



REPUBLIC OF KENYA

High Court at Mombasa

Criminal Case 8 of 2012

REPUBLIC.....PROSECUTION

VERSUS

OMAR MOHAMED KAPTENI NZAKA.....ACCUSED

JUDGMENT

The accused **OMAR MOHAMED KAPTENI NZAKA** 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 night of 10th and 11th day of February, 2012 at Akili ni Mali Area in Kaloleni District of Kilifi County within Coast Province murdered HADIJA KONDE MWADENA.”

The accused who was represented by learned counsel **MS. ODHIANG** entered a plea of ‘*Not Guilty*’ to the charge. The state represented by **MR. TANUI**, learned state counsel called a total of ten (10) witnesses in support of their case.

The prosecution case was that the deceased ‘*Hadija Konde Mwadena*’ was a step-mother to the accused. On 10th February, 2012 **PW1 NZAKA KAPTENI** the accused’s father (who was also the husband to the deceased) left his home at 6.00 p.m. to go to his job as a night watchman. He was urgently called back to his home at about 1.00 a.m. only to find a crowd in the homestead and his wife lying dead outside. **PW2 MARIAMU HASSAN** and **PW5 ASHA ATHUMANI** who were both relatives of the deceased told the court that on the material night at about 12.00 midnight they were woken up by a shout. Upon coming out of their houses they met the wife of the accused called **MWANAIKI** shouting that her mother-in-law had been killed. **PW5** ran to the scene but **PW2** stayed back due to fear. **PW5** told the court that she found the body of her mother-in-law (the deceased) lying dead with cuts all over. Both witnesses say they saw the accused walking away into the fields at the time.

On his part **PW3 KIDANGU KILUNGU RUWA** a neighbor to the family told the court that on the same night at about midnight he heard a knock on his door. He opened to find the accused half naked standing trembling at his door. The accused had on a shirt but was naked from the waist down. **PW3** questioned the accused but accused did not utter a word. **PW5** then gave accused a lesso to cover his nakedness then told him to go to the village chairman. Police were alerted and came and removed the body to the mortuary. The following day the accused returned to his home from where he was arrested and taken to the police station. Upon completion of police investigations the accused was arraigned in court and charged with the offence of murder.

At the close of the prosecution case the accused was found to have a case to answer and was placed on his

defence. He gave an unsworn defence in which he denied the charge of murder. This court is now obliged to scrutinize the evidence placed before it and come to a determination as to whether the charge of murder has been proved beyond a reasonable doubt.

The offence of murder is defined by 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.”

From this definition arise three crucial ingredients all of which must be proved in order to sustain a charge of murder.

- 1) The fact of the death of the deceased as well as the cause of such death.
- 2) The fact that the accused caused the death of the deceased by way of an unlawful act or omission.
- 3) That such unlawful act or omission was committed with malice aforethought.

On the fact of the death of the deceased there can be no doubt **PW1**, **PW2** and **PW5** all testify that they saw the badly mutilated body of the deceased lying dead within the homestead. **PW4 ABDALLA JAKA MWANZALA** the Assistant Chief of Kaliang’ombe sub-location told the court that he was alerted of the incident at 1.00 a.m. He rushed to the scene and found the body of the deceased lying dead outside the house.

All these witnesses who knew the deceased very well identify her as ‘*Hadija Konde Mwadena*’.

The cause of death is equally non-controversial. All the witnesses who saw the body told court that it was badly mutilated with deep cuts all over – indeed the hands had been totally severed from the body. This is clearly visible in the photographs taken of the body by **SERGEANT MICHAEL ODUOR PW8** who is a gazetted scenes of crime photographer. The said photographs were produced as exhibits **Pexb5**. They show the body of a female African adult, totally naked, lying on the ground with cuts on the body and an amputated hand. Conclusive proof of the cause of death is provided by the evidence of **PW9 DR. NGALI MBUUKO** the pathologist who produced the post-mortem report **Pexb4**. He confirms that upon examination the body was found to have multiple cuts and fractures. The cause of death was found to be “*traumatic head injury with blood loss*”. This is expert medical evidence which was neither challenged nor controverted by the defence. I find therefore as a fact that the deceased met her untimely and unfortunate death as the result of the unlawful act of being savagely cut all over the body.

To prove the death and cause of death of the deceased on its own is not sufficient. The prosecution must go further and adduce evidence sufficient to show that it was the accused who attacked and so savagely cut up the deceased leading to her death. There was no eye witness to the murder. Neither **PW2** nor **PW5** who were in the homestead at the material time actually saw the accused cut up the deceased. Both witnesses state that they came out of the house **after** hearing the screams from the deceased. By the time they came upon the scene the deceased was already dead. They only saw the accused (who was also in the homestead) walking away towards the shamba. Neither **PW2** nor **PW5** saw the accused attack the deceased. It may be deemed curious and indeed suspicious that accused would be walking away from the home yet his step-mother had been brutally murdered but the fact of this suspicion is not sufficient proof of guilt.

