



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MALINDI**  
**CRIMINAL CASE NO. 12 OF 2014**

**REPUBLIC.....PROSECUTOR**

**=VERSUS=**

**MWENI NGUMBAO KATANA.....ACCUSED**

**J U D G M E N T**

The accused is charged with the offence of murder contrary to Section 203 as read with Section 204 of Panel Code, Chapter 63 laws of Kenya. The particulars of the offence are that the accused, on the 30<sup>th</sup> April 2015 at Kazuyuni village, Marereni within Kilifi County murdered Agnes Kaliye Mkutano.

The prosecution called six witness called six witnesses. PW1 SAMSON MWARONGO KAZUNGU is a relative to both the deceased and the accused. On 29<sup>th</sup> April 2014 he was asleep when he got a phone call at about 11:00 pm from the deceased brother. He was informed that the deceased had been assaulted. The following morning he got information that the victim had died. He went to report at the Marereni police station but found out that the police were aware of the incident. While at the station, the accused went there while holding a panga. He surrendered and was placed on the cells. On 6<sup>th</sup> May 2014 PW1 identified the deceased's body to the doctor who performed the postmortem.

PW2 GILBERT KATANA CHIBO is the area village elder. On 29<sup>th</sup> April 2014 he was at his house when the accused went there at about 8.30 pm. He told him that the deceased had stolen Kshs.30,000 out of Kshs.20,000. While talking to the accused, the deceased's husband, PW3 arrived at PW2's home. PW2 told him that the accused had assaulted the deceased. This was the first time PW2 was getting a report about the missing money. PW2 rushed to the scene. He saw the deceased who had cuts on the neck. They took her to Malindi Hospital but was pronounced dead on arrival.

PW3 KITS AO KATANA is a brother to the accused. He testified that on 29<sup>th</sup> April 2014 he went fishing in the morning and returned at 5.00 pm. While selling his fish, the accused told him that he had visitors at home. He told the accused to go home and he would follow him after selling his fish. PW3 reached home at about 8.00 pm. The deceased was in the toilet. The accused came out from his home carrying two bottles of alcohol and placed them down. The accused called the deceased by her name and while she was at the door, the accused assaulted her with a panga. It was dark but PW3 was just about five (5) meters away from where the deceased was assaulted. PW3 went out to inform his neighbours. He did not return home that evening as the accused was armed with a panga.

Pw3 was recalled and further testified that the accused had told him that the deceased had stolen his money. He found out that the deceased had stolen the money and gave it to a church leader. The

deceased later denied taking the money. He did not see the deceased assaulting the accused on the date of the incident but the deceased used abusive language on the accused. She told the accused to demolish his home and go to his wife. One week before the incident the accused was asking for his money but the deceased kept on abusing the accused.

PW4, DR. SALMIN OMAR ABUOD produced the postmortem report conducted by Dr. Amina at Malindi District Hospital on 6<sup>th</sup> May 2014. The deceased had a deep cut wound on the left side of the neck and mandible extending to the major blood vessels. The cause of death was cardiopulmonary arrest secondary to severe bleeding.

PW5 KARAHAI FAJO is the accused's uncle. On 29<sup>th</sup> April 2014 at 8.00pm he was at his home when the accused went there. The accused told him that he had killed the deceased. He told the accused to report to the village elder. PW5 went to the scene and found the deceased. She had a cut wound on the neck. She could still talk. She told him that it was the accused who had assaulted her on allegation that she had stolen Kshs.30,000. Neighbours went to the scene and the deceased was taken to Malindi Hospital. When the accused went to inform him that he had killed the deceased, he was carrying a panga.

PW6 Chief Inspector JAMES GITAU was based at the Marereni Police Station. He investigated the case. A report was made at the station on 29<sup>th</sup> April 2014. PW6 went to the scene but found that the deceased had been taken to Malindi Hospital but had died. He saw a lot of blood outside the deceased's house. The accused later surrendered at the police station carrying a panga while in the company of his relative. The accused complained that the deceased had stolen his money. He had hidden Kshs.50,000 in his house and the deceased had taken Kshs.30,000 and left Kshs.20,000. His investigations found out that a family meeting was called to resolve the matter. The family discussed the matter but no resolution was reached. The accused found out that the deceased had given her daughter Kshs.5,000.

In his defence, the accused offered to give unsworn statement. He stated that on 28<sup>th</sup> April 2014 he went out in the morning to collect building poles. He came back in the evening and found the deceased talking. He asked her where PW3 was and the deceased told him that he was not in. He traced PW3 and told him to go home. PW3 told him that he would follow him. The deceased told him that even if he went somewhere else out of the homestead he would go and die. PW3 arrived home. He asked PW3 to call his wife so that they could talk as the deceased was alleging that the accused had sold his brother's plot. The deceased was showering. He called the deceased for discussion but she declined. Since 2012 the deceased used to abuse him but he was sick that time.

