in which he denied any participation in the murder of the deceased. That forms the basis of the charge, evidence by the prosecution and a rebuttal defence by the accused persons.

**Analysis**

I reiterate that the prosecution case was primarily based on circumstantial evidence. The cases of **Musili Tulo v R {2014} eKLR** contains classical principles and guidelines in relation to circumstantial evidence.

> **"It follows that the evidence linking the appellant to that offence is circumstantial. We must therefore closely examine the evidence on record, not only as our normal duty as the first appellate Court to arrive at our own conclusions, but also to ascertain whether the recorded evidence satisfies the following requirements:-**
>
> **(i) The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;**
>
> **(ii) Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;**
>
> **(iii) The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.**
>
> **Those principles were set out in the case of GMI v Republic {2013} eKLR which echoes the locus classicus case of R v Kipkering Arap Koske & Another, 16 EACA 135 …… In order to ascertain whether or not the inculpatory facts put forward by the prosecution are incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of guilt, we must also consider a further principle set out in the case of Musoke v R {1958} EA 715 citing with approval Teper v R {1952} AL 480, thus:**
>
> **"It is also necessary before drawing the inference of accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."**

From the foregoing, it is the quality of the evidence in the testimonies of witnesses that is the crucial factor that should determine whether the prosecution has discharged the burden of proof in terms of Section 107 (1) and 108 of the Evidence Act and the principles in **Woolmington v DPP {1935} (AC 462).** The import of Section 108 is that the prosecution bears the ultimate burden of proof of beyond reasonable doubt.

The allegations in the instant case concerns the death of the deceased as prescribed in Section 203 of the Penal Code. The evidential burden of proof is for the prosecution to demonstrate the following elements:

> **(a). That the deceased died.**
>
> **(b). That his death was through unlawful acts of omission.**
>
> **(c). That in the accused persons committing the murder they were actuated with malice aforethought.**
>
> **(d). That firmly so, the available evidence from all the witnesses sufficiently places the accused persons at the scene of the crime.**

On the other hand, therefore, the nature and quality of the identification evidence becomes a determining factor necessary to prove that accused persons and that no one else was involved in committing the murder against the deceased. Reliance on this is to be found in the helpful dicta of **Lord Widgery C. J.** in **Turnbull v R {1977} 1 QB 224** where he said that:

> **"In our Judgment when the quality is good, the Jury or Judge can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it. Provided always, however, that an adequate warning has been given about the special need for caution. When in the Judgment of the trial Judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The Judge should then withdraw the case from the Jury and direct an acquittal witness. There is other evidence which goes to support the correctness of the identification."**

The real question in this case is whether **Kazungu Karisa** had a proper opportunity to identify the accused persons at the scene where the deceased was allegedly killed. In my view the detailed explanation by **Kazungu** did reiterate only on issues of witchcraft and the death of the 1st accused child. Essentially, it remained a matter of conjecture for this Court to determine the people who designed, planned and executed the murder of the deceased on 16.7.2018 at Chumani area.

There is nothing in the statement of the witness **(PW1)** that during the duration of the murder he saw the accused persons at the deceased house or at the scene. More importantly, certain weaknesses in **Kazungu's** statement when tested by cross-examination may be hearsay evidence with low probative value to proof existence of a fact in issue under Section 107 (1) of the Evidence Act.

In **Gregory August & Another v the Queen {2018} CCJ** the Court observed as follows on the guidelines in applying circumstantial evidence to the facts of the case:

> **"To use circumstantial evidence, you must accept certain facts, pieces of evidence and when you combine them together it must point to one conclusion. If there is an alternative conclusion, the circumstantial evidence will not be good. The pieces of evidence must be reliable and, it must point in one direction. The only direction would be towards the accused. If it is not pointing to that direction, the pieces of circumstantial evidence fail. Circumstantial evidence consists of this, that when you look at all the surrounding circumstances you find that such a series of undersigned unexpected coincidences, that as a reasonable person you find in your Judgment is computed to our conclusion. If the circumstantial evidence falls short of that standard, if it does not satisfy that test, then it is no use at all."**

The next determinant issue for my consideration is whether the prosecution on the basis of the evidence has discharged the burden of implicating the accused persons beyond reasonable doubt. As already stated elsewhere murder is defined as the unlawful and intentional killing or causing grievous harm to another human being without any excuse or justification.

