REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL CASE 18 OF 2007

REPUBLIC ..... PROSECUTION

=VERSUS=

SALIM KALINGA MWATELA ..... ACCUSED

JUDGEMENT

The accused **SALIM KALINGA MWATELA** faces a charge of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE.** The particulars of the charge were given as follows:

"On the 22nd day of December 2006 at about 6.30 A.M. at Samburu Village, Samburu Location in Kwale District within Coast Province, jointly with another not before court, murdered CHIPHORO DUNDO"

The accused entered a plea of ***'Not Guilty'*** to the charge and his trial commenced before the High Court at Mombasa on 10th February 2010. The prosecution led by the learned State Counsel **MR. ONSERIO** called a total of thirteen (13) witnesses in support of their case. **MR. NGENO** Advocate acted for the accused.

The brief facts of the prosecution case as narrated by **PW1 SULEIMAN MWADZUMA CHIPHORO** the deceased's son were that on 21st December 2006 the deceased and his son went to the offices of the chief seeking assistance over a dispute between the deceased and a fellow villager called **KOMBO MAJERI**. The chief told the duo to return to his office the next day. The two went and spent the night in the home of a relative nearby. On 22nd December 2006 the deceased awoke and headed back to the chief's camp leaving **PW1** behind. **PW1** later followed the deceased to the chief's camp where he came across the body of his father, the deceased having been savagely cut up lying on the road. Police were called in. The accused was named as a suspect. Police went to the home of the accused who upon seeing the police ran away and escaped. The body of the deceased was later taken to the mortuary. It was not until about eight (8) months later on 3rd August 2007 that the accused was arrested from the Makindu

Mosque where he worked at the Madrassa. He was then taken to the police station where he was booked in. On 3rd September 2007 the accused was arraigned before the High court where he was formally charged.

At the close of the prosecution case this court did rule that the accused had a case to answer and he was placed onto his defence in accordance with Section 306(2) of the Criminal Procedure Code. The accused elected to give an unsworn defence in which he denied any and all involvement in the murder of the deceased. The accused further explained that the reason why he ran away when police came to his home was because the police together with the deceased's son set upon him with blows and that the police even fired gun-shots at him. As such both he and his wife had to run away in order to save their lives. At the conclusion of the prosecution and defence cases this court now must make a determination as to whether the prosecution have proved the case beyond a reasonable doubt.

The offence of Murder is defined in S. 203 of the Penal Code as follows:

"Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of Murder"

This definition gives rise to three (3) key ingredients which the prosecution must prove in order to prove a charge of murder:

1) The fact of the death of the deceased as well as the cause of that death.

2) The fact that the accused committed the unlawful act or omission which led to the death of the deceased – this constitutes the ***'actus reus'*** of the offence.

3) The fact that this unlawful act or omission was committed with malice aforethought – this forms the ***'mens rea'*** of the offence.

The fact and the cause of death of the deceased have been satisfactorily proved. **PW1** who was a son of the deceased as well as **PW10 HELLEN MZARA** a step-sister to the deceased all state that they saw the body having been badly chopped with body parts severed lying by the road. They both identify the deceased as ***'Chiphoro Dundo'*** a man who was well known to them.

PW4 DR. K.N. MANDALYA is the consultant pathologist who carried out the autopsy examination on the body of the deceased. He confirms that there were multiple, deep cuts all over the body and that the right wrist had been totally severed. His opinion was that the cause of death was ***"intra-cranial haemorage due to skull fractures"***. **PW4** filled and signed the post-mortem report which he produces in court as an exhibit **Pexb1**. This was expert medical opinion evidence which was not challenged nor controverted by the defence. I therefore find as a fact that the deceased met his unfortunate and untimely end as the result of being unlawfully chopped up literally to pieces.

