



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL CASE NO. 40 OF 2012

REPUBLIC..... PROSECUTOR

VERSUS

- 1. MTAWALI AMINI NGAWA**
- 2. SAFARI FOLENI NGAWA**
- 3. CHARO CHOME KITSAO**
- 4. FOLENI KARIMA NGAWA**
- 5. SAIDI AMINI NGAWA**
- 6. BANAKA NGAWA CHOME**
- 7. NGALA CHARO PONDA**
- 8. ABEID AMIN NGAWAACCUSED**

JUDGMENT

The eight (8) Accused persons above named are charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code.

The particulars being that:-

“On the 21st day of July, 2012 at around 8:30 am at Matano Manne village within Kilifi County, jointly with others not before the Court, murdered Kahindi Ngawa Katana”.

The prosecution in this case called six (6) Witnesses in support of their case. All the eight (8) Accused persons gave unsworn statements and called no other Witnesses.

The offence of murder is defined under section 203 of the Penal Code thus,

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder”.

The ingredients of malice aforethought as per section 206 of the Penal Code are;

“(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 of or grievous harm to some person, 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”.

Brief facts for the prosecution case:

On the 21st day of July, 2012 a burial ceremony was being conducted for Daniel Foleni at his homestead at Matano Manee village Ganze – Kilifi County.

The family members of Daniel Foleni suspected the Deceased **KAHINDI NGAWA KATANA** to have caused the death of Daniel Foleni through witchcraft.

In a brazen daylight attack, the Deceased was pounced upon with a hammer, sticks and stones and his life cut short at the age of fifty eight (58).

Adam Kahindi Ngala (PW 1) is a son of the Deceased, he told the Court that all the eight Accused persons are his relatives and that on the 21st day of July, 2012 which was a Saturday many people were gathered at the Homestead of Daniel Foleni in respect of his burial that day. At around 8:30 a.m. He observed the Accused persons and others not before the Court break into groups for discussions in hushed tones. After a short while he saw Charo Chome (3rd Accused) and Safari Foleni (2nd Accused) proceed to where the Deceased was seated with other elders drinking palm wine. Charo Chome 3rd Accused. He pulled him aside as if to tell him something. His colleague Safari Foleni produced a hammer and hit the Deceased twice on the head. The other Accused persons armed themselves with sticks and proceeded to hit the deceased severally saying that he was a wizard. The 8th Accused got hold of a huge stone and hit the Deceased with it on the head. When the Witness went to rescue his father he was pushed away by the 1st and 3rd Accused persons. After killing the Deceased the attackers moved away from the scene. The matter was reported to the assistant chief who called police and after investigations the eight Accused persons were arrested same day.

The body of the Deceased was taken for post mortem examination. The stone that the 8th Accused had used in hitting the Deceased with was taken by police as exhibit.

During cross examination the Witness gave the role each Accused played in the murder of his father. The first Accused kicked the Deceased as he was lying down during the incident. When the Witness went to rescue his father the first Accused pushed him away and returned to kick the Deceased.

That the second Accused Safari Foleni in the company of Charo (3rd Accused) went and pulled the Deceased from where he was taking drinks. 2nd Accused produced a hammer and hit him twice. The 3rd Accused had pushed the Deceased till he fell down.

That the 4th Accused was armed with a piece of wood with which he hit the Deceased with.

He further testified to have seen the sixth Accused kick his father severally. The seventh Accused was said to have been armed with a piece of wood which he used in hitting the Deceased severally.

The eighth Accused Abedi Amini Ngawa was said to have been armed with a huge stone which he hit the Deceased with. This stone was produced in Court as prosecution Exhibit No 1.

Nathaniel Mumba Kahindi (PW 2) was also present on the 21st day of July, 2012 during the preparations for the burial of one Daniel Foleni the same day. He testified to the effect that many people were present including the Accused persons. At about 8:00 am he had observed them break into groups for discussions. He went and enquired from them as to what was the matter. He was ordered to go back and sit down by George Foleni and Charo Foleni who are still at large. At 8:30 am he saw the 2nd Accused Safari Foleni and Charo Chome (3rd Accused) proceed to where the Deceased was seated with other elders, plucked him out from them and his colleague Safari Foleni produced a hammer and hit the deceased with it. Charo Chome (3rd Accused) pushed the Deceased down.

The other Accused persons while armed with sticks proceeded to hit the deceased severally while down. They also kicked him. The 8th Accused picked a huge stone and hit the Deceased on the head. When the Witness tried to intervene Karisa Kitsao who is still at large hit him on the head, Charo Foleni and George Foleni also beat him up. These three were not arrested as they had disappeared.

PW 2 further testified to the effect that the attackers were also threatening to kill the Deceased's wife.

This Witness also gave the roles each of the Accused persons played in the murder of his father. That the first Accused jumped on the deceased and employed several kicks on him. The second Accused hit the Deceased twice with a hammer on the head.

