



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL 19 OF 2009

DANIEL MWERI JEFWA

SAMUEL NGALA MUNYAKA alias NGUMBAOAPPELLANT

VS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in criminal case no. 497 of 2010 of the Senior Resident Magistrate's Court at Kilifi)

JUDGMENT

1. The two accused are charged with the murder of Bendera Kahindi Kitu on 9th November, 2009 at Kadzuoni village, Gongoni, Malindi, contrary to section 203 as read with section 204 of the Penal Code. They denied the charge. They were represented by Mr. Nyakoe.
2. In brief, the prosecution case was that the two accused persons resided in the same village as the deceased. They were all related by marriage. In 2008, the 1st accused started to complain that his wife Kahaso Kenga was having extra marital affairs, in particular with Kitsao Kazungu (PW8) and facilitated by the deceased and one Elizabeth Ngoro (Dzoro) (PW5) all of them neighbours of the 1st accused. In October, 2009 he claimed to a friend Kazungu Baya Ngatata(Pw 1) that his wife admitted to the extra marital affairs and implicated the deceased as a facilitator.
3. Thereafter the 1st accused, accompanied by the 2nd accused went to the home of the deceased on 7th November, 2009, insulted her and threatened to “put her in a hole (grave)”. As matters appeared to get worse Kazungu (PW1) to whom the 1st accused severally confided in the material period, decided to convene a meeting on 8th November, 2009 to discuss the issue. Several villagers including PW5, her husband Martin Mwiti Mureithi (PW4) attended.
4. At the meeting the 1st accused continued to accuse the two women of facilitating his wife's infidelity. When it was suggested by the elders that the deceased be summoned to testify, the 1st accused left the meeting with his wife after issuing threats to the effect that those who had misled his wife and caused him pain would pay. PW1 adjourned the meeting to the next day but it was not to be, as on that morning, unknown people attacked the deceased at about 5am as she answered a call of nature outside her house. She was slashed severally on her body. She succumbed to the injuries dying soon after. A sharp panga was found at the scene. At about 9.30am the 1st accused called his friend PW1 on PW4's phone and told him that nobody should bother his family or look for him as he would surrender himself to police

the next day. On the same evening he presented himself to police and was promptly arrested.

5. In his defence the 1st accused gave an unsworn statement. He said that in 2008, PW1 was sent to him by PW5 who complained that the 1st accused with whom she previously enjoyed cordial relations had suddenly become unfriendly towards her. He was sent to ask whether the change had anything to do with rumours in the village that PW5 was facilitating his (1st accused's) wife to have affairs with other men. 1st accused said he promised to inquire but after talking to his wife she denied, only saying that PW5 had told her that the 1st accused had affairs of his own with other women.

6. The matter did not rest there as PW5 insisted in November, 2009 to have a meeting to resolve it. The meeting took place on 8th November, 2009. The allegations were raised and discussed and the meeting adjourned to the next day. He learned of the death of deceased the next day. He called his wife and PW1 picked the phone. PW1 told him he was required to go to Malindi Police Station, which he did, was questioned and placed in custody. The 2nd accused elected to remain silent.

7. The two accused were charged jointly. However, the evidence touching on the 2nd accused rested with the testimony of the two children of the deceased being Ngala Hinzano (PW2) and Zawadi Hinzano (PW3) that on 7th November, 2009 the 2nd accused in the company of the 1st accused went to the house of the deceased. They insulted her, molested her by pushing her around and left after threatening to put her in a "hole". Two days later the deceased was brutally attacked at her home and killed. Clearly the evidence against the 2nd accused raises strong suspicion that he was involved in the events leading to the death of the deceased.

8. However, there is no firm evidence of his involvement in the attack of 8th November, 2009. Besides, even though the 2nd accused was somewhat related to the 1st accused, there appears to be no real strong motive on the part of the 2nd accused. In the circumstances I must find that the case against the 2nd accused has not been proved beyond reasonable doubt and acquit him at this stage under Section 306(1) of the Criminal Procedure Code.

9. With regard to the 1st accused however, the situation is starkly different. There is no dispute that the 1st accused and Bendera (deceased) are from the same village and that an issue had arisen in 2008 involving allegations that the deceased and PW4 were facilitating the infidelity of the 1st accused's wife. That the issue caused a strain in a hitherto cordial relationship between Pw 5 the deceased and the 1st accused. That late in 2009 Pw 5 who was the accused together with Bendera demanded a meeting to resolve the issue, which refused to go away. That such a meeting was convened by PW1 on 8th November, 2009. That the meeting was attended by among others, Martin Mwiti Mureithi (PW4) whose wife Elizabeth Ndzoro (PW5) was blamed by the 1st accused as party to his wife's infidelity, Osumo Mururu (PW6) and the 1st accused's father. That the meeting was adjourned to the next day but on the morning of that day someone attacked and killed the deceased. That the 1st accused talked on phone to PW1 after the news of the death of the deceased spread in the village. The court must determine whether the 1st accused murdered the deceased on the morning of 9th November, 2009.

