



REPUBLIC OF KENYA

High Court at Mombasa

Criminal Case 22 of 2008

REPUBLIC.....PROSECUTION
VERSUS

KARISA MASHA.....ACCUSED

JUDGMENT

The accused **KARISA MASHA** faces a charge of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE**. The particulars of the charge were that:

“On the 5th day of August, 2008 at Madzumbani village in Kaloleni District within Coast Province murdered CHANGAWA KARISA.”

The accused who was first arraigned in court on 9th September, 2008 entered a plea of ‘*Not Guilty*’ to the charge. His trial commenced on 26th May, 2009 before Hon. Justice Sergon who heard six (6) prosecution witnesses. Following the transfer of the trial Judge to the Nyeri High Court, I took over the conduct of the case. **MR. TINDI** advocate indicated to court that the defence did not wish to have the trial start *de novo*. I therefore proceeded to hear the final three (3) witnesses.

PW1 KARUMBI KITSAO told the court that on 5th August, 2008 whilst in her farm she heard the deceased being chased by the accused. **PW1** then states that she saw the accused cut up the deceased with a panga. She ran to call fellow villagers who came to the scene. The police were alerted and they came and removed the body of the deceased to the mortuary where an autopsy was conducted. The body was thereafter released to relatives for burial.

At the close of the prosecution case the accused was found to have a case to answer and was placed on his defence. The accused elected to give no defence as per was his option under section 306(2) of the Criminal Procedure Code. It is now upon this court to determine whether the charge of murder has been proved to the standard required in law.

The offence of murder is defined by section 203 of the Penal Code as follows:

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

Thus the prosecution must prove the following three ingredients in order to sustain a charge of murder:

- 1) The fact of the death of the deceased and the cause of that death.

2) That the death of the deceased was the direct result of some unlawful act and/or omission on the part of the accused.

3) That such unlawful act or omission was committed with malice aforethought.

In this case the death of the deceased cannot be in any doubt. **PW1** told court that she saw the deceased being cut down with a panga. **PW3 KARISA MASHA**, the husband to the deceased as well as several other prosecution witnesses all testify that upon hearing the cries of alarms they rushed to the scene, where they saw the body of the deceased lying dead with cuts on the neck. **PW8 SERGEANT MICHAEL ODUOR**, is the scenes of crime officer who produced the photographs which were taken of the body of the deceased. The photographs all show the body of an elderly African female lying dead in the grass with cuts around the head. Medical evidence on the cause of death is given by **PW7 DR. NTALI MBUUKO**, who performed the autopsy on the body. He told the court that he noted deep cut wounds on the neck and spine. One blow was so viscious it severed the spinal cord. In his opinion the cause of death was “*severed spine and cord due to deep cuts to back and neck*”. **PW7** filled and signed the post-mortem form which he has produced in court as an exhibit **Pexb1**. This was expert medical evidence which has not been challenged or controverted by the defence. I therefore find as a fact that the deceased met her death as the direct result of being cut on the neck and back by a panga.

The next key question is whether it was the accused who committed this unlawful act of cutting and killing the deceased. This is a case where there was only one eye witness to the incident who was **PW1**. That being the case this court is under an obligation to carefully examine the evidence of this single eyewitness to determine whether it is beyond reproach. [See **MAITANYI – VS – REPUBLIC [1986] KLR 198**. **PW1** told the court that the incident occurred at 11.00 a.m. whilst she was out cultivating her farm. As such it was in the mid-morning in broad day light and I have no doubt that visibility was optimum. Further, **PW1** told the court that she knew both the accused and the deceased very well as they were both fellow villagers. **PW1** in her evidence states as follows:

“I had known Karisa (accused) for many years. Karisa Masha is my step-son. The incident took place within a short time. I have not had any grudge with the accused.....”

It is quite clear therefore that being her step-son the witness knew the accused very well and this eliminates the possibility of mistake in identification. In the case of **ANTONONI –VS – REPUBLIC [1980] KLR 59** the Court of Appeal held that:

“Recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.....”

Similarly, the accused in this case being a person who was related to the witness, her identification of him is based on recognition and is not mere visual identification.

In his submissions defence counsel argues that since **PW1** stated that she ran away to call neighbours, the implication is that she did not have sufficient time to see or identify the accused. However, **PW1** is very clear in her evidence that she saw and watched the accused as he chased the deceased. In her evidence **PW1** states:

“I saw the deceased being chased by Karisa Masha. I heard her scream by saying I am dying. Karisa (accused) was armed with a panga. I saw him cut the deceased several times at the back and on the neck.....”

