



REPUBLIC OF KENYA

High Court at Malindi

Criminal Case 36 of 2010

REPUBLICPROSECUTOR

VERSUS

ALFRED CHIRIBA NASSOROACCUSED

JUDGMENT

1. The accused is charged with two counts of Murder contrary to section 204 of the Penal Code. The particulars of the counts are as follows:

Count II: On the 4th day of December, 2010 at Chonje village, Jaribuni Location of Ganze District within Kilifi County murdered NASSORO CHIRIBA MRAMBA. And

Count III: On the 4th day of December, 2010 at Chonje village, Jaribuni Location of Ganze District within Kilifi County murdered KANG'OMBE NASSORO CHIRIBA.

2. The accused denied the charges and was represented by Mr. Michira. The prosecution case can be summarized as follows: Nassoro Chiriba Mramba (hereinafter Nassoro Senior) lived at Chonye Village in Kilifi County. He operated a palm wine business at Sanzuri Trading Centre. He was a polygamous man with four wives by whom he had several children. The youngest wife was Kangombe Nassoro Chiriba (Kang'ombe). Prior to the material date there was bad blood between Nassoro Senior and the accused who was his son with another wife Kadzo Nassoro Chiriba (PW4). The relationship between the accused and Kang'ombe was also strained. Allegations that both were witches flew around and especially after the death of one Everlyn, the wife of Thomas Nassoro Chiriba (PW3) the son of the Senior Nassoro with another wife Nzingo Nassoro Chiriba (PW6), which had occurred a few weeks before the material date. At one point the accused threatened to set his father ablaze and a family meeting had to be convened.

3. On 4th December, 2010 when accused came home from Mombasa. He met his brother Thomas (PW3) at 2.00pm and expressed unwillingness to accept the cause of Everlyn's death as natural. He vowed to get a clear explanation for Nassoro Senior. Meanwhile Nassoro Senior had spent the day at his business place at Sanzuri. He usually drunk and at 7.30pm his son Leonard Chiriba Nassoro (PW2) was informed by a friend that his father was too drunk to make his way home alone. PW2 called his stepmother Kang'ombe to go and collect Nassoro Senior and help him get home. Kang'ombe left with her son Emmanuel Chiriba, Nassoro (PW1).

4. They went to the centre and met up with Nassoro Senior. They started the journey home. It was about 8.00pm. The two walked together but PW1 who had a torch was ahead of his parents. Some 200 metres from the home, they were accosted by a man who emerged from the nearby bushes. He attacked

them. PW1 started to flee. He heard his mother ask “*Kajeshi (the nick name of the accused herein) umeamua kutumaliza?*” (Kajeshi, you have decided to finish us?) At that point PW1 shone his torch and recognized the assailant as the accused. He fled home and reported the occurrence to his stepbrother Thomas (PW3) and stepmother Nzingo (PW6) and others in the homestead. A rescue party left for the scene of attack but all they found were a pair of sandals and lessso, identified to be articles belonging to Kang'ombe and a Swahili cap belonging to Nassoro Senior. They were fearful to venture further and returned home.

5. Presently they were joined by PW2 and his wife. The party returned to the scene. About 100 metres inside the bushes they found the bodies of Nassoro Senior and Kang'ombe which had seemingly been dragged away from the scene of attack. Both bodies bore head injuries and the eyes were punctured. Kang'ombe's body lay stark naked with a sharp object thrust in her private parts. The bodies were eventually removed to the local mortuary by police.

6. Early on the next day, the accused came home and questioned PW1 in relation to the murder. When told that his name was being mentioned in connection with the offence he warned PW1 of dire consequences if anyone should mention his name to police and get him imprisoned. He said he would come back to exact revenge. According to PW2 the accused uttered the same warning during the funeral as he harassed mourners because of crying over the deaths. Because the accused exhibited violence, police were called in and he was arrested. Eventually he was charged. According to the postmortem reports, both Nassoro Senior and his wife Kang'ombe succumbed to severe head injuries.

7. The accused gave an unsworn defence statement to the effect that on 2-12-10 his wife called him at his place of work at Mombasa informed him that she had had a quarrel with the accused's mother PW4 and decided to go to her parents' home. He decided to travel to his home arriving on 4-12-10. After confronting his mother about the issue he decided to visit his in-laws' home upon the promise of his mother to join him the next day, presumably to convince his wife to return.