10. The prosecution evidence against the 1st accused is all circumstantial, resting in part on the admitted fact of the souring of relations between the 1st accused and Bendera, the deceased, over allegations that Bendera introduced men to the 1st accused's wife for purposes of extra marital sex. Another related strand of evidence is the consistent threats by the 1st accused towards Bendera, and finally, the phone call and surrender by the 1st accused to police on the day when Bendera was murdered.

11. Pw 1, a business partner, friend, and confidant of the 1st accused, gave a chronology of the events starting in 2008 when the 1st accused first confided in him that his wife was having an affair facilitated by Bendera (deceased) and PW5. It appears that the matter did not let up as again on 2nd October, 2009 the

1st accused sought PW1's advice as he claimed that his wife had finally admitted to an affair with Kitsao Karisa Kazungu (Pw 8) and Bendera's role in facilitating it. PW1 advised the 1st accused to set up an elders' meeting to demand "malu" a traditional form of compensation, from the offender. The 1st accused was not satisfied with his friend's advice. He allegedly replied:

"As concerns my wife, leave it to me, I will teach them, I'll take them to the police."

12. PW1 attempted to dissuade the 1st accused and moved fast to arrange a meeting on 8th November, 2009 inviting several persons including the 1st accused and his father, PW4 and PW 5 and elders to resolve the dispute. At the meeting the 1st accused voiced his complaints but became agitated when elders decided to send for and hear Bendera. 1st accused got up and left with his wife saying:

"The pain I feel will end in the body of those who have misled my wife."

When Bendera finally arrived, she and PW5 expressed fear for their lives because of the threats issued by 1st accused, but the 1st accused's father convinced them not to report to police but to allow him to talk to 1st accused first.

13. On 9th November, 2009, when PW1 learned of the death of Bendera, he went to her home and viewed the mutilated body and returned to the appointed meeting place. He was accompanied by PW4. PW1's phone battery was down. A call came through to PW4's phone. It was 9.30am. PW4 gave the phone to PW1. The 1st accused uttered words to the effect that;

"There was no point in searching for him or harassing his family and that he would be at the police station the next morning at 7.00am."

14. PW1's evidence regarding the circumstances and events of the meeting is corroborated by that of PW4 and PW6. Although PW4 did not reproduce the threats uttered by 1st appellant as he left the meeting, he stated that 1st accused told the elders that if the deceased (Bendera) was allowed to come and testify he would leave. And he did when the elders decided to hear Bendera. PW4 too is the witness whose phone the 1st accused called and he passed it onto PW1. PW1 repeated the words told him by the 1st accused on phone of PW4.

15. PW5, one of the subjects of the 1st accused's accusations also confirmed that she had spoken to PW1 prior to the meeting of 8th November, 2009 concerning the 1st accused's utterances against her. She too attended the meeting of 8th November, 2009 and confirmed that 1st accused left the venue when elders decided to call Bendera to testify. In her words the 1st accused stated:

"My pain will end in your (my) body and even if it is police, I will be the one to go not my wife."

According to Pc Andrew Wekesa (PW7) the 1st accused actually surrendered himself to the police on the 9th November.

16. The witnesses PW1-6 were cross-examined during the trial. They gave consistent testimony and were not shaken. There is extra strength in the fact that PW1 is a friend of 1st accused while PW6 was a neutral elder who wanted to help resolve the dispute which was the subject of the meeting. PW4 and his wife PW5 were concerned because the latter had been named by the 1st accused, and in fact in his testimony the 1st accused focused on the issue as it related to PW5. He did not mention Bendera at all even through every witness who testified did so.

17. In addition to the evidence of PW1, 4, 5 and 6, the prosecution called the children of the deceased, PW2 (aged 11) and PW3 (aged 16). They testified on the events of 7th November, 2011 when the

deceased was threatened by the 1st accused in the company of his co-accused. They said the men pushed their mother about, called her a “stupid” or “useless woman” and threatened to put her in a “hole”. The incident occurred at 7.00pm but PW3 said there was moonlight and the two men were known to them. Indeed the 1st accused was married to their “aunt” and previously visited their home.

18. Mr. Nyakoe in questioning the two minors elicited answers with regard to the language in which they communicated with police: because PW2 could speak only Giriama but PW3 said they spoke to police in Kiswahili. That issue in my view was clarified by PW2 saying that P W3 acted as her interpreter from Giriama to Kiswahili. There was no evidence that their statements as recorded were inconsistent with their oral testimony. In my view the significant issue in their evidence is the identification of the two men on the night of 7th November, 2011 by the minors.

