



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
CRIMINAL CASE NO. 6 OF 2009

REPUBLIC.....PROSECUTOR

VERSUS

**JAMES KAZUNGU LUGHANJE
JOHN KITSAO *alias* BUNDI *alias* BAYA
PATRICK KAZUNGU LUGANJE ACCUSED**

JUDGEMENT

JAMES KAZUNGU LUGHANJE (1st accused), JOHN KITSAO *alias* BUNDI *alias* BAYA (2nd accused) and PATRICK KAZUNGU LUGHANJE (3rd accused) are jointly charged with murder contrary to section 203 Penal Code as read with section 204 Penal Code that on 25th January 2009, at Midondoni village, Gongoni Location, within Malindi District, jointly with others not before court, murdered ALBERT MLANDA LUGHANJE (deceased). The accuseds are sons of deceased's brothers. They are represented by Miss Chepkwony.

LYDIA KABIBI (PW 4) a daughter of the deceased, testified how on 22nd January 2009, she met her late father (deceased) at Comeback Hotel, at the request of the deceased. The reason for the meeting was that 1st accused's son had died, prior to 22nd January 2009 and one of her cousins by name DANIEL WANJE ZIRO had informed her at the funeral that after 1st accused's father had been buried, 2nd accused consulted a witchdoctor after the burial, who disclosed to him that deceased had consulted a medium and obtained some charms which he was now using to cause death among members of the larger family. PW4 upon hearing about this suggested to her father to call a meeting of the family so as to address the issue. Her father had promised to call meeting on 27th January 2009.

It was PW4's evidence that the consultant witchdoctor had said it was the charms used by the deceased which had caused his elder brother (i.e 1st accused's father) to commit suicide by hanging himself.

The deceased was the Assistant Chief of Mushongoleni.

Meanwhile, on 25th January 2009 at about 7.30pm Emmanuel Mahenzo Mlanga (PW2) a son to the deceased was on his way home in Mdondoni, having come from Gongoni when he heard a phone ringing along the path. He shone his cellphone light on the path, and saw his father lying on the path with cuts on

the head, under the arm, (near the chest), his cheeks and waist. He rushed home to call other relatives. PW4 confirmed that just at about that time (i.e 7.30pm on 25th January 2009), she made a call to her father, the phone rang but he did not answer. It is probably this call that had attracted PW2's attention. PW2 had been accompanied by his friend James Mwavule (PW3) who told this court that while along that path, they first saw a bicycle just as they were getting near the deceased's home, then they saw a body and the phone ringing. PW2 immediately told him **"This is my father, I know how he looks and even the sound of the phone ringing is his"** PW3 had not immediately recognized the deceased because it was dark. However, both PW2 and PW3 did not see anyone at the scene.

PW4 on cross-examination explained that she had a close relationship with her father as the first born child and he had always expressed his concerns to her. The deceased had told her he felt he was going to die. PW4 had not immediately reported the information she had about 2nd Accused's claims to police or village elders because she was waiting for the outcome of the planned family meeting, which unfortunately did not materialize because her father was killed two days before the date set.

Charo Lughanje Ziro (PW5), a step brother to the deceased referred to discussions he held with his son Daniel Wanje Ziro, where the later informed him that accused 2 and his cousin had consulted a sorcerer who disclosed to them that PW5's wife, deceased, and his wife, were witches.

He mentioned the claims to the deceased, who said they would have a general meeting on Monday to establish who went to the sorcerer and who was the sorcerer. It was not disclosed to him who the named persons had bewitched or whether they were responsible for any death.

There is also the evidence of PW6 (STEPHEN NGUMBAO KITSAO), (a brother to 2nd accused) who recalls that prior to the deceased's death, James (1st accused) approached him and they had a chat outside his house, where 1st accused said:

"mimi nataka nimalizane na mzee" – in reference to Albert Lughanje (the deceased).

1st Accused said he was certain the deceased was a witch and that a sorcerer in Mtangani had revealed to him that fact. PW6 was shocked, because he had lived with the deceased for years and never heard that he practiced witchcraft. 1st accused also said that their aunt (i.e PW5's wife) was also a witch. 1st Accused did not say whether deceased's art of witchcraft was linked to any deaths. However Mzee Kazungu Lughanje (1st accused's father) had died not too long ago, and was followed by the death of 1st accused's child.