8. He did not find his in-laws while his wife insisted on seeing his mother and he was forced to spend the night there. His mother never came and he decided to go back home. He learned that his parents had been murdered by unknown people. He went back to Mombasa to brief his employer and returned one day to the funeral. Due to lack of sleep and consumption of alcohol he “lost” himself and police came in to arrest him. He denied killing his parents adding that he had no reason as he had never disagreed with them.

9. There is no dispute that the late Nassoro Senior and his youngest wife Kang'ombe were attacked on the night of 4-12-10 as they walked home. That they died almost instantly from their head injuries. The main issue that falls to be determined is the identify of the assailant who seemingly waylaid them before attacking them. In this regard, the prosecution lined up eye witness evidence as well as circumstantial evidence. The sole living eye witness called by the prosecution is pW1, who at the time of giving evidence was 17 years old. After examining the witness the trial court ruled as follows:

“He is intelligent, understands the duty to tell the truth. Let him be affirmed.” (Because his faith forbade swearing on the bible)

10. PW1 testified that on the material night he used a not-very bright torch to illuminate the path ahead of his parents who walked close behind him. Some 200 metres to their homestead, he heard a movement in the bushes by the path and beamed his torch in that direction. He saw a man whose torso was uncovered. The man threw a wooden plank at him first and PW1 tried to flee. Next his parents were attacked by the man. His mother Kang'ombe cried out “*Kajeshi, Kajeshi, umeamua kutumaliza (Kasheji have you resolved to finish us)*”

11. At that moment the witness realized the attacker was his stepbrother the accused. He turned his torch and beamed it to confirm. He saw the accused. He ran off to inform his family. It is also his evidence that on the next morning the accused accosted him at 7.00am. The witness said the accused was interested to confirm that his name had been mentioned in connection with his parents' death. When the witness confirmed, the accused said that if any person mentioned his name to police and caused his arrest and

imprisonment, he would return to “deal with us properly”.

12. PW1 was cross-examined at some length by the defence counsel. The cross-examination centered on his alleged recognition of the accused at the scene. Admittedly, the attack occurred quite suddenly and PW1 said he was shocked. At first he beamed his light towards the bush because he thought an animal lurked there, only to be confronted by a half naked man who proceeded to attack him. In his evidence in chief PW1 freely offered that his torch was not very bright and could not see far, but that at close quarters it shed enough light. He admitted during cross-examination that he would not have known the attacker was the accused had his mother not called out his nickname, namely Kajeshi. At that moment PW1 froze his flight and beamed his torch once more to confirm, and he did, from a distance of one metre. He described his torch during cross-examination as having been charged “two weeks earlier...(its) light was not very strong and could not beam very far.” Of the accused he said he knew him very well as his brother.

13. Although PW1 acquitted himself well during cross-examination, his alleged recognition evidence of a single witness at night must be treated with care. In the case of **Paul Etole & Anor VR Cr. App. No. 24 of 2000** the Court of Appeal warned that evidence of visual identification was fraught with the risk of miscarriage of justice and exhorted courts of the

“need to warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally, it should remind itself of any specific weaknesses which had appeared in the identification evidence”

14. In considering the circumstances in which identification is made, the court must ascertain the nature of light available, its size and position relative to the suspect (see **Charles O. Maitanyi v R Cr. App. No. 6 of 1986**). In the present case the evidence of PW1 hinges on his recognition of the accused, his brother. Recognition is more reliable than identification of a stranger. (see **Anjononi v R [1980] KLR 54**). But this does not take away the need in the circumstances of this case to be cautious. PW1 in my opinion demonstrated honesty and genuineness in admitting, firstly, that his torch was not bright enough to beam a long way off and secondly, that it is after his mother Kang'ombe called out the name of accused that he turned around and flashed the torch to confirm the identity of the assailant, and he did. He said he was a metre away. He saw the assailant well, and it appears that Kang'ombe had already recognized the accused going by her dying declaration. I am persuaded that this evidence appears plausible. No doubt the conditions obtaining were difficult.

15. More recently, the Court of Appeal restated the applicable principles in **Majaliwa Mohamed Maneno vs R (2005)e KLR** as follows:

“subject to well known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error”

This court must therefore look for other evidence of a direct or circumstantial nature pointing to the guilt of the accused.