19. First their evidence was mutually consistent. Secondly, it is consistent with the rest of the evidence on record and in particular that of PW1 that on 2nd October, 2009, the 1st accused reported to him that his wife had finally admitted an affair with one Kitsao Karisa Kazungu “**but that it was Bendera who was facilitating it**”. In that discussion the 1st accused rejected his friend’s advise to demand “*malu*” through an elder’s sitting. Instead he said “**he’d teach them ...take them to police...**”

20. PW1 was alarmed enough to call a meeting, also on the insistence of PW5 to resolve the matter. This coming from one who knew the matter at hand and parties is telling. The 1st accused started to complain the previous year and was still apparently pursuing the issue of his wife’s infidelity in October 2009. Aggressively enough to cause anxiety to Pw 5 and Bendera. What I am saying is that the evidence of the two minors appears plausible and consistent with the chronology of events. Besides, even though both said they identified the two men on the material night in moonlight, they were not challenged on that score. They gave a straight forward narration.

21. In the case of **ANJONONI & OTHERS V R(1980) KLR** the Court of Appeal emphasised the value of recognition evidence of an accused by a complainant over identification of a stranger. Citing **R V Turnbull (1976) 3 ALL ER 549** the court drew a distinction between recognition and identification in the following terms;

“Recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.....when identification is made after a long period of observation, or in satisfactory conditions say, by a relative, a neighbour, a close friend, a workmate and the like, the jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it”

22. Looking at the evidence of the two minors in this light, it is evident that they knew the accused well and in the incident described had opportunity to observe him. Moreover the same is consistent with the unfolding events at the time, which culminated in the brutal attack on Bendera.

23. The law on principles to be applied by court when considering a case based purely or partly on circumstantial evidence is settled since **Kipkering Arap Koskei & Anor V R (1949) 16 EACA 135**. The

Court had this to say;

“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 his guilt, and the burden of proving the facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always in the prosecution and never shifts to the accused. “

In subsequent cases starting with **Pravin Singh Dhalay V R-Cr A 10/97 (unreported) following Teper V Reginam (1952) AC 480:**

“It is also necessary before drawing the inference of the accused’s guilt from the circumstantial evidence to be sure that there are no co-existing circumstances which would weaken or destroy the inference.

(See also (**SIMON MUSOKE v r(1958) EA 715**). The evidence of Pw1 to Pw 6 and Pw 8 considered in this light presents a formidable case against the 1st accused person and tends to exclude his innocence. Whoever attacked the deceased intended to kill her and must have been lying in wait for her in the dawn of 9th November, 2011. All the evidence before me consistently points at the 1st accused as the culprit.

24. When put on his defence, he gave evidence in relation to PW5 and not the deceased, despite her name having featured prominently in the events leading to the meeting and the meeting itself. That was strange. But the explanation for it lies in the phone call by the 1st accused to his friend Pw 1 and PW4: He was surrendering himself to police. Why if he had no issues with the deceased before? He never put to PW1 and 4 in cross-examination that they told him police wanted to him to report to police station. At any rate it is not possible that police having gotten the report at 8.00am (per PW7 and 9) had visited the scene, taken photographs interviewed witnesses and decided by 9.30am (time of the 1st accused’s call) that he was the suspect.

25. The 1st accused also introduced the idea that he called his wife but PW4 placed the phone. That was not the evidence of PW1 and PW4 and the suggestion that he called his wife’s phone was not put to the witnesses in cross-examination. His conduct as per his evidence is also telling. Although in his words the meeting of 8th November, adjourned to next day, he rose to go on his own business. Even when he learned of Bendera’s death, he did not go to scene but stayed away. His call to PW4 and PW5 viewed in the circumstances of the case said it all: ***“I have finally executed my threats. I will face the consequences”*** - all consistent with his previous proven utterances and especially those of the 8.11.09 that;-

“My pain will end in your (my) body and even if it is police, I will be the one to go not my wife” (per Pw 5).

26. Malice aforethought is exhibited by all the threats previously uttered by the 1st accused and the viciousness of the attack which inflicted fatal injuries on the deceased. The 1st accused had the opportunity, motive and did murder Bendera on the morning of 9th November, 2009. His denials have been displaced by the overwhelming prosecution evidence. I find him guilty as charged.

Delivered and signed at Malindi this 17th day of July, 2012 in the presence of: Mr. Naulikha for State, Mr Michira holding brief for Mr. Nyakoe for accused, Accused present, Court clerk - Evans/Leah.

C. W. MEOLI
JUDGE

Court; - Mitigation and sentence on 20/8/12. Mr Nyakoe be informed.

C. W. MEOLI
JUDGE