1st accused's parting shot was:

"mwisho wake wa mzee, ni leo, huyu mzee nitamalizana naye."

1st accused then left.

On 25th January 2009 at 6.00pm, 1st accused went to PW6's home and asked whether he could assign him the task of finishing someone. 1st accused called him aside and said,

"mzee huyu, leo nitamalizana naye, kwasababu huyu mzee ni mchawi."

PW6 told him he had lived with the deceased and had never heard of him being a witch and that deceased had even shown love to his (PW6) children and PW6 declined the assignment. 1st accused derided him saying he was as cowardly as a woman, but in any case he (1st accused) would finish the deceased. 1st Accused then left and by 8.30pm, PW6 learnt that deceased was dead.

On cross-examination PW6 said, the accuseds are his cousin brothers whom he had never had any problems with and recalls that on the evening in question, 2nd accused was not in Midondoni as he was in

Malindi.

PW6 was categorical that Albert Lughanje was killed because of claims that he engaged in witchcraft and that it had been said that his brother Kazungu's death, was as a result of witchcraft.

The deceased's wife (PW7- FURAHA NGUMBAO) confirms receiving news from her son Emmanuel Mahenzo about her husband's death and upon rushing to the scene, she saw his body lying on the ground with injuries on the head, back of the neck and upper lip.

The deceased's body was identified by Changao Chiro (PW8), a nephew to the deceased to the Doctor who did the postmortem. Photographs of the deceased who in various angles of the injuries both at the scene and in the mortuary, were taken by Pc Gabriel Kosgey (PW9) and produced as exhibits.

They show deep, permanent cuts on the back of the head, neck, under the arm/near the chest and on the cheek just above the jaw.

The postmortem report was produced by Dr. Tayari Omar (PW 10) who stated that deceased had multiple deep cuts with compound fractures of the parietal and occipital bone. The cuts extended to the brain tissue. The deep cut on the mastoid bone extended to the maxillary bone, a crescent shaped deep cut in the left auxiliary region (i.e under the armpit, and a cut on the right forearm postinally).

Internally, all systems were normal. There was intracranial bleeding noted (i.e bloody in the skull) and the cause of death was the severe head injury.

Supt. John Nderitu (PW 11) visited the scene and learnt that deceased was being branded a wizard which was the reason for his murder. He visited the scene again on 26th January 2009 and searched the surroundings for any murder weapon but made no recovery. However at the scene there was blood, he recovered a sheath for a sword, which suggested that it fell from a sword which had been used to cut the deceased – it was produced as exhibit 4.

He also drew a sketch plan of the places, showing the body's position marked A, the deceased's house marked B, the position of his bicycle marked C and the junction of an unmarked earth road leading to deceased's house marked D.

The deceased was killed just about 50m from his home and his bicycle by just 2m away from his body. An informer told Supt. Nderitu that the murder was planned and executed by his family members namely Patrick Kazungu, James Lughanje and John Kitsao alias Bundi alias Baya.

Having interrogated several witnesses PW 11 formed the opinion that the deceased's murder was as a result of claims that he was a wizard and PW11 realised that in the area, once one is branded wizard, he must be killed. He tried to get the witchdoctor who had been consulted, but failed, but the information was that it was James Lughanje who had consulted him and been told that deceased had bewitched and caused the death of his father and son.

On cross-examination he explained that he did not submit the recovered sheath for dusting of fingerprints because it is a rough object and therefore not suitable for lighting of finger prints.

Further he stated that he had been given names of four suspects, but only got to arrest three because JUSTIN KATANA remains at large.

