



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL CASE (MURDER) NO. 22 OF 2011

REPUBLIC.....PROSECUTOR

-VERSUS-

MWAGANDI NGALA HINZANO.....1ST ACCUSED

MOSES CHEA MSANZU.....2ND ACCUSED

J U D G M E N T

1. The two accused are charged with Murder Contrary to Section 203 as read with Section 204 of the Penal Code. The Information states that on 15th July, 2011 at Kakokeni, Jilore, Kilifi County, they murdered **Bahati Kazungu**. They pleaded not guilty and were represented by Mr. Okuto.
2. Through its nine witnesses the prosecution presented the following case. The deceased **Bahati Kazungu (aka Kalama)** left home on the morning of 15th July, 2011 to go to the farm. In the course of the morning the deceased approached a villager, **Mwalimu Katama Unda (PW1)** who was busy on his shamba. The deceased was in a terrible state: he had burns all over the body and was in great pain, pleading to be escorted to hospital. PW1 put the deceased on his bicycle and started for the local dispensary at Kakokeni. On the way he met **Mary Kazungu (PW2)**, a sister to the deceased and the deceased's wife, **Christine Sidi (PW4)** among other relatives.
3. The deceased received intravenous treatment at the dispensary before being referred to Malindi Hospital. He was escorted there by an ambulance in the company of PW4 and his mother **Bendera Kazungu (PW5)** who had been summoned by PW2. On the way to the hospital, the deceased named four persons, namely **Katana Mae, Sulubu (1st Accused), Chea (2nd Accused)** and **Kazungu Kifogo alias bin Wazimu** as his assailants. He said they set him ablaze on accusations that he had stolen farm produce.
4. The deceased died on 21st July, 2011 at the Coast General Hospital where he had been transferred. The cause of death was cardiopulmonary arrest due to fluid electrolyte imbalance due to extensive burns with infections.
5. The matter was reported initially to **APC Shadrack Opondo (PW8)** who visited the scene of the assault. On 4/8/2011 he was called to a scene at Sholonela where he found the two accused under attack by a mob who wanted to lynch them in connection with the death. He arrested them but other suspects remained at large.
6. When placed on their defence, the accused elected to make unsworn defence statements which are similar in content. The accused said they resided at Kakokeni and that on the material day they left home to attend to their respective occupations. While there one **Kazungu alias Wazimu**

came by and declared he had burnt a thief called **Kalama** to death. He later vanished. The accused were later summoned by the Chief to record statements.

Much later the two co-accuseds were arrested on account of allegations that they had concealed **Bin Wazimu**.

7. There is no dispute that the deceased was attacked and set ablaze on the material date and that he died while undergoing treatment. The cause of death was the burns sustained and consequent infections. **Dr. Otieno** (PW9) who conducted the post mortem told the court that the extensive nature of burns sustained by the deceased (75%) are invariably fatal. Clearly therefore, whoever occasioned those injuries on the deceased intended to cause him grievous harm if not death.
8. The question that requires determination is the identity of the person or persons who inflicted the burns on the deceased. In this regard the only evidence relied on by the prosecution is the deceased's dying declaration as allegedly made to the wife of the deceased (PW4) and the mother of the deceased (PW5). These two witnesses stated that the deceased having received initial treatment at Kakokeni Dispensary was conveyed to Malindi District Hospital for further treatment. They accompanied him. While on the way, the deceased allegedly told them that four persons had set him ablaze. He named these persons as **Katana Mae** (at large), **Sulubu** (1st Accused), **Chea** (2nd Accused) and **Kazungu Kifogo alias bin Wazimu** (at large).
9. In cross-examination the two witnesses confessed that at the time of making the declaration the deceased was in pain and in bad shape. However they said that, he was conscious, lucid and could speak, even though he had been much worse on the way to the Dispensary where he received initial treatment.
10. It would seem that during the trip to the hospital, while in the company of PW1, PW2 and 4, the deceased did not name his attackers. PW1 stated that when he questioned the deceased, he explained that he had caught fire while switching on a generator at the shamba, and begged to be taken to hospital. Hence other relatives of the deceased such as the two sisters being PW2 and **Tabu Kazungu** (PW3) who accompanied the deceased until Kakokeni Dispensary did not hear the declaration. However, PW3 on her way home subsequently witnessed **Bin Wazimu** atop a coconut tree uttering words to the effect that he had "finished" the deceased and was ready for the consequences.
11. This evidence is consistent with the statements of the two accused who said they too witnessed the public confession by **Bin Wazimu**. The accused however distanced themselves from the assault on the deceased. What weight can be attached to the dying declaration made to PW4 and 5? Dying declarations are received in evidence pursuant to Section 33 (a) of the Evidence Act. They are admitted on the basis of the principle that the maker made them extreme or dire circumstances while facing imminent death and therefore must have stated the truth. (See **Chogo V. Republic [1985] KLR 1**). Even though there is no firm rule to require corroboration of such declaration, it is considered generally unsafe to base a conviction solely on a dying declaration without seeking corroboration. The court is obligated to evaluate the evidence with caution.
12. In the present case, the deceased was attacked during day time. On his first approach seeking help from PW1 he merely stated that he caught fire while switching on the generator. PW1 claimed that on reaching hospital the deceased "changed his story". That must be in reference to the subsequent declaration naming his attackers as made to PW4 and PW5. Possibly, the deceased was embarrassed to admit to PW1 that he was assaulted on allegations that he had stolen farm produce from neighbours.
13. Whatever the case his initial reticence lessens the weight of his dying declaration. Evidence by PW3 and the accused persons that **Bin Wazimu** openly confessed to the act of setting the deceased ablaze would have been adequate corroboration against the said **Bin Wazimu**. However apart from the statement by the deceased linking the said person with the accused at the time of

the assault, there is no other evidence to show that the two accused were present with him at the time of the assault, even though from their own account, they were not too far from the scene.

14. Similarly, PW1 seemingly did not witness the attack or name any assailant. Unfortunately therefore only close relatives (PW4 & 5) of the deceased were present when the declaration was made by the deceased. That happened several hours after the attack.

15. Reviewing the prosecution evidence in light of the defence preferred by the accused, parts of which are confirmed by PW3, I am of the view that it may be unsafe in the present case to base a conviction solely on the dying declaration of the deceased. I am not satisfied that the prosecution has proved its case beyond reasonable doubt and will acquit both accused persons under Section 322 (1) CPC.

Written and signed at Naivasha this 10th December, 2014

C. W. MEOLI

JUDGE

Delivered and signed at Malindi this 24th day of February, 2015

SAID J. CHITEMBWE

JUDGE