



REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CRIMINAL CASE NO. 2 OF 2011

REPUBLIC STATE

VERSUS

KAZUNGU KATANA NGOA ALIAS POLA KATANA..... ACCUSED

JUDGMENT

1. The accused person is charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal code. The particulars in the information state that on the 7th day of December, 2010 at Kibokoni II Village, Konjora Sub location within Kilifi County HE murdered KATANA NGOA SARO.

2. The accused denied the charges. He was represented by Ms. Chepkwony at the trial. The prosecution case was as follows:

Katana Ngoa Saro (the deceased) was the father to the accused. He lived at Konjora with his family which included his second wife Kadzo Katana Ngoa alias Kadzo Kahindi (PW2) and his sons by another wife who are Mwalimu Katana Ngoa (PW1), Safari Katana Ngoa (Safari) and the accused. Administratively, the elder responsible for Konjora sub-location was Alphonse Kahindi Mwanguo (PW3) working under Chief Anthony Maitha (PW4).

3. Sometimes in October, 2010 the accused had approached PW4 complaining that the deceased had bewitched him thereby causing him nightmares and business failure. He wanted PW4 to ask the deceased to treat the accused. PW4 issued a stern warning and advised the accused to seek medical attention for his nightmares. On 21st October, 2010 the deceased reported to the witness that the accused had threatened to kill him if he did not remove the curse he had placed on him. PW4 advised the deceased to report to police, but three days later father and son came back accompanied by relatives. After a sitting, the matter was apparently resolved.

4. It would seem that the younger brother of the accused known as Safari subsequently fell sick and died. His burial was conducted on 7th December, 2010. While the funeral rite was proceeding in the presence of the family and other mourners, the accused rose and struck the deceased with a mattock. The deceased got up to flee with the accused in hot pursuit. The accused caught up with the deceased after several metres, subdued him and sat on his torso. He was armed with a wine tapper's knife known in the local dialect as "lihamba". He then proceeded to slit his father's throat. He died on the spot. Frightened mourners scampered from the scene.

5. The matter was reported by PW2 to PW3 first, and later to PW4. Eventually police were notified. PW2 fled the home on the same date. Later that day the accused presented himself before the crime desk as Kilifi Police Station and reported to IP Newton Sangalia Mjomba (PW6) that the deceased was

attacked and killed by a mob during the funeral of his brother (Safari). PW6 in the company of PC (W) Sarah Amadi (PW5) and the accused drove to the scene. The home was deserted. The body of the deceased lay at the scene in a pool of blood, the neck severed. The body was removed to the mortuary.

6. The police officers instructed the accused to return to the station with the stepmother (PW2) for purposes of recording statements. The accused is said to have approached PW2 and instructed her to tell police that the deceased was killed by members of the public. He warned of dire consequences if anyone gave evidence connecting him with the murder. This threat was also communicated to PW1. Twice thereafter the accused visited PW4 in the company of PW1 and PW2. On the first occasion, he informed PW4 that his two companions had reported that the deceased was lynched by a mob and he wanted PW4 to record a statement in agreement. PW4 declined. On the second occasion (16-12-10) the accused claimed that the witness (PW4) was required to record a statement at Kilifi (Police Station) and he requested PW4 to “coach” PW1 and PW2 as to how to record statements. PW4 told them to speak the truth. Eventually, the accused was arrested and charged.

7. In his defence, the accused gave a sworn statement. He said that on 7th December, 2010 he was at the family home during the funeral of his deceased brother Safari Katana Ngoa. He heard people scream “*muue mchawi, muue mchawi*” (Kill the witch! Kill the witch!). At that moment Safari’s body was at the graveside. A scuffle had developed among the mourners and when he moved towards the scene to help, he found the deceased had been bludgeoned and slashed and was dead. He stated that the mob had chased his father round a house in the homestead before killing him. He reported to police and accompanied PW5 and PW6 to the scene to collect the body.

8. Police also instructed him to report to the station with PW2 and other witnesses. He complied and recorded a statement on 9th and 17th January, 2011. However, on 23rd January, 2011 when he went to collect the burial documents from the police he was placed in custody. He denied killing the deceased stating that previous disagreements between them over witchcraft allegations had been resolved by the chief. He denied to have threatened PW1 and PW2 concerning the murder and asserted that witnesses in the case were family members.

