



REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRIMINAL CASE NO . 23 OF 2011

REPUBLICPROSECUTOR

VERSUS

GARAMA CHENGOACCUSED

JUDGMENT

1. The accused person was charged with Murder contrary to Section 203 as read with Section 204 of the Penal Code. In that on the night of 31st day of July, 2011 at Boyani village, of Palakumi Location within Kilifi County, he murdered Charo Mwangirani Chula. He denied the charge and was represented initially by Ms. Otieno and later Mr. Nyakoe.
2. The prosecution evidence is as follows: Charo Mwangirani Chula (the deceased) aged about 79 years at the time of death, was a resident of Palakumi, Ganze. On the night of 31st July, 2011 the deceased was at home with his family including a grandchild, Juliet Kadzo Kenga (PW1) his two wives Bendera Charo Mwangirani (PW2) and another described as Chadi. After supper the family retired to bed.
3. The deceased was with PW2, the younger wife in a separate house, while PW1 and the older wife of the deceased (Chadi) occupied another. It is the prosecution case that the called out at the door to PW2's house at about 11.30pm. The deceased got up. There were at least two other men accompanying the accused. The visitors were given seats by PW1 and PW2 and they sat outside the house (presumably PW2's) with the deceased. PW1 and PW2 after settling the visitors returned to their respective houses. Before long however, the doors to their houses were locked from outside. PW1 said she heard and recognized the voice of one Kahindi warning her not to raise any alarm.
4. At the same time, PW1 heard the voice she recognized to be the accused's warning her not to step outside the house. Both witnesses then heard the deceased screaming for help and uttering words to the effect that he was under attack, injured and dying. Attempts to get help from a neighbor Mwenda Kazungu (PW4) failed as it was late. PW1 and PW2 remained indoors all night. Early on the next morning PW4 went to the home of the deceased and opened the door to Chadi's house. At the door to PW2's however she and PW1 found the mutilated body of the deceased. They raised an alarm. Police were called to the scene. They took away the body. Eventually the accused was traced and arrested.
5. When placed on his defence, the accused elected to make an unsworn statement and did not call witnesses. He stated that on 31st July, 2011 he was in his rental house, staying there overnight. He rose on 1st August, 2011 to proceed to work but while on the way, he got a call from a relative,

one Charo Mwangirani to the effect that the deceased had been slashed to death. He promised to go to the caller's house later. In the evening after he reported from work he went to Charo's house at Shanzu and participated in the fund raising for the burial. He and other relatives proceeded to their rural home at Boyani on 5th August, 2011 to settle the mortuary charges. He was arrested with his father on the next day. He denied the offence.

6. There is no dispute that the deceased and his family were well known to the accused as a relative (nephew/son). That certain persons set upon the deceased and slashed him to death on the material night within his homestead. That the accused was arrested on or about 6th August, 2011 in connection with the murder. The court must determine whether the accused was present in the deceased's homestead and participated in the murder of the deceased.
7. Three witnesses gave evidence tending to connect the accused with the murder, PW1, PW2 and PW3. None of them witnessed the actual murder, however. The prosecution case as regards the actual murder is solely built upon circumstantial evidence.
8. In considering the sum total of their evidence I have appraised myself with the applicable law, as set out in the locus classicus **Kipkering Arap Koskei & Anor V R (1949) 16 EACA 135** where it stated:

“In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt, and the burden of proving the facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always in the prosecution and never shifts to the accused.”

And again in **Simoni Musoke v R (1958) EA 715** it was held that:

“In a case depending exclusively upon circumstantial evidence, the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt.”

Citing the decision of the Privy Council in **Teper v R [1952] 2 ALL E.R. 447; [1952] A.C. 480** the court stated in **Musoke**:

“It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.”

9. Secondly, the trial court is mindful of the fact that the murder occurred in the night and that the visual and voice identification evidence of the witnesses (PW1 and PW2) must be treated with caution. In **Joseph Muchangi Nyaga & Anor v R [2013] eKLR** the Court of Appeal stated:

“Evidence of visual identification should always be approached with great care and caution (see Waithaka Chege v R [1979] KLR 271). Greater care should be exercised where the conditions for a favorable identification are poor. (Gikonyo Karume & Another v R [1980] KLR 23). Before a court can return a conviction based on identification of any accused person at night and in difficult circumstances, such evidence must be water tight. (see Abdalla Bin Wendo & Another v R (1953) 20 EACA 166; Wamunga v R [1989] KLR 42; and Maitanyi v R [1986] KLR 198). Before acting on such evidence, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the

accused and time taken by the witness to observe the accused so as to be able to identify him...