16. The material corroboration can be in the form of direct or circumstantial evidence as stated in **Majaliwa's case**. In the case before us, PW1 not only gave evidence that he recognized the accused. He narrated an event that occurred on the morning of 5-12-10. On this date the accused allegedly came home and found PW1. In his words:-

“The next day, Kajeshi came home at about 7.00am. I followed him and greeted him. He said he had

heard that our parents had been killed and that during the attack, his name had been mentioned, he wanted me to confirm that (and) I said “yes, your name was mentioned”. He told me he knew we would be called to Kilifi (police station) to record statements but warned that if any of us should mention his name to police and that if he dared mention, he would get arrested, serve his jail term, then come out upon release and deal with us properly. He then left for his home.”

17. During cross-examination of PW1 the defence did not challenge this portion of his evidence. In his defence the accused did state that he went to the home on the second morning. With regard to the identity of the assailant and the threats made to PW1, several witnesses confirmed these. His stepmother PW6 and sister PW7 stated that when the witness came home running from the scene of attack. He stated that his mother had called out Kajeshi's name during the attack. And it seems that was reason for Kajeshi (accused) accosting PW1 early the next day to issue his warning. As regards the latter PW2 told the court that PW1 had reported the threat to him even through his statement to police did not contain that statement. It matters not, in my view as PW1 is the person who was threatened on 5-12-10. That indeed the accused came to the home early on 5-12-10 inquiring about the murder is also confirmed by PW6 even though he did not witness the threat incident.

18. These are only part of the bits of evidence adduced by the prosecution with regard to the conduct of the accused prior to and after the murder. Regarding the former all the family members who gave evidence save the accused's biological mother (PW4) testified that the accused had a bad relationship with his father Nassoro Senior and did not “see eye to eye” with Kang'ombe prior to the death. Indeed according to PW2, at one time the accused threatened to set his father ablaze and even though a family meeting was convened, the matter did not resolve. PW2 told the court that the accused claimed that Kang'ombe was bewitching him (accused). PW3 also told the court of the bad relationship existing between the accused, his father and Kang'ombe. The accused's stepmother (PW6) also testified that the accused complained that the two deceased were witches. A younger sibling PW7 said that though she had not heard about witchcraft allegations, she was aware that the accused's relationship with Nassoro Senior was bad. These persons are members of the same family, sharing a father but different mothers.

19. It is unlikely that all of them invented this bit of evidence against the accused. The accused's mother PW4, naturally attempted to whitewash the subject relationship but her evidence can only be understood as an attempt by a mother to save her son. The defence labored on the fact that some of the statements touching on the allegations of witchcraft and bad relationship were not recorded in police statements. The witnesses gave their answers which in my view are reasonable: the police either failed to record fully what they said and in some instances did not ask of them questions that could have elicited that evidence. The fact that their statements to police were not on all fours with their evidence in court does not detract from the substance of their evidence. I am not aware of any legal requirement that the police statements must contain everything the witness could ever say: what is required in the statement is the substance of the evidence to be adduced. The witnesses herein did not contradict themselves in the course of their evidence. Their evidence is also consistent and there was no suggestion that these persons conspired against the accused.

20. Some hours before the murder, the accused who had not been home for some months even in his own admission, arrived home. Early in the afternoon, the accused met several members of his family including PW3, PW4, PW6 and at a later hour PW7. It would appear that the last family member he met in the day was his step sister PW7. The two exchanged pleasantries. The accused had just had a conversation with PW3 at the homestead as he appeared very keen to know the true cause of the death of Evelyn (PW3's wife) three weeks before. When PW3 said she died of malaria the accused expressed disbelief and said he needed to hear a clear explanation from his father. Thereafter he went to the home of his step mother PW6 and demanded food. Again he queried the cause of Evelyn's death after demanding food from PW6.

21. He then left in the company of PW4 his own mother whom he accused of casting a spell on his wife after their disagreement, the alleged cause of the accused's visit. It would appear from the evidence of PW4 that the conversation with Thomas (PW3) occurred after thereafter. From the testimony of the witnesses, the accused came to the father's homestead and had interactions with PW6, PW4, PW3 in that order before he left to go to his own nearby house, and on the way met with PW7 at 5.00pm. PW7 was

coming from Sanzuri to greet her father. PW2 was with his father Nassoro Senior until 7.00pm when he asked that Kang'ombe collects him.