9. There is no dispute as to the relationship between the accused, the deceased, PW1 and PW2; that they are members of one family. There is no dispute that about two months prior to the fateful date, the accused had reported to the authorities (PW4) that the deceased was a witch and had cursed him and or his brother Safari, the latter who later fell ill in late 2010. PW4 had intervened in the matter to reconcile the family. It is not in dispute that Safari did not recover. He died and his burial was set for the 7th December, 2010. Both the accused and deceased were present. The deceased was attacked during the said funeral and, sustained severe injuries to which he succumbed, dying almost immediately. The accused reported to police and together with PW1 and PW2 recorded statements in connection with the murder.

10. The court must determine whether the accused participated in the assault on the deceased, and with malice aforethought occasioned his death. It is correct as observed by the accused that the star witnesses in this case are his relatives. In itself that does not mean that the witnesses are not credible, rather, that it is necessary to pay close attention to what they said concerning the murder especially since no fellow villager who participated in Safari’s burial ventured to come forth and testify.

11. Starting with that aspect, PW6 testified that on the night of 7th December, 2010 he proceeded to the home to collect the body of the deceased. He found the home deserted. He could not even convince neighbours to help him because they were scared. Secondly, he said that later PW1 and PW2 when summoned were fearful and hesitated to record statements. The explanation by PW1 and PW2 is that they had witnessed the murder and that the accused warned them he would equally deal with them if they implicated him. In court, PW1 in particular struck me as thoroughly traumatized and I made a note of the fact during his testimony.

12. The local chief (PW4) testified that PW2 left the home in fear to return to her parents’ home on the night following the murder. He gave evidence, unchallenged by the accused, that the latter tried to

persuade him and also PW1 and PW2 in his presence, to conspire with the accused by confirming the accused's initial report to police that a mob lynched his father. The chief was an independent witness. He had no axe to grind in this matter. I think the chosen style and setting of the murder as described by PW1 and PW2 and confirmed by medical evidence (PW7) supplies a convincing reason why the mourners and family deserted the home on 7th December, 2010 and further, the reluctance by villagers to get entangled in this case. Because, if the evidence of PW1 and PW2 is believed, the murder was executed in open, blatant and blood curdling cruelty. To this matter I now turn.

13. It is the evidence of PW1 and PW2 that while Safari's funeral was underway, the accused suddenly rose and struck the deceased on the head using a mattock (or *jembe*). The deceased attempted to flee, with the accused hot in pursuit. He caught up with and subdued the deceased. In the full view of mourners, he sat on the torso of the deceased and slit his throat using a wine tapper's knife called "*lihamba*". Mourners fled. According to PW1 the accused said he would kill whoever testified concerning his actions. PW1 begged some brave people to help throw soil into Safari's still – uncovered grave.

14. On the same day, the local elder PW3 got a call from PW2 reporting the murder. Also, PW4 received PW2 at his home in the night on the same date in the company of PW3. PW2 reported that the accused had killed the deceased and she was returning to her parents' home, which she did. It appeared to me that the weakest link in the evidence of PW1 and PW2 out of which the defence attempted to make mileage was the allegation that they gave two reports or statements to police. Unfortunately, none of the alleged first reports, supposedly suggesting that a mob killed the deceased, were shown to the two witnesses during the trial. The defence seemed to abandon that line after a challenge by the prosecution.

15. For one, PW1 is illiterate and in my view PW2 was no better in matters of learning. What PW6 stated is that in the initial stage both PW1 and PW2 had been reluctant to speak about the murder. This is consistent in my view not only with their apprehension arising from what they had witnessed, but also the fact that the accused issued threats against them. The accused denies this but it is not believable because he even had the temerity to request the chief PW4 to support his story line that a mob had lynched the deceased.

16. Secondly, he twice visited PW4 with both PW1 and PW2 in tow in a bid to convince all three to agree with him and record exonerating statements with police to the effect that a mob lynched the deceased because he was a suspected witch. If indeed that was true why was the accused at pains to procure and counsel witnesses? Police had already received the initial report. The accused said in his defence that he did not identify any of the persons whom he saw attack his father by slashing and bludgeoning using blunt objects. That is something he could tell the police and leave them to conduct their own investigations. On the evidence placed before me, he was not satisfied to leave the matter to the police to investigate.

17. PW7 produced the postmortem form completed by a colleague, Dr. Rashida, on 23rd December, 2010. Under the heading "External Appurtenance of Body" the report indicates the following:

"- Extensive deep cut wound across neck transverse severing R+ carotid artery and veins, trachea and aesophagus completely severed, cervical spine intact..