Both **PW2** and **PW5** told the court that the wife of the deceased one ‘*Mwanaidi*’ is the one who uttered the words ‘*mama yetu ameuwawa*’ i.e. ‘*our mother has been killed*’. It is quite likely that this Mwanaidi witnessed what actually happened. There is further evidence that as he walked away the accused did call his wife and spoke to her briefly. Again whatever he may have told her is crucial evidence which would have gone a great way to solve this puzzle. However, the wife of the accused was not called to testify in this matter. No doubt this failure to call her as a witness was due to the fact that she was not a compellable witness being the spouse of the accused person. In all probability she may have declined to

testify against her spouse.

It would appear that the circumstantial evidence would point to the accused as the murderer. Indeed I may have been inclined to come to such a finding were it not for the evidence of **PW3** which cast great doubts on the prosecution case.

PW3 told the court that the accused came to his house at about midnight on the material night. The accused was half-naked and was trembling. However, although **PW3** asked the accused what the problem was, the latter did not respond. Indeed **PW3** states that the accused did not utter a single word to him. All **PW3** did was to offer the accused a leso to cover his nakedness and advise him to go to the chief.

PW10 Ag. INSPECTOR MARTIN OLUOCH was the investigating officer. He told the court that after the arrest of the accused, he interrogated him. **PW10** claims that the accused confessed to the crime before **Chief Inspector Obonjo**. This alleged confession not having been recorded in compliance with section 25A(1) of the Evidence Act Cap 80, Laws of Kenya is not admissible as evidence in this trial. The correct procedure would have been for this Inspector Obonyo to record this alleged confession after properly cautioning the accused and to himself appear in court to testify to this fact. Failure to follow the procedure set out by section 25A means this allegation of a confession remains just that – a mere allegation upon which this court can place no reliance.

PW10 further claims that accused led police to the house of **PW3** and showed them a panga which they took as the murder weapon. However, this evidence is directly contradicted by **PW3** himself who told the court that accused **did not** come to his house carrying any panga. Infact **PW3** insists that the accused was bare-handed when he arrived at his house. Further **PW3** insists that the panga produced in court **Pexb1** and alleged to be the murder weapon is actually **his own** panga which police collected from his house. It is not uncommon for rural families in Kenya who largely rely on farming to have pangas in their homes. If this panga belonged to **PW3** and was at all times in his possession in his home then how can it be said to have been used by the accused to kill the deceased. The fact that neither **PW2** nor **PW5** said they saw the accused carrying a panga as he walked away from the homestead lends credence to the claim by **PW3** that accused **was not** carrying any panga when he arrived at his house. This is a major contradiction in the prosecution case, one which severely weakens the chain of evidence and an anomaly which this court cannot ignore.

Given the evidence adduced before me, I will concede that there exists a very real suspicion that the accused did kill the deceased. However, the law requires that the prosecution prove their case beyond a reasonable doubt.

In this case the prosecution have basically sought to rely on circumstantial evidence in order to convict the accused – being the fact that the accused was seen leaving the scene at the time when the deceased met her death. In the case of **SAWE – VS – REPUBLIC 2003 KLR 364** the Court of Appeal in discussing circumstantial evidence held that:

“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 guilt.”

The mere fact of the accused leaving the scene does not in and of itself provide conclusive proof of the accused’s guilt. It must be remembered that the accused did not abscond from his home. He voluntarily returned to the homestead the following day and infact police arrested the accused from his house. There may be valid grounds to **suspect** that it was the accused who committed this crime but as stated by the Judges of Appeal in the **Sawe case** “*suspicion, however strong, cannot provide the bases of inferring guilt which must be proved by evidence beyond reasonable doubt.*”

From the foregoing and in view of the contradictions and anomalies in the evidence, I am not satisfied that the ‘*actus reus*’ of murder has been proved against the accused beyond a reasonable doubt. The evidence leaves several crucial questions unanswered and the chain of evidence does not flow. For this

reason, I find that the charge of murder has not been proved to the standard required in Law and I hereby acquit the accused. The accused is to be set at liberty forthwith unless he is otherwise lawfully held.

Dated and delivered in Mombasa this 18th day of February, 2013.

M. ODERO

JUDGE

In the presence of:
Ms. Odhiang for Accused
Mr. Jami for State
Court Clerk Mutisya