The next crucial question this court has to ask itself is whether it has been satisfactorily proved that it was the accused who unlawfully cut up and killed the deceased. **PW5 ALEX YAWA CHILACHI** told the court that on the material day at about 7.00 A.M. his son **PETER YAWA** who was sweeping outside their house called out to him telling him that a man was cutting another with a panga. **PW5** rushed to the scene and tried to intervene. The man wielding the panga ran off leaving the deceased groaning on the ground. **PW5** told the court that as they chased the culprit he turned and informed them that he had killed the deceased for practising witchcraft. **PW5** told the court that he did not manage to apprehend the culprit. All that he recovered was an open sandal **Pexb1**, a black cap **Pexb2** and a phone wallet **Pexb3** which the attacker discarded as he ran away. In his evidence in chief **PW5** says:

"I knew the culprit. He was an employee of Samburu county Council. I did not know his name. We went to the home of the village chairman called Mbuni Mrabu. I described the culprit to him ...."

By this evidence **PW5** seems to suggest that he caught a very good glimpse of the attacker and thus

would have been in a position to identify him. This is more so given that further on in his evidence **PW5** says:

"It was daytime and I saw the accused well".

However he immediately seems to backtrack when he states:

"This happened a long time ago. I saw the accused for a brief moment. I cannot identify him today"

Whereas **PW5** had all along indicated that he was in a position to see and identify the man who attacked the deceased, he later changes his mind and admits that he would not be able to identify the man. This position is reinforced by **PW5** when under cross-examination by defence counsel he states:

"We chased accused for about 3 km. I knew the culprit as an employee of the county council. I saw him very briefly. I cannot identify him today"

No evidence is ever adduced in court to prove that accused was in actual fact an employee of the county council as alleged by **PW5**. The sum total therefore of the evidence of **PW5** is that he did see a man armed with a panga attack and cut the deceased however, he is unable to positively identify the accused as the man whom he saw.

The evidence of the other eyewitness **PW9 ISMAEL MUGAMBI** is not of much greater help. He too told the court that on the material day at about 6.30 A.M. he was at the Greenhills Academy School where he works preparing to start the morning tuition. He heard students shouting that a man was being cut up. He rushed out to scene together with **PW5**. The man who was busy cutting up the accused saw them and began to run away holding the panga. **PW9** gave chase but was unable to catch up with the attacker. He and **PW5** only managed to recover the items which the attacker dropped as he ran away. However more importantly **PW9** was not able to positively identify the accused before court as the man whom they had been chasing.

The other eyewitness to the incident was **PW8 PETER YAWA** who was a son to **PW5**. It was he who alerted his father that he had seen one man cutting the other with a panga. In his testimony to court **PW9** says:

"I saw the man with a panga cut the other man. I could not see his face well. The man with the panga ran into the bushes and escaped."

Under cross-examination by defence counsel **PW9** reiterates his evidence by saying:

"I could not identify the two men"

Here again is an eyewitness who is totally unable to place the accused at the ***'locus in quo'***.

The only witness whose evidence places the accused at the scene of the offence is **PW11 HELLEN NZARA** who was a sister to the deceased. In her evidence **PW11** states that:

"I saw the accused with a panga cutting the deceased. I saw the accused cutting my brother"

She proceeds to identify the accused as the man whom she saw cutting up the deceased. It is very odd that whereas this witness claims to have had a clear view of the accused, she did not seem to notice the presence of the other three eyewitnesses who gave chase. This is evident from the testimony of **PW11** where she states as follows:

"Many people came. The accused ran away. I did not follow him. I do not know if anyone chased him. I was very upset. I was crying. I know Peter Yawa. I cannot recall if he was at the scene. The chief came to the scene. I do not know what time he came ...."

