



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MALINDI

Criminal Case 5 of 2009

REPUBLIC.....PROSECUTOR

-VERSUS-

MATESO KARISA1ST ACCUSED

HAMISI KARISA2ND ACCUSED

JUDGMENT

1. MATESO KARISA and HAMISI KARISA the accused in this case, are charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on 18th July, 2006 at Matsango village, Kaloleni within Kilifi district they jointly murdered KAZUNGU MUSHA DAHU. The prosecution called seven witnesses, while the accused both gave unsworn statements in their defence.

2.From the evidence on record, several facts are not in dispute. The deceased, was an elderly man residing with his family in Msengo village Kaloleni. The two accused who are brothers are his neighbours. On the morning of 18th July 2006, the deceased was in his home. He was viciously attacked and sustained fatal injuries.

3.The prosecution case is that the two accused persons went to victim`s home while armed with metal bars. They descended upon the deceased and bludgeoned him to death, in the presence of his wife (Pw 1) and daughter in law (Pw 4). The prosecution also asserted that the accused had previously been summoned by the area assistant chief (Pw 3) after the deceased complained that they (accused) had charged him with bewitching the 2nd accused.

4.On their part the accused denied having attacked the deceased. They gave similar defences to the effect that on the material morning they were in their home. They were attracted to the home of the deceased by screams. They found many fellow villagers. The deceased lay down on the ground, injured. The accused assisted to take him to the roadside to await transport to the hospital, but he died. Both were arrested on 16/1/09 at Mikiriani village while attending a funeral wake. They were charged with an offence they knew nothing about.

5. The court must determine whether the accused are the persons who with malice aforethought attacked

the deceased and inflicted fatal injuries. The prosecution mainly relied on two eye witnesses, the deceased's wife (Pw 1) and daughter –in-law (Pw 4). Both said they were at home at about 10.00am on the material morning when the two accused came to the homestead and proceeded to the veranda of the deceased's house. The deceased was seated there roasting maize. The accused allegedly clobbered him with metal bars they carried and also beat Pw 1 when she tried to intervene, while screaming. She lost consciousness for a while. But the two accused fled the scene before neighbours arrived.

6. These two witnesses remained firm in cross-examination regarding the events of the fateful morning. Pw 1's son Katana Kazungu who arrived home soon after the incident said that his mother named the attackers to him as the 1st and 2nd accused but they were not at the scene. It appears that while these witnesses were very clear about the attack and the identity of the attackers, they all seemed to be reluctant to admit the defence suggestion that the deceased had been accused by the two accused of bewitching the second accused prior to the incident.

7. Eventually though, Pw 2 did concede that he had attended a meeting at the office of the assistant chief (Pw 3) with his father over that issue. Pw 3 freely referred to that meeting in his evidence in chief and in his answers during cross-examination. I believe Pw 3's testimony regarding the witchcraft allegations made by the accused against the deceased. In the court notes made regarding Pw 2, it was noted that he was reluctant and appeared scared.

8. Equally Pw 1 and Pw 4 pled innocence regarding the witchcraft allegations. This is puzzling because they readily identified the two accused as the attackers, as did Pw 2. Could it be that they feared admitting anything that would put the deceased in bad light, as clearly, witches are abhorred in the culture? Indeed this court has taken judicial note of the fact that accusations of witchcraft are almost equivalent to a death sentence on the suspected witch in the region concerned.

9. I have asked myself whether the testimony of Pw 1 and Pw 4 ought to be treated with circumspection because of their deliberate denial concerning the witchcraft issue, which appears to have been otherwise well publicised in the village.

10. But having closely considered their evidence regarding the attack however, I must conclude that the same must be true. Not only is that evidence consistent but also it is corroborated by an independent fact: according to Pw 3 the two accused disappeared from the village soon after the offence and only resurfaced 3 years later. Pw 3 is the witness to whom the deceased had reported earlier about the accusations made against him by the two accused and who also repeated the claim before him after Pw 3 summoned them to his office.