3rd Accused was the one who first went and pulled the Deceased from his colleagues.

The 4th Accused armed himself with a piece of wood and hit the Deceased with it on the head.

The fifth Accused is said to have been armed with a piece of wood with which he used in battering the Deceased. The sixth and seven Accused are said to have used pieces of sticks in attacking and injuring the Deceased.

The eighth Accused used a stone in hitting the Deceased.

PW 3 Hamisi Kahindi did corroborate the evidence of PW 1 and PW 2 and also gave the roles each of the eight Accused persons played in the killing of the deceased.

A post mortem examination was done on the Deceased by Doctor Malik of Kilifi on 26th July, 2012. The cause of death was ascertained as due to severe head injury.

In their unsworn testimonies all the Accused persons denied having committed the offence of murder.

The first Accused told the Court that though he was present at the funeral ceremony he arrived after the Deceased had been killed.

2nd Accused maintains that on the day in question he had gone to milk cows when he heard screams and decided to go home. He found when the Deceased had already been beaten unconscious. When he went to check police arrived and he was arrested together with others.

The seventh Accused testified to have found when the Deceased had already been beaten unconscious. His name was mentioned by the sons of the Deceased and he was arrested and charged.

The 8th Accused testified to have been sent to buy food stuffs and upon return he found police who hand cuffed him. He was taken to police station and later charged with this offence.

The issues for this Courts determination are -

1. Identification
2. Motive

3. Malice aforethought
4. Corroboration

Identification

It is not in dispute that Kahindi Ngawa Katana was murdered at around 8:30 a.m., at a burial ceremony for one Daniel Foleni a relative of his.

Many people were gathered at the scene. He was plucked from where he was seated while in the company of other elders where they were imbibing palm wine. This incident took place in broad daylight in an open place. PW 1 testified to have been at a distance of between 100 meters to 200 meters. PW 2 testified to have been at a distance of about 8 meters from the scene. It has not been suggested in evidence that there was an intervening object like a structure which could have obstructed the Witnesses view.

The Accused persons are close relatives of the prosecution Witnesses PW 1, PW 2 and PW 3. They knew each other before and there was no likelihood of mistaken identity.

PW 1, PW 2, PW 3 gave consistent evidence as to the role that each of the Accused persons played during the incident.

Motive

This incident took place during the burial preparations of one Daniel Foleni who was a relative of the Accused persons.

The Deceased was also a relative of Daniel Foleni who was to be buried that day.

Allegations were flying to the effect that the Deceased was a Wizard and used witchcraft to kill Daniel Foleni hence the revenge by his close relatives.

Malice aforethought

PW 1, PW 2 and PW 3 had testified of how on the fateful morning they had observed the Accused persons breaking into groups and discussing in hushed tones. PW 2 in particular did testify to have gone to find out what was being discussed but he was chased by one George Foleni, Charo Foleni and Karisa Kitsao who are still at large, while its not uncommon for mourners to break into groups for discussions, its evident that the atmosphere was charged and thats why the prosecution witnesses were chased away, the group went and attacked and killed his father (Deceased). Those discussions must have been in relation to the plan of killing the Deceased for having bewitched Daniel Foleni.

The intention to kill the Deceased was hatched in those meetings as alleged and the participants had a common intention to kill.

Corroboration

The evidence of PW 1 was corroborated by that of PW 2 and PW 3 who were eye Witnesses. Though the Accused persons deny having killed the Deceased, their defence is that they were elsewhere, that fateful morning only to have been informed later that the Deceased had been killed. They all claim to have gone to the scene after the Deceased had been killed, and arrested after the prosecution Witnesses pointed them out to the assistant chief and the police. I am satisfied that PW1, PW 2 and PW 3 clearly saw them in the act of killing the Deceased. Their evidence was not shaken during cross-examination. There have been no allegations of the existence of a grudge between the prosecution Witnesses and the Accused persons. I am satisfied that the ingredients of the offence of murder were proved beyond reasonable doubt.

Each Accused person is found guilty of the offence of murder contrary to section 203 of the Penal Code and Convicted accordingly under section 322 of the Criminal Procedure Code.

Judgment delivered dated and signed this **22nd** day of **October, 2015** .

.....

M. MUYA

JUDGE

22ND OCTOBER, 2015

In the presence of:-

Miss Odhiang for 4th Accused

Miss Mwashube holding brief Miss Kipsang for 3rd Accused.

Miss Odhiang holding brief Mushelle, Mwawasi

Masila for prosecution

M. MUYA – JUDGE

Court:

Bonds canceled. They are remanded in custody. Mention on 10th November, 2015 for probation reports and mitigation.

M. MUYA – JUDGE

Court:

Surety documents if any to be released to the Depositor.

.....

M. MUYA

JUDGE

22ND OCTOBER, 2015