



REPUBLIC OF KENYA

High Court at Mombasa

Criminal Case 27 of 2009

REPUBLIC.....PROSECUTION

VERSUS

MWANATSONGO MUHENDA CHENGO.....1ST
ACCUSED

TSUMA GEREZA MTSITI.....2ND ACCUSED

MAJIMBO NGALANI.....3RD ACCUSED

MWENZANGU MASUDI MRIBE.....4TH ACCUSED

KWAKA MWAIWE.....5TH ACCUSED

JUDGEMENT

The accused persons namely **MWANATSONGO MUHENDA CHENGO** (hereinafter referred to as the 1st accused), **TSUMA GEREZA MTSITI** (hereinafter referred to as the 2nd accused), **MAJIMBO NGALANI** (hereinafter referred to as the 3rd accused), **MWENZANGU MASUDI MRIBE** (hereinafter referred to as the 4th accused and **KWAKA MWAIWE** (hereinafter referred to as the 5th accused), are all jointly charged with the offence of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE**. The particulars of the charge are that:

“On the 30th day of June 2009 at Kudutsi Village, Kudutsi sub-location in Kwale District within Coast Province, murdered MOHAMED RUMBA MUYIKA.”

All five accused persons entered a plea of ‘**Not Guilty**’ to the charge and their trial commenced before the High Court in Mombasa on 22nd July 2010. The prosecution led by **MR. ONSERIO** Chief State Counsel called a total of twelve (12) witnesses in support of their case. **MS. ODHIANG**, learned Advocate acted for all the five accuseds.

PW1 KADHII KADIJA who was the widow of the deceased told the court that on the night of 30th June 2009 she and the deceased **RUMBA MUNYIKA**, together with their young children were out in their shamba where they intended to spend the night. The reason why they were to spend the night outdoors was to protect their crop from wild animals. **PW1** and her young children occupied a shed which had been built in the shamba while the deceased went out to chase away the wild animals. At about 9.00 p.m. three men came to the shed and enquired from **PW1** where her husband was, **PW1** told the court that she recognised one of the three men as ‘**Mwanatsongo Muhenda**’ the son of a neighbour. She offered the

three men a seat and went to call the deceased. When the deceased came the men greeted him then immediately set upon him with sticks beating him. At that point two other men emerged from the darkness and joined in the attack upon the deceased. The men were armed with pangas. They threatened **PW1**. The men began to cut up the deceased. As **PW1** watched in horror the men felled the deceased and sliced open his stomach causing his intestines to spill out. The deceased tried to get up and run but the men followed still chopping him up.

At this point **PW1** ran back to their homestead to alert her co-wife. She then went to report to the village chairman who rushed back with her to the scene. They found the body of the deceased lying in the shamba. The matter was reported to police who came and removed the body to the mortuary. The five accused persons were later arrested and charged.

At the close of the prosecution case this court ruled that all five accused persons had a case to answer and they were all placed onto their defence. Each accused opted to make an unsworn statement in which they each denied having played any role at all in the death of the deceased. It is now the duty of this court to determine whether the prosecution have proved this charge of murder to the standard required in law.

The offence of murder is defined by Section 203 of the Penal Code as follows:

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder”

From this definition is derived the three crucial ingredients which must be established in order to prove the offence of murder. These are:

- 1) The death and cause of death of the deceased
- 2) That the accuseds (5) by some unlawful act or omission caused this death to occur
- 3) That said unlawful act or omission was committed with malice aforethought.

With regard to the first ingredient the fact of the death of the deceased cannot be in any doubt. **PW1** told court that she witnessed five (5) men slice her husband literally into pieces. **PW2 MUNYAZI** the deceased's second wife and **PW3 KAHINGU MUGAZA NZAE** the village chairman both testify that after **PW1** raised the alarm they went to the scene and found the deceased lying dead in the fields with multiple cuts all over his head, his stomach having been sliced open and the intestines spilling out. All these witnesses who knew the deceased very well identify him as '**Rumba Munyika**'. Conclusive proof of the death of the deceased is provided by **PW4 PC SAMUEL CHIRCHIR** a Scenes of Crime officer who also went to the scene and took seven (7) photographs of the dead body. He did produce the seven (7) photographs as exhibits in court **Pexb1**. They made for very gruesome viewing and depict the body of an adult male with severe cuts all over and with the intestines spilling out of the sliced stomach just as described by **PW1, PW2, and PW3**.

Evidence regarding the cause of death of the deceased is provided by **PW9 DR. HELTAN JILO** a medical practitioner based at Msambweni District Hospital. **PW9** told the court that an autopsy examination was performed on the body of the deceased and he produces the post-mortem report as an exhibit **Pexb2**. This witness confirms that the body had multiple deep cuts all over and confirms that ***“the intestines were protruding from a cut in the abdomen”***. The medical opinion was that death resulted from ***“severe haemorrhage leading to shock due to severed vascular injury in the neck and head injury”***. This was expert medical evidence which has in no way been challenged and/or controverted by the defence. I therefore find as a fact that the deceased met his death as the result of the unlawful attack on him by panga-wielding men.