It is clear from this narration that the witness watched as the accused chased the deceased and she saw him strike the deceased. She had far more than a short glimpse at the incident. It is only after **PW1** saw the accused strike down the deceased that she ran back to seek help. From this I am satisfied that although there was only one eyewitness, her account of events is clear, cogent and reliable. **PW1** knew both parties well and the incident occurred in broad daylight. As such I find no possibility of a mistaken identity.

Aside from the eyewitness account given by **PW1** there is also the evidence of **PW9** Chief Inspector Njeru, who told the court that on the same day at about 1.00 p.m. the accused presented himself at the Mariakani police station brandishing a blood-stained panga. Accused proceeded to inform **PW9** that he had cut and killed somebody. Why would accused volunteer this information to the police if infact it was not true. The panga accused had was kept by police and was produced before court as an exhibit **Pexb1**. Mr. Tindi for the defence argues that the statements made by accused amounts to a confession and as such is not admissible. As a court I am fully aware of and mindful of the law regarding confessions as contained in section 25A of the Evidence Act. However, the statements made by the accused were made at his own volition without being asked for any information and secondly the accused was **not** under arrest (indeed he was not even a suspect) when he uttered these words to **PW9**. The accused went to the police station on his own accord and made the utterances to **PW9**. The accused had not been asked any questions – he simply volunteered the information to police. I therefore find that his words did not offend the rules against illegal confessions. Not only did accused tell **PW9** what he had done – he even surrendered the panga he used to commit the deed to **PW9**. I therefore find that there exists overwhelming evidence that it was the accused who cut and killed the deceased.

The *mens rea* of murder being ‘*malice aforethought*’ is defined as follows in section 206 of the Penal Code:

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:-

(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.”

The accused using a panga attacked and cut the deceased with such force that her spinal cord was severed. The ferocity of the attack is a clear indication that the accused fully intended to and did infact cause the death of the deceased.

Having found that malice aforethought has been shown to have existed, this court must now consider the question of the mental state of the accused. From the record the trial proceeded well and with no incident or hindrance until the point at which the accused was placed onto his defence. After that the accused became ‘*unhinged*’ so to speak. He began to exhibit obvious signs of mental disturbance causing the delay of the defence hearing. The court did severally seek to have the accused examined by a psychiatrist. On each occasion the accused was examined and found to be normal yet his behaviour in court left much to be desired. However, I find there is no evidence to suggest that at the time of the commission of this offence the accused was suffering from any mental ailment. There are no records to show that he was previously under treatment for any mental condition. Indeed the defence have not raised the defence of insanity at all. I am satisfied that at the time of commission of this offence, at the time of plea and during the first part of this trial the accused was normal and of sound mind. He had the requisite mental capacity to formulate the *mens rea* for the offence of murder. As such I enter a verdict of Guilty for the offence of murder.

**M.ODERO
JUDGE**

19/12/2012

Judgment not read as letter from Officer in Charge Shimo La Tewa indicates that accused is ill and has been escorted to hospital. The judgment is postponed to 7th February, 2013. Hearing notice to Mr. Tindi.

**M. ODERO
JUDGE
19/12/ 2012**

12/02/2013

Court:

Judgment read out in open court in presence of:

Mr. Kiruki h/b Mr. Tindi

Mr. Jami for State

Mr. Jami:

Treat as a first offender

Court:

Mention 18th February, 2013 for mitigation.

M. ODERO

JUDGE

12/02/2013

18/02/2013

Before Hon. Lady Justice M. Odero

Court Clerk Mutisya

Mr. Jami for State

Counsel absent for Accused

Court:

Mention on 20th February, 2013 for mitigation. Hearing notice to Mr. Tindi.

M. ODERO

JUDGE

18/02/2013

20/02/ 2013

Before Hon. Lady Justice M. Odero

Court Clerk Mutisya

Mr. Jami for State

Mr. Tindi for Accused

Mr. Tindi:

I submit on behalf of the accused. He is a young man. He is unmarried and is an orphan and has had a difficult background. He did not have a stable family background. He is remorseful. He has no prior criminal record. We request for a lenient sentence. We urge court to allow the accused an opportunity to reform and to change his life.

Court:

The offence of murder is indeed a very serious offence. Due to the actions of the accused, a human life has been lost and a family left in mourning. Although this court found that the accused was sane at the time he committed the act it has become very evident that his mental state has greatly deteriorated during the course of the trial. It is not certain that the accused is now in a position to understand the proceedings. As such I do therefore invoke section 167(1)(b) and section 167(2) of the Criminal Procedure Code and I direct that the accused be detained during the President's pleasure at Port Reitz

Hospital in Mombasa from where he will receive the requisite treatment.

It is so ordered.

Dated and delivered in Mombasa this 20th day of February, 2013.

M. ODERO
JUDGE