



REPUBLIC OF KENYA

High Court at Malindi

Criminal Case 18 of 2008

REPUBLIC.....PROSECUTOR

VERSUS

CHANGAWA KAHINDI YERIACCUSED

JUDGMENT

1. The accused is charged with murder contrary to Section 204 of the Penal Code, particulars thereof being that on the 16th day of September, 2008 at Muyu wa Kea Village Marereni sublocation, Fundisa location within Malindi District of the Coast Province murdered Charo Kahindi Jefa.
2. The prosecution case was as follows: a week or so prior to the 16th September, 2008 Francis Ngala (PW2) the Chief in charge of Fundisa Location received a complaint from one Charo Kanyila Kiti that his mother Kadzo had been bewitched by the deceased after she turned down his amorous advances. The deceased allegedly uttered words to the effect that her genitals would “rot away” and that it had come to pass. PW2 summoned the deceased, the complainant and other elders. The deceased denied the accusation and offered to take the traditional oath in proof of his innocence. So the 16th September, 2008 found the deceased, Kiti, some elders and the deceased's son Karisa Charo Kahindi proceeding to Kijiwetanga in search of a medicine man to administer the oath.
3. However, the deceased admitted before the said medicine man that he had only seduced Kadzo and so the medicine man declined to administer the oath and referred the party back to the area chief. The chief was not in the office. He advised to see him the next day. However, it appears that Kadzo died on the same evening and as the deceased and PW1 walked home they were accosted by a group of men armed with crude weapons demanding

“Where is this witch”
4. They set upon the deceased and assaulted him as PW1 fled for dear life. By the time PW2 reached the scene of the attack he found a group of people surrounding the deceased who was badly injured. PW2 managed to apprehend one of the assailants whom he caught hitting the deceased with a stick. He identified that man as the accused herein. The deceased succumbed to the injuries hours later.
5. The accused's defence is that he was on his mother's errands on the material date when he came upon a group of people surrounding the deceased who was bleeding. As he drew near wondering how to help he was suddenly held from behind. He was eventually accused of assaulting the deceased, which he denied.
6. The fact of the accused's presence at the scene of the attack on the deceased at the material time

and date is not in dispute. The court must determine if the accused was among those who assaulted the deceased and inflicted fatal bodily injuries.

7. The evidence of PW2 was that indeed he saw the accused assaulting the deceased upon arrival at the scene. Although PW1 said he did not see the accused, it is apparent that he fled the scene upon the arrival of the mob that was after his father whom they called a witch. PW1's evidence however lends credence to other evidence that indeed the deceased met his death through an assault by a mob on his way home on 16th September, 2008. PW2 was cross-examined at some length concerning his version of the events of the evening of 16th September, 2008 and his relations with the deceased. It was suggested to him that his evidence was tailored to conceal the actions of certain suspects who are members of his family.

8. In answering these questions, PW2 was not shaken. He said, and this is confirmed by the testimony of the accused that as he approached the scene most of the assailants who spotted him fled but the accused who had his back to PW2 was caught right at the scene. There does not appear to be any probable reason why PW2 would only fix blame on the accused while exonerating others. To this witness the defence never suggested that indeed the accused was only a good Samaritan who was caught while trying to see how to help the deceased. The accused was admittedly caught at the scene while armed with a stick.

9. According to PW2 when asked why he had assaulted deceased, the accused replied "the one who died (Kadzo) was my senior mother." This statement and the accused's possession of the stick negate the accused professed motive for his presence near the deceased. These pieces of evidence tie up with the earlier events of the day and the month concerning the claim that kadzo had been bewitched by the deceased and the death of Kadzo on the date of the offence (just an hour or so before).

10. I am persuaded that PW2 had ample opportunity to view the accused with whom he was familiar and observe what he was doing at the scene. Besides the accused was caught in possession of the stick and his answers to PW2 left no doubt his as to his motivation. He had an axe to grind with the man apparently responsible for his senior mother's death. I do not believe he was a good Samaritan who happened to be at the wrong place and at the wrong time as his defence tends to suggest.

11. In terms of the provisions of Section 206 of the Penal Code the accused's conduct demonstrates malice aforethought. Besides, it matters not that the deceased was also beaten and even slashed by other persons. The proven facts show the accused was part of the group . The utterances of the first accused PW1 and his father "where is that witch" and the accused's words to PW2 "the one who died is my senior mother" binds these actors in one common intention, namely to do grievous harm to the deceased in avenging the death of Kadzo for which the deceased was thought responsible. I find that the prosecution has proved its case against the accused beyond any reasonable doubt, will find him guilty and convict him accordingly.

Delivered and signed this **17th** day of **October, 2012** in the presence of the accused, Mr. Michira for accused, Ms Mathangani for State.

Court clerks – Leah, Evans

C. W. Meoli

JUDGE

Ms. Mathangani

Treat him as a first offender.

C. W. Meoli

JUDGE

MR. MICHIRA

The accused is remorseful. He was a minor at time of incident. He prays for a non-custodial sentence.

C. W. Meoli

JUDGE

COURT

Report and sentence on 15th November, 2012. Probation Officer's Report for the appellant be availed.

C. W. Meoli

JUDGE

15-11-12

Before Hon. Lady Justice C. W. Meoli

prosecutor – C.I Nyamai

court clerk – Onyancha

accused – present

Interpretation – English/kiswahili

COURT – High Court not sitting. Judge is away on official duties.

Report and sentence on 23-11-12.

N. SHIUNDU - DR

23-11-12

Before Hon. Lady Justice C W Meoli

Mr. Kemo for State

Mr. Shujaa holding brief for Mr. Michira for accused.

Interpretation – English/swahili

MR. WATHOME – Report ready.

COURT -

C. W. Meoli

JUDGE

COURT

I have noted the probation officer's report in respect of the accused. He is a young man who appears to have had little help from his parents or family and is desperately poor. I agree with the recommendations of the probations officer and will place the accused on probation for a period of 3 years, the first year of which will be spent at the Nairobi Youth Hostel where the accused may learn a trade in preparation for rehabilitation.

C. W. Meoli

JUDGE

MR. WATHOME

We need a general medical exam before admission into the hostel.

C. W. Meoli

JUDGE

ACCUSED - No objection.

C. W. Meoli

JUDGE

COURT – Accused to be examined by the doctor at Malindi Hospital.

C. W. Meoli

JUDGE