



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MALINDI**  
**CRIMINAL CASE NO. 19 OF 2011**

**REPUBLIC**

**VERSUS**

**CHARO SAFARI CHARO ..... 1<sup>ST</sup> ACCUSED**

**MTAWALI SAFARI CHARO ..... 2<sup>ND</sup> ACCUSED**

**JUDGEMENT**

The two accused persons are charged with the two counts of the offence of murder contrary to section 203 as read with section 204 of the penal code, Cap 63 Laws of Kenya. The particulars of the offence for the first count is that the accused on 29<sup>th</sup> April, 2009 at about 7.30 pm at Kibokoni village, Malindi Location, Malindi township within Kilifi County jointly with others not before court murdered Katana Baya Yaa. The particulars of the offence for the 2<sup>nd</sup> count are that on the same date and place the accused murdered Nyevu Chengo Kalama.

The state called seven witnesses in support of the case. PW1 FRANCIS KITUNGA BAYA is the son of the two deceased persons who were a husband and a wife. His evidence is that the accused are his grandchildren. On the 29<sup>th</sup> April, 2009 at about 7.30 pm he was drinking at a club when he heard cries coming from his home. He rushed home and it was dark. He saw a body lying on the ground and his wife told him it was the 2<sup>nd</sup> accused who had fainted. He came to realize that a son of his uncle by the name Baraka had died. Shortly a group of about 50 people gathered at his parents' home alledging that they were witches. They were armed with crude weapons. The group assaulted his parents and killed them. They later burned their bodies. By the time police went to the scene the bodies had already burned. It is his evidence that he had tried to defend his parents but someone by the name Shauri pushed him. He was threatened and he went to his house. He watched the scene by peeping from the window through the help of moonlight. The scene was about 25 metres from where he was.

PW2 KADI KATANA BAYA is the deceaseds' daughter. On 29<sup>th</sup> April, 2009 she heard people crying from her parents' home. She went and met her parents. She later went to Baraka's home. While there she heard noise from her parents' home and heard people shouting "kill" "kill". She went to her parents' home and found people armed with crude weapons. One Shauri pushed her off and they killed her parents. She went to her house and fainted. It is her evidence that the two accused were part of the crowd. She did not witness the killing.

NEEMA KAINGU KATANA, PW3, is the wife of PW1. On the material day at about 7.00 pm she was in the house when she heard noise coming from Baraka's home. Baraka's parents said Baraka had

died. She saw people breaking into her son's house. PW1 then arrived home. She saw the 1<sup>st</sup> accused pushing her mother-in-law. The 2<sup>nd</sup> accused was lying on the ground having fainted. She could not stand the assault of her mother-in-law and decided to go to her home. She never went back to the scene and heard that her mother and father-in-law were killed.

PW4 P.C. JOHN MWITHIA was based at Malindi police station and took over the investigations from Cpl. Mwema who had been transferred. He found that the accused had been implicated in the case. PW5 CHARO KAHINDI BAYA is an uncle to the deceased. On the 29<sup>th</sup> April, 2009 at about 7.00 pm he was at Malindi hospital. He got information that his uncle had been killed. He went home and found that the two bodies had already been burnt.

PW6 BAHATI CHARO, an elderly woman was at her home on 29<sup>th</sup> April, 2009 at about 7.30 pm. They had a sick child called Baraka Kahindi who had died at Malindi hospital. She informed people about the death and people gathered at her home. There were many people and she did not know where they came from. The two deceased people were killed but she cannot tell who killed them. She did not witness the killing. PW7 DR. MINA MUMBA is based at Malindi Sub-County hospital. She produced the postmortem report conducted by Dr. Kandia. The postmortem report indicate that these were charred remains of the bodies. The doctor's opinion was that the cause of death was asphyxia and burns of multiple organs.

The accused were put on the defence. In his unsworn defence, the 1<sup>st</sup> accused, Charo Safari Charo testified that he is married with three children. He works at a sand quarry. On the 29<sup>th</sup> April, 2009 he worked at the quarry up to 6.00 pm. They loaded sand on a lorry and while there he got information that Baraka who was sick had died. He went home and found many people screaming. He heard people shouting "achomwe" "achomwe". He saw his parents were being burnt. He started crying. The police went to the scene and he assisted by giving them water to put off the fire. The remains of the bodies were taken to mortuary. He later heard that he was one of the suspects.

The 2<sup>nd</sup> accused, Mtawali Safari Charo also gave unsworn evidence. He testified that on 29<sup>th</sup> April, 2009 at about 7.40 pm he was at the quarry loading sand onto a vehicle. At about 8.30 pm he got a phone call from home and was informed that his brother had died. He went home and heard people screaming. He saw his uncle and his wife being burnt. He was shocked and lost consciousness. When he regained his consciousness he was drenched in water. He was told that he had fainted. He saw the police officer had arrived and were trying to put out the fire. The following day he went to Malindi hospital and the bodies were put in the mortuary. While heading home he heard that he was being mentioned and one of the suspect.

The prosecution evidence show that the two deceased were assaulted and killed on the 29<sup>th</sup> April, 2009 at about 7.30 pm. According to PW1 there was a crowd of over 50 people. The main issue for determination is whether it is accused who killed the deceased. This would also mean whether the accused did participate in the killing of the two people. The evidence show that it was dark but there was moonlight. PW1 saw the 2<sup>nd</sup> accused lying on the ground having fainted. PW3 who is PW1's wife also testified that the 2<sup>nd</sup> accused lied on the ground and had fainted. The evidence of the 2<sup>nd</sup> accused is that he got information about the death of his brother, Baraka, and went home. By the time he reached there he saw the victims already being burnt and he fainted. It is the prosecution evidence that it was dark. The 2<sup>nd</sup> accused in his unsworn evidence stated that he fainted when he reached home after seeing the deceased being burnt.

With regard to 1<sup>st</sup> accused, there is the evidence of PW2 who stated that she saw the accused pushing her mother. All the three witnesses namely PW1, PW2 and PW3 went out of the scene while the incident was taking place. PW1 was peeping from the window at a distance of 25 metres through the help of moonlight. PW2 testified that she did not witness the killing. PW3 could not stand it and went to her house where she fainted. She came to know about the killings the following morning. PW6 who was at the scene did not see those who were burning the victims.

From the evidence on record it cannot be safely concluded that the accused participated in the killing of the deceased. The incident occurred at night and there were many people. It appears that the family members were removed from the scene and could not see what was happening. The neighbours were there but none of them volunteered to testify. It is possible that the two accused were at the scene but I am unable to find that they participated in the killing. Indeed the prosecution evidence show that the 2<sup>nd</sup> accused fainted. PW1 dashed home from the club where he was drinking and on reaching home found the 2<sup>nd</sup> accused lying on the ground. Although the defence evidence is unsworn, I do find that it is not farfetched. It resonates with the prosecution evidence. I also note that although the offence took place on 29<sup>th</sup> April, 2009 the accused were arraigned in court on 26<sup>th</sup> July 2011. PW1 stated that some of the suspects ran away. There is no evidence that the 2 accused were at large. It is clear that the investigations took quite some time and the witnesses could not recollect as to what happened by the time they were recording their statements to the police or testifying in court. Over two years had lapsed.

Given the circumstances of the case, I do find that the prosecution has not proved its case beyond reasonable doubt. The accused are entitled to the benefit of doubt. I do find that the accused are not guilty of the two counts of murder as charged. They are hereby set at liberty unless otherwise lawfully held.

**Dated and delivered in Malindi this 28<sup>th</sup> day of June, 2016.**

**S.J. CHITEMBWE**

**JUDGE**