



REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRIMINAL CASE NO. 8 OF 2011

REPUBLICPROSECUTOR

VERSUS

CHENGO NICKSON KALAMAACCUSED

JUDGMENT

1. The Accused was charged with murder of Kaviha Karisa Gamoyo on the night of 3rd February, 2013 at Bora Imani village of Mokowe Location Lamu. He pleaded not guilty and was represented by Mr. Okuto.
2. In brief, the prosecution evidence is that on the material night several villagers of Bora Imani village, including the deceased's brother Keah Karisa (PW1) Jackson Charo (Pw2) were informed through fellow villager Rehema Abe (PW3) that she had heard the deceased crying out in distress. PW1 and PW2 found the deceased on a path in the homestead of the Accused. He was bleeding. He had a deep injury to the abdomen and the intestines protruded. The deceased allegedly said that the Accused shot him with an arrow. Although he was admitted to hospital at Lamu, he died a few days later. The Accused was arrested and charged. When the Accused was placed on his defence he elected to remain silent.
3. The court must determine whether the prosecution evidence establishes the charge against him.
4. The prosecution evidence is primarily hinged on the dying declaration made by the deceased to his brother (PW1) and the clinical officer who escorted him to hospital, Nicholas Charo (PW6).
5. It was the evidence of PW1-5 that the body of the deceased appeared to have been dragged to the footpath as there was no blood at the foot path where he lay. The deceased wore no shirt or shoes. While PW2 said the deceased did not name his assailant PW1 and 6 who spent a long time with him said he was lucid and that he named the accused. What is not clear is the time and circumstances in which the attack occurred.
6. A dying declaration is received on the basis of the provisions of Section 33 (a) of the Evidence Act. In the case of **Pius Jasanga s/o Akumu v R (1964)21 EA 331** the court stated:

The question of the caution to be exercised in the reception of the dying declarations and the necessity for their corroboration has been considered by this court in

numerous cases, and a passage from the 7th Edition has been cited with approval....

It is not a rule of law that, in order to support a conviction there must be corroboration of a dying declaration (Rvs/o Odel & Another (1943) 10 EACA 9

....and circumstances which go to show that the deceased could not have been mistaken in his identification of the accused.

....But it is generally speaking very unsafe to base a conviction solely on the dying declaration of a deceased person, made in the absence of the accused and not subject of cross-examination unless there is satisfactory corroboration”

7. The first piece of corroboration of the declaration is the close proximity of the deceased's body to the home of the Accused. As per the sketch drawn by PW10, the home of PW3 who called PW1 is further from the home of the Accused. Surprisingly the Accused was not one of the villagers who responded to the distress call by the deceased. It was the lady, PW3 who took the steps and summoned PW2. Yet the deceased lay within the shamba of the accused, in closer proximity to his house.
8. Secondly, It would seem that the Accused by 5th February, 2011 was actively inquiring into the matter of the killing, all the same. On the evening of 5th February, 2011 he met Joseph Njenga Gichoya (PW5). According to PW5 the Accused appeared disturbed. He questioned the witness regarding where he was headed when they met on a path in the village. When informed that PW5 was going to the headman's home, he said he too had been there to see the Headman because he had learned that someone had been shot on his farm. He also offered that he had not been on the farm for a week.
9. This conversation is telling. Also telling is the fact that a few hours later when PW5 decided to visit the accused's home after his visit to the headman, the accused refused to open the door. It took threats that PW5 would force the door open for the accused's wife to open the door. Even then, the accused refused to come outside demanding that PW5 and the elders with him go inside. It was only after PW5 shot in the air that the accused came out, naked. He was apprehended. All the prosecution witnesses, including PW5 rejected the suggestion that there had been several incidents of thuggery in the village around the material time.
10. I have carefully considered the evidence of PW1 and PW6 himself an independent witness. In my opinion these witnesses stated the truth. They spent long hours with the deceased before he died. The dying declaration of the deceased cannot but be true for several reasons. The accused and deceased were fellow villagers, in fact neighbours therefore known to each other. The body of the deceased lay in the homestead (farm) of the Accused. The accused's conduct of 5th February, 2011 as narrated by PW5 reveals guilty knowledge. He was overly concerned with the death of the deceased after the fact and very keen to distance himself by offering an alibi to PW5.
11. The above alibi was first offered to PW5. The investigating officer CPL Jidraph Maina (PW8) stated in cross-examination that the Accused gave different statements regarding his whereabouts on the night of the murder - at first that he was not home but later he changed the explanation. This piece of evidence was elicited by the defence during cross-examination of PW8.
12. When the Accused was put on his defence, he elected to remain silent. He therefore did not explain his whereabouts on the material night, his excessive interest in the issue surrounding the death and unprovoked alibi defense to PW5, all which constitute formidable case against him.
13. Taking all this evidence together I am satisfied that the Prosecution evidence has sufficiently established the guilt of the accused. I find him guilty and convict him as charged.

Delivered and signed at Malindi on this 25th day of October, 2013 in the presence of the Accused, Mr. Okuto for him, Mr. Nyongesa for State, Court Clerk Samuel.

C.W. Meoli

JUDGE

MR. NYONGESA - Treat as first offender.

C.W. Meoli

JUDGE

MR. OKUTO

The accused is 39 years old married with a wife and children. There are three children the youngest two years old. He is a peasant farmer. He has been in custody since 2011. He is a first offender. He is remorseful.

C.W. Meoli

JUDGE

NOTES IN SENTENCE

Accused treated as first offender. He has been in custody for two years and has expressed remorse.

C.W. Meoli

JUDGE

SENTENCE

Accused sentenced to fifteen (15) years imprisonment.

Right of Appeal 14 days

C.W. Meoli

JUDGE