10. It is the evidence of PW1 and PW2 that no sooner had the family retired to bed after supper than some visitors (possibly three men) came knocking on the door to PW2's house where the deceased was. According to PW2 the accused called out to the occupants and the deceased got up to answer, followed by the witness. PW2 was ordered by the deceased to place seats outside the house for the visitors. She greeted the guests before returning indoors. She later heard the door being latched from outside and the accused's voice warning her not to get outside. Thereafter she heard the deceased being assaulted and crying out for some time. She said she had seen the guests in the light of a torch which the deceased carried as he went to answer the door.

11. During cross-examination the witness stated:

“I have known Garama (accused) since he was a child and I heard his voice and recognized it. I went close to the guests and I gave them seats. The one I recognized is Garama. I gave the seats and greeted them. Matano Chengo present but I did not see him. The one I am sure about is the accused (Matano's brother). I know both ... equally. It is Garama's voice I heard calling at first at the door and on coming there saw him first. He was the one heading others at the door...my eyes are good but also my husband's torch was on. Garama was directly in the line of the torch at the door when we went to open.”

The witness appeared certain that Garama was at the scene and spoke to her one the material night moments before the fatal assault on the deceased.

12. Although PW1 stated in her evidence that she helped PW2 to provide seats for the guests, this was not mentioned by PW2. Furthermore, although PW1 claimed to have seen the accused among the night visitors she does not indicate what light enabled visibility. However, the rest of her evidence as to the locking of the doors of the house by some people outside and dire warnings preceding the attack on the deceased is in tandem with PW2's evidence, and is also confirmed by the first neighbor, PW4 whom she called on the same night and who only came to the home early the next day.

13. It is possible that PW2 learned from PW1 about the involvement of Matano (the accused's brother from PW2). This is because according to PW1 this same Matano had called her severally on 30th July, 2011 inquiring on her whereabouts and commenting that she had not informed him of her trip from Mombasa where PW1 resided, to her parents' home at Boyani. Equally, PW1 must have learned from PW2 about the presence of the accused at the homestead on the fateful night because it is not clear whether there was any light when PW1 interacted with the night visitors. I find nothing unusual in these matters particularly because, it is not unusual for victims or mutual witnesses of an incident to discuss it subsequently and to mentally reconfirm what they saw.

14. There is no indication at all from their answers in cross-examination that either PW1 and PW2 deliberately contrived their evidence with a view to giving false impressions. On the contrary they struck me as witnesses of truth whose evidence ought to be considered not in isolation but as a whole. As I have indicated, the evidence is consistent save for the circumstances of identification of the accused by PW1 and the fact that each witness heard the voice of a different person (Kahindi & Garama respectively) at their respective doors.

15. PW2 remained unshaken during cross-examination as to the identification of the accused at the scene. This is evidence of a sole eye witness at night. As has been held since the case of **Maitanyi v R [1986] KLR 198** in the following words:

“I have warned myself as I am bound to ...of convicting an accused based on the evidence of a sole identification witness. It falls upon me to be absolutely certain that

the conditions for identification were free from any possibility of error or mistake.”

Such evidence requires careful examination.