All the accuseds gave unsworn testimony and a total of eight (8) witnesses testified for the defence. 1st defendant's simony is that on 25th January 2009, he was at his home in Gongoni where there was a gathering of persons who had come to condole with him over the death of his child who had passed away two weeks earlier having had malaria. The service began at 3.00pm and was conducted by Pastor Daniel Kiruma of Full Gospel Church. He was with other members of his family, including Stephen Ngumbao Kitsao, his in-law Kahazo Minzi, Mama Kadzo, Kenga Mboshi, Mapenzi Safari. They were listening to

the radio, when Mapenzi requested him to switch off the radio as there was some noise coming from the direction of the road. The persons at the home following the general direction of the noise, to the road and that's when he got to learn of his uncle Albert Kazungu's death.

On 26th January 2009, he was arrested in connection with the death and was surprised to hear allegations that deceased was a witch, so he told police he wasn't even aware of such claims as he had lived peacefully with the deceased, without any ill-will and he did not know anything about the killing.

The 2nd accused's defence was that on 25th January 2009, he was at his place of work, having been assigned guard duties. He performed his work until 7.30pm when he joined other staff for supper. At 11.00pm he was called to help offload luggage from a motor vehicle, which he did then returned to his duty until 26th at 6.00am when his supervisor arrived and he had a shift change-over. He only got to learn about the deceased's death when police arrested him. He denied ever consulting a sorcerer or connecting any calamities within their family to powers of witchcraft or black magic practiced by the deceased.

As regards PW4's evidence, he was totally surprised at her, because he even used to give her financial assistance.

The 3rd accused described his activities on 25th January 2009, from the morning when he left for Malindi Salt Factory to get a canter to ferry his goods. The motor vehicle was driven by one Kahindi Fondo and the loader was one Manuel Kombe.

He eventually got to Timboni at 7.30pm, off loaded his luggage, then returned to Gongoni shopping centre where he parted ways with the driver. Half an hour later he got a lift from James Maitha and just as he alighted, he heard wails from the deceased's homestead. When he got there, he realized that deceased was lying dead on the ground.

On 26th January 2009, he accompanied deceased's wife, deceased's son (Emmanuel) and James to the police station. Upon arrival, he was asked by the DCIO about a rumour which alleged that the deceased was a witch, but 3rd accused said he was not aware. He was then arrested and charged yet he knew nothing about the incident.

DW4 (DANIEL KAHINDI KIRIMO) is a pastor at Midondoni Baptist Church and confirmed that on 25th January 2009, he was at the home of 1st accused from 3.00pm to 6.30pm as he had gone to condole with 1st accused's family over the loss of his child who had passed on a few days earlier.

1st accused saw him and other church members off at 6.30pm. At 9.00pm, one of the church members called his wife to say the deceased had been killed.

On cross-examination he stated he had known the accused and deceased for over 20 years and that they lived in harmony nor did he ever detect any hostilities. He had never heard of accuseds making allegations that their late uncle was a witchcraft.

He also explained that the distance between 1st accused's home and the deceased's home was about 500m apart.

Mapenzi Safari (DW5) a sister-in-law to the accuseds says she was at 1st accused's home on the 25th January 2009. She saw him see off the church people who had visited – that was at 6.30pm. It was her evidence that 1st accused remained at home until about 8.00pm when she heard screams and requested 1st accused to switch off the radio so as to monitor where the noise was coming from. After determining where the noise was from, they all proceeded to the scene. Her testimony was that:

“after the ceremony ended at 6.30pm, I went into my house and never left the house until 8.00pm when

I heard the scream.”

She also confirmed on cross-examination that 1st accused’s house (although within the same compound) is about 60m from her house and that:

“It was not yet dark, by the time the visitors left, but by 7.00pm, it was dark...if James had left the compound I would have known. OK if James had left his house while I was inside my house, I wouldn’t have known.”

On re-examination she confirmed that 1st accused was actually seated outside his house.

Kahindi Kalama Fondo (DW7) a lorry driver, confirmed that 3rd accused hired him to transport his goods to Timboni and they arrived in Timboni at about 7.30pm and that before reaching Timboni, 3rd accused never left his company. They offloaded luggage at Timboni, then returned to Gongoni where they parted ways at 8.30pm.

Msanze Lawrence who worked for Silver Sand Security Company from 2008 to 1st October 2009 as a supervisor. He told this court that on 25th January 2009 at 6.00pm he assigned 2nd accused, guard duties at an orphanage near Galana secondary school in Mambrui. He took 2nd accused to his place of assignment, arriving there at 6.30pm, using a motor cycle. After checking the site, he left 2nd accused there.