It is the accused's evidence that he tried to hold the deceased's hand so that he could make her sit where the accused and PW3 were but the deceased hit him with a bucket. He fell down and got confused and could not recall what happened later. It is the accused evidence that he had sold a settlement scheme plot. The buyer was paying by installment. He had kept Kshs.50,000 in his home. The deceased went to clean the accused's home and took Kshs.30,000. The accused asked the deceased about the stolen money but she told him that it was PW3, his brother, who had taken the money. PW3 told him that it was his wife, the deceased, who had taken the money. The deceased and PW3 agreed to refund him the money. However, they later raised the issue that the accused was sick and he would die.

Mr. Ogeto, counsel for the accused submitted that the accused was provoked by the deceased. He did not prepare to commit the offence. There was no *mens rea*. Mr. Nyongesa, counsel for the state submitted that the prosecution proved its case. The alleged provocation in form of insults had taken place prior to the date of the killing. The killing was not done as a result of the provocation.

The prosecution evidence does not prove that the deceased was killed on 30<sup>th</sup> April 2014. The postmortem report indicate that the deceased suffered deep cut wound across the left neck and mandible, extending to major blood vessels: The cause of death was cardio pulmonary arrest secondary to severe haemorrhage/bleeding. The main issue for determination is whether it is the accused who killed the deceased.

From the evidence of PW3, Kitsao Katana, there were only three people at the homestead. The deceased, PW3 and the accused. The evidence from both sides also show that the deceased was taking her bath. It is the evidence of PW3 that it is accused, his brother, who assaulted the deceased. There is the evidence of PW5, Karahai Fajo. He went to the scene and found the deceased could still talk. The deceased told him that it is the accused who had assaulted her. The evidence also shows that immediately after the incident, the accused went to PW2, Gilbert Katana Chibo, the village elder and reported that the deceased had stolen his Kshs.30,000. PW3 went there and informed PW2 that the accused had assaulted the deceased.

From the evidence adduced, it is proved that it is the accused who assaulted the deceased. PW5, was the first person to be informed by the accused about the incident. He told the accused to report to the village elder, PW2. The chain of events show that the accused went to report to PW2. There was no other person that evening .

PW3 was quite clear that the accused was at home and he had placed two bottles of alcohol on the ground for them to take. I do hold that it is the accused who assaulted the deceased using a panga.

Counsel for the accused contends that there was no *mens rea*. The accused was provoked by the deceased. In his defence evidence, the accused testified that the deceased told him he would die since he was sick. It is also alleged that the deceased used to abuse the accused. The evidence shows that it is possible that the accused had lost his money. It is equally possible that possible that it was the deceased who had taken part of the accused's money. The main issue is whether there was anything done at that moment that could have provoked the accused.

Provocation is defined under section 208 (1) of the Penal Code in the following terms:

**“any wrongful act or insult or such a nature as to be likely, when done to an ordinary person or in the presence of any ordinary person to another person or in the presence of any ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered”**

The evidence shows that the alleged theft of the accused's money had occurred several days before the killing. According to the investigation officer, family members had discussed about the issue but had not resolved it. It is the evidence of PW3 that the deceased was in the toilet. The accused called her by her name and when she reached at the door, the accused assaulted her. That line of evidence shows that the deceased did not provoke the accused. There is no proof that deceased attacked the accused with a bucket. PW3 was there and did not witness that incident. It is not also established that the accused went to look for the panga after he was provoked. It is clear from the evidence that the accused had the panga with him. He had already armed himself. The accused had talked to the deceased earlier on that day. The deceased had told him that PW3 was not at home when the accused went home. There is no proof that the deceased provoked the accused. If money had been stolen, it was stolen several days earlier. The contention that the deceased used to tell the accused that he would die does not show that it did provoke the accused.

PW3 was recalled, he tried to assist his brother by testifying that the deceased used to use abusive language on the accused. It is not established that the deceased used abusive language on the accused that evening.

Section 206 of the Penal Code states that malice aforethought is established by evidence proving any of the following:

**(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;**

**(b) knowledge that the act or omission causing death will probably cause the death or grievous harm to some people whether that person is the person actually killed or not although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may be caused**

**(c) an intent to commit a felony;**

**(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.**

As already held herein, it is the accused who assaulted the deceased. He assaulted the deceased using a panga. He knew that by assaulting the deceased, he was going to cause her death or grievous harm. The accused was not provoked or drunk at that time. He was quite sober. He had gone to the shopping area looking for PW2. The accused intended to cause grievous harm on the deceased. There was *mens rea* on the part of the accused. It is established that the accused had planned to assault the deceased. He pre-armed himself with a panga before calling the deceased from the toilet.

In the end, I do find that the prosecution has proved its case beyond reasonable doubt against the accused. The accused is hereby found guilty of the offence of murder contrary to section 203 as read with section 204 of the penal code and is convicted accordingly.

**Dated and delivered in Malindi this 23<sup>rd</sup> day of February 2016**

**S.CHITEMBWE**

**JUDGE**