11. Pw 3 also admitted during cross-examination that during that meeting the 1st accused had physically pushed the deceased off a seat. Following the attack, the witness looked for the two accused who had been named as the culprits but they had gone underground to resurface almost 3 years later all these persons are people residing in the same locality and known to each other.

12. For their part, the accused do not deny that they went to the homestead of the deceased. But they said they went there as good neighbours after the attack and assisted to take the deceased to the roadside to seek transport to hospital. However, Pw 2 who arrived at the home soon after the attack said he did not find the accused there, even though his mother said the two had attacked the deceased. He said that neighbours assisted him take deceased to the roadside.

13. Despite these assertions, the defence did not suggest to this witness that the accused were present and assisted him with this father. If they were, the witness would surely not have failed to notice them as his mother had already mentioned them to him. Similarly Pw 3 the assistant chief arrived just in time to find the deceased by the roadside and assisted to escort him and Pw 1 to hospital. He said the named suspects were not at the scene. Again it was never suggested to him that the accused were part of those helping the injured.

14. The incident occurred in day time among people well known to each other. Pw 1 was seated at the

door of her house while her husband sat at the veranda. The attackers walked past her in order to reach the deceased at the veranda. Later they also attacked her when she went to intervene. There was in this situation ample opportunity in my view for recognition of the attackers. As for Pw 4, she may not have drawn near Pw 1's house but she was 30 metres away seated at her veranda, overlooking the house of her in-laws. She could follow what was happening, in my opinion, and had opportunity to recognise the attackers.

15. And as I have indicated the disappearance of the accused soon after this offence, for 3 years does lend further credence to the evidence of Pw 1 and Pw 4. I have also considered the possibility that Pw 1 and Pw 4 merely suspected the two accused because, they were aware, and hence their denials, that the two accused had previously made accusations over witchcraft against the deceased. That would mean they were not witnesses to the attack and they made up their evidence. I doubt that these witnesses are capable of such sophisticated manipulation of the evidence as both appear simple villagers, indeed Pw 1 is fairly aged according to the record. Some of the details given could have been made up e.g. That Pw 1 defecated on herself during the ordeal.

16. The reasons for denial of witchcraft allegations must be more basic; the honour of their loved one. The description of the material events from the narration by Pw 1 and Pw 4 does not appear contrived, nor was it shaken during cross-examination. I accept it.

17. In the case of **ANJONONI & OTHERS VS REPUBLIC (1980)KLR 59** the Court of Appeal held that recognition is more reliable than mere visual identification:

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

18. It is a strange coincidence that the very allegations (witchcraft) Pw 1 and Pw 4 deny appears to constitute the motive behind the attack on the deceased. While the defence consistently raised the said allegations with the prosecution witnesses, the accused's evidence is silent on that score; with not even a mention of the meeting at Pw3's officer over the issue. The defence appears to suggest the accused were arrested without any reason, 3 years after an offence, whose victim they had assisted as good neighbours. That is difficult to believe as many other neighbours had also assisted the victims.

19. Having carefully reviewed all available evidence, I am satisfied that the prosecution has established that the two accused set upon and beat the deceased to death, because of the belief that he had bewitched the second accused. The vicious attack using metal bars left the deceased with severe head fractures. He died on the same day due to intracranial haemorrhage due to the said fractures.

20. Pw 1 said the beating took about 10 minutes of blows inflicted with metal bars. Malice aforethought is self-evident from these facts (See section 306 a & b of the Penal Code).

21. I am satisfied that the prosecution has proved the offence preferred against the accused beyond any reasonable doubt. I do accordingly convict the 1st accused. With regard to the 2nd accused, an age assessment conducted following his advocates request confirms that he was about 15 years old at the time of the offence. It is unfortunate that this matter was only brought up by counsel at the close of the trial. Be that as it may I do find him guilty of the offence charged.

Delivered and signed at Malindi this **11th May, 2012** in the presence of the accused, Mr. Kemo for the State, Mr. Wasunna holding brief for Mr. Lughanje for the accused persons. cc Evans.

C. W. MEOLI

JUDGE

- MR. KEMO- We do not have records. Treat as first offender.

C. W. MEOLI

JUDGE