PWII claims that she did not notice anyone chasing the accused. This is odd because both **PW5** and **PW9** told the court that they ran after the accused. Similarly **PW11** states that she did not see Peter **PW8** at the scene yet by his own evidence **PW8** was there. It is not farfetched to conclude that **PW11** was in a very agitated and distraught state of mind. She had just seen her brother being butchered. By her own admission she was ***'crying'*** and ***'upset'***. **PW7** **CHIZI MGHAZA** told the court that it was she who alerted **PW11** that her brother was being attacked. **PW7** said:

"I saw people cutting the deceased I called out to Nzara [PW11] telling her that her brother is being killed. She ran to the scene and fell down crying"

In those circumstances she may not have been able to get a clear view of the perpetrator. There is the very real possibility that **PW11** could have been mistaken in her identification of the accused.

PW7 told court that she is the one who called **PW11** to the scene. **PW7** claims that when she got to the deceased she heard him name ***'Kalinga'*** the accused as his attacker. It is curious that out of all the people who were there that day only **PW7** heard the deceased utter any words at all much less name his attacker. Even **PW11** did not mention having heard the deceased saying anything. The other witnesses stated that the deceased was groaning in pain but did not utter a word. **PW7** however proceeds to contradict her own testimony when she goes on to say:

"As he was being cut the deceased said 'my friend why are you killing me'. He gave a name. I have forgotten the name"

Whereas earlier **PW7** claimed to have heard the deceased name his attacker as ***'Kalinga'*** hardly a few minutes later she claims to have forgotten the name. This contradiction comes out more clearly when under cross-examination by defence counsel **PW7** says:

"I wrote my statement four days after the incident. The police read back the statement to me and I confirmed its correctness. In my statement I did not name the accused"

If four days after the incident when events were still fresh in her mind the witness did not know the name of the accused, it is certainly not possible that several months after the incident she is suddenly able to recall the name of the accused with clarity. I was able to observe the demeanour of **PW7** as she testified. She appeared confused and unsure of her facts. In my view her veracity was in question and in my considered opinion **PW7** was an unreliable witness.

As matters stand the evidence of identification leaves much to be desired. The witnesses who chased the deceased's attacker and thus had the best opportunity to see him did not identify the accused in court as that attacker. **PW7** and **PW11** both give inconsistent and reliable evidence with respect to identification.

PW13 **PC CHARLES OYOO** is the officer who went to the home of the accused to effect his arrest. He told court that when the accused spotted the police he ran away and they were unable to catch up with him. In his defence the accused explains that he ran away because when the police came to his home, they came with the son of the deceased who began to beat him up and that the police also fired at him. Credence is lent to this defence by the evidence of **PW1** who was the son to the deceased and confirmed that the police did fire shots at the accused in an attempt to attempt to effect arrest. It is quite understandable for the accused to have run away in those circumstances.

Aside from failure to tender evidence which positively identifies the accused as the one who killed the deceased the prosecution have failed to establish a clear motive for the murder. There is an allegation that the accused had differences with the deceased. However both **PW1** the deceased's son and **PW13** the arresting officer name one ***'Kombo Majeri'*** as a suspect in the murder. **PW13** stated that he did arrest the said Kombo Majeri as a suspect but later released him. No investigating officer was called to explain exactly why this Kombo Majeri was cleared by the police. On his part **PW1** told the police that the deceased named this Kombo Majeri as the man who was threatening his life. Their disagreement was due

to the fact that the deceased had been involved in a love affair with the wife of this Kombo Majeri. **PW1** further told court that he knew of no disagreement between accused and the deceased. No connection is shown to exist between this Kombo Majeri and the accused. The issue motive in this case therefore remains unclear.

On the whole I find that the prosecution case is weak as several gaps and doubts remain. The chain of evidence is not clear. The law requires that the benefit of any doubt be accorded to the accused. I find that the charge of Murder has not been proved beyond a reasonable doubt. As such I enter a verdict of ***'Not guilty'*** and I do acquit the accused under S. 306(2) of the criminal Procedure Code. Accused is to be set at liberty forthwith unless he is otherwise lawfully held.

Dated and Delivered in Mombasa this 21st day of May 2012.

M. ODERO
JUDGE

In the presence of:

Mr. Ngeno for Accused

Mr. Tanui for State