22. The accused appears not to have been convinced that Evelyn died of natural causes hence the persistent probing of his relatives PW6 and PW3 and his final declaration that his father (whom he already declared a witch) owed him an explanation in the matter of Evelyn's death. During cross-examination PW3 said he told police about this encounter with the accused. But he openly admitted that he did not tell them that the accused after the conversation said he would go keep his bag and go seek his father at his place of business. However since PW7 while coming from Sanzuri Centre met the accused, it may well be that the accused was on his way home after meeting PW3. The fact is that in the late hours of 4-12-10 the accused was in the general vicinity of the scene of the murder. He met PW7 at 5.00pm and on the next day at 7.00am was back at the family homestead. When did he visit his wife's home and allegedly "wait" on the next day (can only be 5th) for his mother PW4 to join him, before giving up, and returning home?

23. The accused's evidence that he had some discussion with his mother before leaving with his step brother (PW4) tallies with the accounts of the said persons (PW4 and PW3) until the accused left the homestead. He left with PW3 according to PW4 and was seen alone later by PW7 headed in the direction of his house. The accused's evidence that he went with his brother (it can only be PW3) to his wife's home on that evening was never put to PW3 in cross-examination. Besides, even to his most sympathetic witness PW4, the accused did not suggest that PW4 had discussed and agreed to join him at the home of the accused's wife. Was the visit to the wife's home an invented alibi and why? The answer I think starts to emerge from the conduct of the accused after the murder as narrated by witnesses.

24. First he arrived very early in the homestead to warn PW1 not to mention his name to police on pain of death. Evidence by PW1, PW2, PW4 and PW6 shows that the accused did in fact go to the homestead on the day after the murder. In his defence he stated that he found people crying and learned of the deaths of Nassoro Senior and Kangombe. He spoke to PW2 he said, to find out who was involved. The accused went away from the homestead allegedly to brief his employer in Mombasa but was denied permission to return home. He therefore only returned a day to the funeral. The accused's evidence regarding his departure from home soon after the murder until the funeral is in tandem with that of other witnesses PW1, PW2, PW4 and PW6.

25. Although it was admitted that the accused worked in Mombasa, it is strange that he decided to travel all the way back to "brief" his employer, rather than call, which was the medium allegedly earlier used by his wife to reach him. It is hard to believe an employer who gave him leave to attend to a matrimonial dispute earlier denied him leave to mourn his two parents and to participate in burial arrangements. On the day of the funeral itself the accused behaved in a bizarre manner opening the coffins and shouting at the corpses and created such a ruckus that he had to be physically restrained. His explanation: alcohol and lack of sleep.

26. I have set out as fully as possible the accused's relationship with the deceased (clear animus) and his conduct prior to and after the death because that evidence though indirect points consistently at the accused's guilt. The evidence by prosecution witnesses as to the presence of the accused in the vicinity of the murder scene on the material date, his inquiries, movements and his conduct prior to and after the deaths lends credence to the testimony by PW1 that the accused attacked and murdered the two deceased on the material night. It cannot be that PW1 made it all up because he clearly had no inkling as to the accused's movements and conversations on the afternoon of 4-12-10 as demonstrated by PW3, 4, 6 & 7.

27. The evidence is overwhelming and totally displaces the accused's shaky alibi. Contrary to his claims, the accused had an axe to grind with the two deceased whom he believed were witches and more immediately, as answerable for what he considered the mysterious death of Evelyn. He firmly believed in witchcraft as is demonstrated even by his accusations against his own mother for allegedly bewitching his wife. He took matters in his hands to eliminate the deceased carrying out a threat he had earlier issued against his father, Nassoro Senior per PW2. The injuries inflicted on the deceased were so severe that they were dead within the hours. The intention to cause grievous harm is demonstrated by the severity of

the injuries inflicted.

28. The accused's alleged alibi must be viewed in the same light as the threats made to PW1 on the morning of 5th December, 2010: An attempt to cover up his involvement in the gruesome murder of his two parents. I am satisfied that the prosecution has proved its case beyond any reasonable doubt and will convict the accused accordingly on both counts.

Delivered and signed in open court this **18th** day of **October, 2012** in the presence of the accused, Mr. Ogeto holding brief for Mr. Michira for him and Mr. Naulikha for the State.

Court clerk – Evans.

C. W. Meoli
JUDGE

FURTHER ORDER

Record and sentence on 5th November, 2012.

C. W. Meoli
JUDGE