The next crucial question is whether the five (5) accused persons have been proved to be the men who unlawfully attacked and killed the deceased. **PW1** was the only other adult in the company of the deceased in his shamba on the material night. She narrated how three men initially came to her and asked

for her husband. The men came at 9.00 p.m. It was night time and no doubt it was dark. However **PW1** told the court that she was able to see and recognize the men who came because there was bright moonlight from the full moon. **PW1** also told the court that her tin lamp was on and this too gave out sufficient light. Under cross-examination on this point by Ms. Odhiang **PW1** states:

“It was 30th June. There was a full moon. The light was bright. I saw there was bright [sic] and one could see very well outside”

As a court I was able to observe the demeanour of **PW1** as she testified. She struck me as an honest and truthful witness. The fact that **PW1** had a clear view of the events of that night is further buttressed by the fact that she was able to give a very clear narration of the events of that night lending credence to her testimony that there was sufficient light at the scene. She stated that out of the three men who initially came to their shed she was able to recognise the 1st accused whom she identifies as ‘**Mwanatsongo Muhenda**’. Thus she knew the 1st accused both by name and appearance. She told the court that she knew the 1st accused very well as a neighbour. **PW1** proceeded to identify the 2nd and 3rd accuseds as the men who came with the 1st accused to look for the deceased in the shamba. **PW1** had ample time and opportunity to see the men. They approached her and greeted her. They held a brief conversation and she even offered them seats. No doubt **PW1** was comfortable enough to offer the three men seats because she knew one of them well. From the evidence it is clear that this was no mere fleeting or casual glimpse. **PW1** engaged the three men and had time to see each one well. The evidence of **PW1** with respect to the lighting at the scene is corroborated by **PW10 CHIEF INSP. LEONARD BARAZA**. He told the court that upon receiving the report of the murder he went to the scene that same night. He stated that:

“There was a full moon and light was bright enough to recognize a person”

Furthermore in her evidence **PW1** was very clear and specific on the sequence of events and she was even able to describe in detail what each man wore. In her evidence **PW1** states:

“The three accuseds A-1, A-2 and A-3 came first. It was accused 2 who greeted me first I knew him. The men sat by the door. The lamp was at the door on the floor. I saw their faces well [my own emphasis]”

PW1 goes on to describe the dressing of each accused as follows:

“Accused 1 had a short-sleeved white T-shirt and a long trouser bluish in colour. Accused 5 had a T-shirt with a print of an animal on the front. It was short-sleeved. The 4th accused had a sleeveless t-shirt. Accused 2 had long-sleeved sweater. I saw them all very well ..”

The fact that **PW1** was able to describe in such great detail what each accused person wore convinces me that there was sufficient light at the scene and that she had a good look at them. **PW1** goes on to describe the role which each accused person played in the deadly attack on the deceased thus:

“Accused 2 is the one who first cut the deceased with a panga Accused 1 hit the deceased on the back with a rungu. I saw the panga. It had a wooden handle and not a rubber one ...”

Once again such detail was only possible because **PW1** had a clear and unhindered view of the events at the scene. **PW1** was clear forthright and consistent in her testimony. She remained unshaken under intense cross-examination by defence counsel. I am mindful of the fact that **PW1** was the only eyewitness to the murder. I am also mindful of my obligation to warn myself of this fact before relying on her evidence as proof of identification. However I am satisfied that in the circumstances – the full moon, the lit fire and lamp, there was sufficient light and visibility was good at the scene. **PW1** spent ample time in the company of the attackers including even talking to them that allowed her an opportunity to see and identify each one well. As I have stated earlier I was impressed by the demeanour of this witness and she did in my view appear to be honest.

After the attack in which the deceased was killed, **PW1** ran back to their homestead to alert her co-wife **PW2** of what had befallen them in the farm. **PW2** confirmed that **PW1** came home at 9.00 p.m. and woke her up with news that their husband had been attacked. In her own words **PW2** says:

“She [PW1] told me some people had come to the shamba and had began to cut up the deceased. I asked if she knew any of the men. She told me one of them was our neighbours son Mwanatsongo ...”

Similarly **PW4** the scenes of crime officer who took photographs at the scene told court that he met several members of public at the scene including **PW3** the village chairman, **PW2** and **PW1**. On his part **PW4** states in his evidence as follows:

“We enquired from the deceased’s wife Khadija and she named one suspect as Mwanatsongo Muhenda (A-1). She said A-1 had come first to talk to her before the deceased was attacked ...”

Thus immediately after the incident **PW1** did confirm both to her co-wife **PW2** and to **PW4** a police officer that she was able to identify one of the attackers. Her story is therefore shown to be consistent and not a mere afterthought.