Cut wounds on arms; Rt mid-arm (about) 10cm length, deep, severed muscles, bone intact; across popliteal fossa scm-superficial

- *Cut wound Rt lumber region, fascia intact (about) 15cm length."*

The severing of trachea, carotid and aesophagus were also confirmed under "Internal appearance of Body". All other systems were found normal.

18. PW7's assertion that the reference to the popliteal fossa (cavity in back of knee according to the Concise Oxford English Dictionary 10th Edn) was erroneous is difficult to sustain. The view was

probably based on a failure to read the details under “External Appearance of Body” in a wholesome manner. It seemed to me that there were two cut wounds on the limbs: the first was a cut wound on the right mid arm measuring 10cm, deep severing of muscles and the second was a superficial cut wound in the cavity behind the knee, and not necessarily the crook of the elbow as PW7 supposed should have been the case. The two were separate injuries.

19. At any rate the cause of death was severe hemorrhage and asphyxiation secondary to severe neck injury due to assault. While it is true that the postmortem form does not state the possible weapon, the injuries speak for themselves: a sharp weapon not a blunt one was used. These injuries are consistent with the description of the murder as given by PW1 and PW2, and displace any suggestion that the deceased was bludgeoned, or the victim of a mob. There should have been blunt and even multiple random injuries on his body had that been the case. This raises the question why the accused would want to continue making implausible assertion to different authorities including before this court.

20. The reason must be what PW5 sensed after some extended initial interaction with the accused: he had something to hide, while his relatives PW1 and PW2 on whom he was applying pressure, appeared frightened and reluctant to record statements. It could well be said that these witnesses were upset that the deceased had been killed, but they had no reason in my view to falsely fix blame on the accused if he was innocent. He had no disagreement with any of them previously.

21. The fact that PW2 admitted during cross-examination that she heard shouts of “*mchawi muue*” – “kill the witch” does not detract from her evidence as to who actually carried out the attack on the deceased. The previous accusation by the accused that his father was a witch was clearly a matter of public record from PW4’s evidence. In this part of the country such an accusation, rightfully or wrongly, attracts antipathy among many local people against the suspected witch. The accused’s proven conduct before and after the death as narrated by PW4 goes to confirm the evidence by PW1 and PW2 as to his culpability.

22. Upon a careful review of the evidence placed before me I am satisfied that the accused attacked and killed his father on the material date. His defence is not believable in light of the overwhelming evidence by the prosecution and I dismiss it. The severity of the injuries inflicted with a sharp knife leave no doubt that the intention was to cause him grievous harm if not death. Death resulted almost instantly. I find that the prosecution has proved the charge laid against the accused beyond any reasonable doubt and convict him accordingly.

Delivered and signed at Malindi this 27th day of **May, 2014** in the presence of: Mr. Gekanana for accused holding brief for Ms. Chepkwony, Mr. Nyongesa for State. Court clerk Samwel, Accused present.

C. W. Meoli

JUDGE

COURT – Record and sentence on **4th June, 2014.**

C. W. Meoli

JUDGE

4-6-2014

Before Hon. Lady Justice Meoli J

Mr. Nyongesa for State

Miss Chepkwony for accused

Court clerk – Samwel

Accused – present

Interpretation – English/Swahili

PROSECUTOR – Treat as first offender. No records

C. W. Meoli - J

MISS CHEPKWONY – The accused is remorseful and asks for lenience as his siblings are suffering. He pleads for a non-custodial sentence.

C. W. Meoli - J

NOTES ON SENTENCE

The accused was treated as a first offender as no records were available. I have noted his mitigation through his counsel.

However, the court takes a serious view of this offence which has become very common in this jurisdiction. Senior citizens have been forced to live in fear of imminent violent death at the slightest whisper accusing them of witchcraft. It is unacceptable that elders should continue to meet cruel and untimely death at the hands ofusually their own children or relatives.

The facts of this case represents a murder most foul. The accused having earlier alleged that his father was a witch executed his murderous intentions in broad daylight. In the full view of terrorized villagers, he proceeded ot butcher his father using a wine-tapper’s knife. Thereafter he commenced a campaign to silence potential witnesses. His cold and calculated acts of cruelty are as revolting as they are morally reprehensible. It is difficult to countenance a lenient sentence for such an offender.

C. W. Meoli

JUDGE

SENTENCE

The accused will suffer death in the manner authorized by law. Right of appeal 14 days.

C. W. Meoli

JUDGE