He then went to Mambrui Town to get batteries for 2nd accused because his torch had problems and returned to the 2nd accused place at 7.35pm. He found 2nd accused still on duty. Still in his guard uniform, gave him the batteries then went to Kwa Domo at 8.45pm to check on other guards. He then did routine check, and returned to 2nd accused’s assigned place at 9.00pm – he was still on duty. He next saw 2nd accused at 5.45am when he went to pick him from his assignment (i.e on 26th January 2009).

On cross-examination he stated that the place 2nd accused was guarding was fenced – one side has a stone wall and the other side has bricks piled up. DW8 claimed to have maintained records of guard duty roster but did not produce any saying those were office records which he couldn’t have plucked to give to 2nd accused for use in his defence. He no longer works for Silver sands Security and had nothing to prove that he had even been employed there.

There is no dispute that Albert Mlanda Lughanje was found murdered long a path leading to his home on 25th January 2009 at about 7.30pm. There is also no dispute that his death was as a result of the multiple injuries shown in the photos, described the witnesses and examined in detail by the doctor who performed the postmortem.

- The injury inflicted on the head was so severe, it led to intracranial bleeding and the cause of death was actually the severe head injury.

The accuseds were charged to have jointly murdered the deceased. I have found a very useful decision by Etyang J. **High Court Criminal Case No. 116 of 1999 R V DAVID RUO NYAMBURA AND OTHERS** which examined an ingredient to be proved by the prosecution i.e that the accused persons jointly with others not before the court, caused the death of the deceased through their voluntary and unlawful act. Justice Etyang had this to say:

“The law on point is clear, under other criminal systems, for instance, in England and the United States of America, there is a distinction between Principal offenders in the first degree and those in the second degree. Principal offenders in the first degree are the actual offenders, the persons by whom the actual wrongful deed was committed, while principal offenders in the second degree are the abettors and aides.”

Under section 20(1) of the Penal Code (Cap 63), it would seem that they are all grouped together – as follows;

“20 (1) when an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence and may be charged with actually committing it, that is to say:-

- (a) Every person who actually does the act or makes the omission which constitutes the offence;***
 - (b) Every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence***
 - (c) Every person who aids or abets another person in committing the offence***
 - (d) Any person who counsels or procures any other to commit the act***
- And in the last mentioned case, he may be charged with either committing the offence or with counseling, or procuring its omission”***

The prosecutor must then show that each of the accuseds here participated in killing the deceased, and must also prove that the accuseds had a common intention to kill the deceased.

Apart from that, this court has considered whether evidence adduced establishes that the accuseds had the necessary *mens rea* – that there actually existed malice aforethought which includes section 206 of the Penal Code is deemed to be anyone or more of those 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, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.

(c) an intent to commit a felony

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who had committed or attempted to commit a felony.

It is the submission of Mr. Kemo (Counsel for the State) that although no one actually witnessed the accuseds killing their junior father (deceased being younger brothers to their fathers), the circumstances are such that the exculpatory facts are incompatible with the innocence of the accuseds and incapable of any other reasonable hypothesis other than that of guilty – the position well stated in the case of **REX- V KIPKERIN’G ARP KOSKEI & ANOR EACA 1949, pg 135.**

In his written submissions, Mr. Kemo pointed out that there was the unresolved issue regarding allegations of witchcraft and the deceased’s perceived dabling with such craft. Mr. Kemo drew to this court’s attention the following;

(1) 1st and 3rd accused had vowed to avenge the death of their father after a witchdoctor had informed them that the deceased had used some black magic power to cause their father to commit suicide.

(2) In spite of being nephews to the deceased, the 1st and 3rd accused together with 2nd accused, failed to go to the scene where the deceased’s body was discovered after he was assaulted, yet that was just about 500 metres from their home.

(3) The defence witnesses were not truthful and when the question as to whether 2nd and 3rd accuseds were home that evening was put to them, they became evasive.

