



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL CASE NO. 17 OF 2012

REPUBLICRESPONDENT

VERSUS

CHARO KARISA SHUNGU CHAIACCUSED

JUDGMENT

The above mentioned Accused person was charged with the offence of murder contrary to section 203 as read together with section 204 of the Penal Code.

The particulars being that:

“On the night of 28th and 29th day of March, 2012 at Dugicha Location Ganze Kilifi County jointly, with others not before the Court murdered KAHINDI KITSAO”.

This case was partly heard before Lady Justice Nzioka. Section 200 of the Criminal Procedure Code was complied with and the defence opted for the case to proceed from where it had reached. At the time six (6) prosecution Witness had already testified and the remaining one was the Doctor who had conducted and performed the post mortem Examination.

The brief facts are that on the night in question funeral rites were being conducted at a place called Dugicha – Ganze Kilifi County. The Deceased and a lady called Tabu Kaka (PW 5) left the precincts of the funeral ceremony and went to some nearby bushes for a stolen moment of lovemaking. It was during this escapade that the deceased was attacked with pieces of wood and was left for dead. He was rescued the following day and was taken to Hospital but he later succumbed to the injuries.

PW 5 TABU KAKA testified to have gone to the bushes while in the company of the Deceased as they were lovers. While in the bushes they were attacked by four men. She was able to identify one **CHARO KARISA** (The Accused), **AMANI KATANA** and two others whom she did not know before. She further testified that she managed to escape and returned to the place where the funeral ceremony was being held and she informed the son of the deceased that his father was being beaten in the nearby bushes.

The main issue in this case is that of identification – more so identification by a single Witness.

In the Court of Appeal case of ***Maitanyi –Vs- Republic KLR*** 1986 it was held,

“(1) Although it is trite law that a fact may be proved by the testimony of a single Witness this does not lessen the need for testing with greatest care the evidence of a single Witness respecting identification

especially when it is known that the conditions favouring a correct identification were difficult.

2. *When testing the evidence of a single Witness a careful inquiry ought to be made into the nature of the light available conditions and whether the Witness was able to make a true impression and description*
3. *The Court must warn itself of the danger of relying on the evidence of a single witness identifying Witness. It is not enough for the Court to warn itself after making the decision, it must do so when the evidence is being considered and before the decision is made.*
4. *Failure to undertake an inquiry of careful testing is an error of law and such evidence cannot safely support a conviction”.*

In the present case its only PW 3 who places the Accused at the scene of murder.

During examination-in- chief she told the Court that she was able to identify the Accused and another person called Amani Katana but she was not able to identify the other two. She further told the Court that there was no light at the time. Three of them followed the Deceased and beat him up. Another beat and pushed her and she decided to run away.

Under cross-examination by counsel for the Accused Mr. Obara she told the Court that when the Deceased told her to go to the bushes it was at night and there was no light. She further testified to the effect that she was attacked from the rear. That she was beaten and fled in a span of one minute and that she was able to see the attackers within that one minute and she took off. She also told the Court that there was no moonlight at the time. She also testified that she did not know who beat the Deceased and that she did not see the Accused holding anything in his hands.

From the above its instructive to note that this incident took place in the dead of the night (at 2:00 a.m.). There was no moonlight. It was dark and in a bushy area. The Witness told the Court that she was able to identify the attackers within a span of a minute. She in the same breadth told the Court that she was attacked from the rear and she decided to flee.

What comes out clearly is that the circumstances obtaining at the time did not offer favourable grounds for proper and reliable identification. PW 5 testified to have informed the deceased son that his father was being beaten in the nearby bushes 100 meters away but when he (PW 1) went to check he did not find his father nor the attackers. The following day he found him at a different spot from where PW 5 had told him. She had left him being beaten. He was still alive at the time and they took him to Hospital where he later died. This incident took place on the night of 28th and 29th February, 2012. The Accused was arrested in the month of April, 2012 which is one and half months later. It has not been explained why it took the police such a long time if they had information that the Accused was the killer. It has not been argued that the Accused had fled from the area. In fact he was arrested from his house at night. It is not in dispute that PW 5 was a married woman at the time of the murder. It is also not disputed that the Deceased was also a married man but not to PW 5. Theirs was an illicit affair. The Deceased was not the Husband of PW 5 and the question which comes to mind is what was the motive behind the murder? Was the Accused a hired, murderer? There is no such evidence before the Court.

In conclusion I find that there are numerous gaps in the prosecution case which present doubts in the mind of the Court.

These doubts can only be resolved in favour of the Accused, This case has not been proved beyond reasonable doubt and the Accused is acquitted of the offence of murder contrary to section 203 as read with section 204 of the Penal Code. He is set at liberty unless otherwise lawfully held.

Judgment delivered dated and signed this **28th** day of **April, 2015**.

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M. MUYA

JUDGE

28TH APRIL, 2015

In open Court and in the presence of:-

Learned State Prosecutor Mr. Masila

Learned Defence Counsel Mr. Obara

Court Administrator Mr. Musundi