16. First, PW2 was admittedly known to the accused as a nephew (son) to her husband. She heard his voice calling at the door. She answered the door beside her husband who allegedly held a torch, itself believable since it was night time, and talked to the visitors. Her evidence concerning the presence of night guests is generally corroborated by PW1 and by PW4, the neighbor who received the night SOS call from PW1 and was first to visit the home on the next morning to open the doors for the corralled in witnesses.
17. The accused's defence is an alibi to the effect that on the fateful night, he was at his rental residence in Mombasa where he admittedly worked. During cross-examination of PW1 and PW2 that defence was not canvassed. More significantly, it was not canvassed with Kahaso Charo Mwangirani (PW3) another relative who testified that at 6.00pm on the material date, the accused while accompanied by two other men was seen riding on motor cycle at the local shopping centre at Boyani. The witness described the scene of their meeting in vivid detail stating that the trio's motor cycle fell as it passed her and that she greeted the accused who answered without much enthusiasm. Her evidence was not challenged in any serious way during cross-examination.
18. The Court of Appeal has stated in the past in **Osiwa v R (1989) KLR 469** that an accused person who pleads an alibi assumes no burden to prove it (see also **Leonard Aniseth v R [1963] EA 206; Ssentale v Uganda [1968] EA 365**). However, like any defence offered by an accused, the court must examine it in the light of the entire case to see, for example, whether it was plausible or an afterthought raised at the last possible moment. There was no possibility in this case of error in identification with respect to PW3 who was well known to the accused and was not shown to have been involved in any misunderstanding with him prior to the offence. Her evidence in my view provides useful corroboration to the evidence of PW1 and PW2 by placing the accused in the proximity of the scene of the attack some hours earlier. The accused's denial of this presence in the village, I think, is a reflection of a guilty mind, in light of the following considered evidence of PW1 and PW2.
19. PW2 said she identified the accused by voice and visually. Of the former, the court stated in **Choge v R (1955) 1 KLR**

“Evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances carry as much weight as visual identification. In receiving such evidence, care would be necessary to ensure it was the accused's voice, that the witness was familiar with it and recognized it and that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who said it.”
20. Applying the foregoing to the instant case, it is evident that the assailants first came in the guise of visitors. PW2 had no proven reason to be anxious; she and her husband must have opened the door late in the night believing the visitors to be genuine relatives and neighbours. As an aunt to the accused (by marriage) it is believable that PW2 knew and recognized his voice when he first called out at the door and later warned her against coming out. Hence in the circumstances there seems little chance of mistaken identity or confusion. This assurance came out clearly in the manner PW2 handled cross-examination.
21. In addition to the voice, she said she had seen the accused in torch light. In the case of **Joseph Muchangi Nyaga & Another v R** the Court of Appeal reviewing relevant case law stated:

“Before acting on such evidence, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and time taken by the witness to observe the accused so as to be

able to identify him subsequently.”

22. Subjecting PW2's visual identification evidence to the foregoing principles, I am satisfied that the evidence is credible and reliable. Not only did PW2 receive the visitors by her husband's side in torch light, she greeted and settled the visitors outside the house. She said the accused was in the lead and was at the door when the couple answered it. She was honest enough to say that she was not certain about his companions. Taking the voice and visual identification evidence I am satisfied that the possibility for error on the part of the witness was very remote. Yet even this evidence is circumstantial in as far as the actual assault itself is concerned, because PW1 and PW2 did not witness the killing, having been locked up in their respective houses.

23. The assault on the deceased commenced soon after PW2 heard the warning uttered by the accused after he locked her door on the outside. This action and the warning followed immediately by the crying out by the deceased in words to the effect that he was dying, inevitably suggests that the same visitors were his assailants. His mutilated body was found at his door early on the next morning. The accused's alibi cannot stand. The proven inculpatory facts in this case inexplicably point to the accused and other unknown persons as the culprits in the murder of the deceased. Moreover, there are no co-existing circumstances to weaken that hypothesis. His defence cannot withstand the weight of the prosecution evidence and is utterly displaced.

24. By inflicting more than 14 cut wounds on the deceased his assailants clearly intended to cause him grievous harm if not kill him. Malice aforethought is self-evident. I find that the prosecution has proved its case against the accused beyond any reasonable doubt and will convict him accordingly.

Delivered and signed at Malindi this 23rd day of **June, 2014** in the presence of Mr. Nyakoe for him, Mr. Nyongesa for State.

Court clerk - George

C. W. Meoli

JUDGE

Court – Mitigation at 2.30pm.

C. W. Meoli

JUDGE

Later at 11.20am

MR. NYONGESA – Treat as first offender.

C. W. Meoli

JUDGE

MR. NYAKOE – I have instructions to leave matter to the court and not submit.

C. W. Meoli

JUDGE

NOTES ON SENTENCE

The accused was treated as a first offender. He has opted not to mitigate. The court having considered

the evidence was satisfied that the deceased was murdered in cold murder in a well-planned attack in which the accused participated fully.

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