There is evidence that **PW1** was able to confirm her identification of the suspects at identification parades conducted at Kwale Police Station on diverse dates a mere four (4) days after the incident. **PW6** Chief Inspector Simon Nganga told the court that he conducted identification parades in which all five suspects participated. In each case **PW1** was able to positively identify the accused persons. The five accused all willingly took part in the identification parades and none of them raised any complaint thereafter. The parade forms were duly signed and were produced in court as exhibits. It is only the 1st accused who objected to his identification by **PW1** as he told **PW6** that the two were known to each other. I do agree that in the case of the 1st accused who was a neighbour to **PW1** the parade was probably superfluous. However as stated earlier **PW1** did identify the 1st accused by name to several witnesses. The fact that **PW1** was well able to identify each accused person in the identification parades is sufficient corroboration of her evidence on identification and provides proof that they were actually at the scene on the fateful night. I am satisfied that with respect to the 1st, 2nd, 3rd and 4th accuseds, there has been a clear positive and reliable identification of each by the eyewitness to the murder. **PW1** was categorical that these were the men who attacked, cut up and ultimately killed the deceased. I am satisfied that the actus reus of murder has been proved as against the 1st, 2nd, 3rd and 4th accuseds.

With regard to the 5th accused the situation is somewhat different. In her evidence **PW1** did not seem very certain of the involvement of the 5th accused. She states under cross-examination by defence counsel:

“I saw them all very well. I could only identify four of the men. Accused 5 came at a high speed and I was in shock. The ones I saw very well were the 1st, 2nd, 3rd and 4th accuseds. The 5th man was also with the others ...”

If as **PW1** says she did not see the 5th accused very well, then court wonders how she was able to positively identify him at the parade? **PW1** states that the 5th accused came at a high speed and this would have compromised a clear identification of him. In the case of the 5th accused I do harbour doubts as to whether **PW1** made a reliable identification of him. The benefit of this doubt must be resolved in favour of the 5th accused. As such I find that the actus reus of murder has not been satisfactorily proved and for this reason I enter a verdict of ‘Not Guilty’ as against the 5th accused at this point.

Having established that the 1st, 2nd, 3rd and 4th accused persons did attack and kill the deceased, this court must now proceed to consider whether the element of malice aforethought has been proved. It is important at this stage to clarify that there exists a clear distinction between motive and malice aforethought. Whereas motive refers to the reasons which would leave one to kill another e.g. a grudge or disagreement, malice aforethought refers to the ‘*mens rea*’ for the offence of murder which is the

intention to kill or to cause grievous bodily harm. Murder may be deemed as sufficiently proven even in the absence of a discernible motive. However in order for a court to find that the offence of murder has occurred there **must** be proof of malice aforethought. Malice aforethought is defined in Section 206 of the Penal Code as follows:

“malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances

(a) An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not

(b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person whether that person is the person actually killed or not ...”

(c)

(d)”

In this case **PW1** and **PW2** have both told the court that there existed a land dispute between the deceased and the father of the 1st accused. **PW12** who was the investigating officer on the other hand told court that his investigations revealed that bad blood existed between the parties because the 1st accused believed that the deceased had bewitched and killed his father. The fact that there appears to be no agreement on the issue of a possible motive does not in any way negate a charge of murder. The fact that the accused persons being a group of five able bodied men chose to brutally attack and chop up an unarmed man, having caught him unawares with his family in his shamba is proof enough that their intention was to kill the deceased. The ferocity of the attack leaves no doubt whatsoever of their intention to completely finish the deceased. In terms of Section 206(a) of the Penal Code there can be no doubt whatsoever of a clear common intention on the part of the accused persons to cause the death of or do grievous harm to the deceased. I am satisfied that the mens rea being malice aforethought has been proved to have existed. As such I find that this charge of murder has been proved beyond a reasonable doubt and I accordingly convict the 1st, 2nd, 3rd and 4th accuseds as charged.

Dated and Delivered in Mombasa this 23rd day of October 2012.

**M. ODERO
JUDGE**

In the presence of:

Ms. Odhiang for all Accused

Mr. Tanui for State

MR. TANUI: The 1st – 4th accuseds may be treated as 1st offenders.

MS. ODHIANG: I require time to present mitigation.

COURT: Mention 24th October 2012 for mitigation.

**M. ODERO
JUDGE
23.10.2012**

24.10.2012

Before: Hon. Lady Justice M. Odera

Court Clerk – Mutisya

Mr. Onserio for State

Ms. Oduor holding brief for Ms. Odhiang for Accused

MR. ODUOR: The accuseds wish to mitigate personally.

1ST ACCUSED IN MITIGATION: I have a wife and five children. My father passed away. I urge court to be lenient.

2ND ACCUSED IN MITIGATION: I seek leniency from this court. I still plead innocence. I have a wife and a child. My parents are elderly. I am the eldest child.

3RD ACCUSED IN MITIGATION: I seek leniency. I have a wife and 2 children. My parents are elderly. They rely on me. My siblings are in school and rely on me.

4TH ACCUSED IN MITIGATION: I have no wife or child. I live with my widowed mother. My siblings rely on me.

MR. ONSERIO: The Republic seeks a custodial sentence. From the evidence the deceased was a bread winner. He lost his life due to mere suspicion. His family is left to suffer.

COURT

Mitigation noted. The offence of murder is a very serious one. The culture of killing suspected witches must be discouraged. A deterrent sentence is called for. Each accused is sentenced to serve fifty (50) years imprisonment. Each has a right of appeal.

M. ODERO
JUDGE
24.10.2012