In this regard, I make the following observations that the evidence so far tendered in Court establishes the death of the deceased **Kazungu Kombe** on 16.7.2018 at Chumani area. Further evidence considered shows that the proximate cause of his death has a causal link with the blunt head injuries inflicted on the material day. It is also clear from the post-mortem report examination by Dr. Noor Mohammed produced as exhibit 4, the cause of death was that head injury.

As this version stands, it is palpably strong and believable that the element of unlawfulness of the death has been proved beyond reasonable doubt.

The next issue to consider is whether on the basis of the evidence the killing was intentional. In a plethora of authorities, the ingredient of malice aforethought is to be understood and construed as set out under Section 206 of the Penal Code, which defines it in the following terms.

> **"Malice aforethought shall deemed to be established by evidence providing manifestation of anyone of the following circumstances, an intention to cause death of any person or to do grievous harm whether such person is the person actually killed or not or knowledge that the act or omission causing death will probably cause the death of some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death is caused or not or by a wish that it may not be caused or intent to commit a felony."**

I also wish to make an observation that in determining whether the prosecution has proved malice aforethought the Court of Appeal in **Rex v Tubere s/o Ochen {1945} 12 EACA 63** held that:

> **"Trial Court has to examine the peculiar circumstances surrounding the facts of each case the guidelines include the nature of the weapon used, the gravity of the wounds inflicted, the parts of and vulnerability of the body injured the conduct of the accused before, during and immediately after inflicting the fatal injuries causing the death of the deceased, and finally the manner in which the weapon is used, whether one stab, or struck or in inflicting harm it was a repeated act or not."**

For instance, in the case of **Ernest Asami Bwire Abanga alias Onyango v R CACRA NO. 32 of 1990,**

> **"the appellant appeal was dismissed and one of the key consideration was the fact that the brutal killing was well calculated and planned to conclude that he had an intention to kill the deceased."**

In addition, Section 4 of the Penal Code defines grievous harm. Simply as a dangerous:

> **"Or permanent harm or injury which is life threatening. In Angustino Orete & Others v Uganda {1966} 430 "the Court held interalia " that to secure a conviction it is important to prove there was an intention to cause grievous harm. If the evidence falls short of proof of such an intention, then the same would not suffice to establish malice aforethought."**

Further, in **Petero Sentah s/o Lemandwa v R {1953} 20 EACA 230** the Court took the view:

> **"that malice aforethought would be established of death is caused by any unlawful act or omission done in furtherance of an intention to commit a felony."**

A clear reading and application of these principles to the facts of the instant case falls short of the threshold to establish malice aforethought. The evidence on record shows that the deceased sustained brunt trauma to the head fracturing his skull. Though the head is a vulnerable part of the body. There are gaps in the prosecution evidence on the probable weapon and the manner it was used to inflict the fatal injuries. I am therefore reluctant to rule that the unlawful killing of the deceased on the facts of this case was accompanied with malice aforethought.

But that as it may, the evidence of identification test laid down in **Turnbull case (supra)** for clarity purposes depended upon PW1 testimony. This the identification being foundational evidence to place the accused person at the scene failed to render it sufficient enough upon which this Court could certainly point out that the deceased was killed by no other person but the accused in the dock. There is a real discrepancy on the part of the prosecution case as to the actual involvement of the accused in this murder subject matter of this trial. There was therefore no enough evidence to warrant an indictment of the accused person in the first place. These questions on identification and malice aforethought remain unanswered from the single identifying evidence of **PW1 (Kazungu Karisa).** Accordingly, the charge of murder as premised falls short of the threshold to proof the offence beyond reasonable doubt.

I am therefore of the strong view that the charge of murder contrary Section 203 of the Penal Code stand dismissed and the benefit of doubt is resolved in favour of the accused persons by having them acquitted and set free unless otherwise lawfully held.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 22ND DAY OF JULY 2020**

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**R. NYAKUNDI**

**JUDGE**