(4) The evidence of DW6 under cross-examination that she had earlier in the day seen 2nd and 3rd

accused but could not remember the time, in itself scatters the accused's defence of alibi. She could not have seen them at home yet their defence was that they were not at home the whole day.

Finally, that the security with which the attack was executed left no doubt that the intention was to kill the deceased and the circumstances under which he was sought disclosed malice aforethought and the evidence points to the guilt of the accuseds to the exclusion of any other person.

The defence counsel Miss Chepkwony submitted that the prosecution had not proved its case in citing the age old decision of **WOOLMINGTON V DPP (1935) AC pg 462** and that even when the defence of alibi has been raised, that burden of proof does not shift reference to the principle stated by Sir UDO UDOMA (then Chief Justice of Uganda) in the case of **SSENTALE V UGANDA 1968 EA pg 365**, where he held that an accused person who puts forward an alibi as an answer to a charge does not assume any burden of proving that answer. It is Miss Chepkwony's argument that the prosecution failed to adduce admissible and credible evidence to displace the defences raised by the accuseds and there wasn't any evidence, whether circumstantial or direct, pointing at their guilt. Further that the alibi defence had not been displaced and the prosecution had not proved its case beyond reasonable doubt. She urged for the accused's acquittal.

From the evidence of the prosecution witnesses, the larger Lughanje family had always had very good relations until the death of Mzee Kazungu Lughanje, an elder brother to the deceased, and father of 1st and 3rd accused. Thereafter, undercurrents begun with allegation of the deceased dabbling in witchcraft. This was made worse when 1st accused lost his son, shortly after his father's death. The evidence of Lydia (PW4) Charo Lughanje Ziro (PW5) is consistent and it confirms that 2nd accused had information then about the allegations that the deceased was a witch – courtesy of consultation by a sorcerer. The claims had been made known to the deceased by both PW4 (his daughter) and PW5 (his elder step brother). The deceased was concerned about the issue and resolved to call a meeting on 27th January – unfortunately he got killed before the meeting.

This allegation of deceased engagement in witchcraft was further amplified by the evidence of PW6 (Stephen Ngumbao Kitsao), a brother to 2nd accused and cousin to 1st accused and 2nd accused – who had discussions with 1st accused and 1st accused disclosed to him his belief that the deceased was a witch and had to be “finished”. He even sought to engage the services of PW6 to execute the job, but PW6 declined. It is of course instructive that 1st accused did not tell PW6 how the deceased's involvement in witchcraft affected him, yet it's not stretching reason too much, to note that just about that period, 1st accused and 3rd accused had lost their father, which it is not denied, had committed suicide, and 1st accused had also shortly thereafter lost a child. Infact Daniel Wanje Ziro had mentioned the same allegations to PW4 and told him that 2nd accused sorcery consultation revealed that his late father was responsible for the suicide death of their uncle (father to 1st accused and 3rd accused) I have no doubt in my mind that the motive behind the attack, was the belief that deceased had involved himself in witchcraft and used black magic to cause his own brother (father to 1st accused and 3rd accused) to take his own life, and the same power caused, in quick succession, the death of 1st accused's son.

The intention to get rid of the deceased was made clear to Steven Ngumbao by none other than 1st accused, (who had suffered double tragedy of losing his father and son) not just once, but on two occasions, the first being on 22nd January 2009 at about 9.00am when he said;

“mimi nataka nimalizane na mzee” in reference to Albert Lughanje and clarified that further on a later date that he was a witch, as had been revealed by a sorcerer in Mtangani.

“Mwisho wake wa mzee ni leo, huyu mzee nitamalizana naye” (the old man's end is today, I must finish with this old man)

Thereafter on 25th January 2009 at 6.00pm 1st accused called PW6 and repeated.

“mzee huyu leo nitamalizana naye, kwa sababu huyu mzee ni mchawi” (I must finish this old man today because he is a witch)”

1st accused then tried to persuade PW6 to take up the assignment of “finishing the deceased”

It has not been suggested by any of the defence witnesses that there existed bad blood between PW6 and 1st accused so as to allege that he had framed 1st accused up. Even if the report to PW4 and PW5 were to be treated as hearsay because Daniel Wanje Ziro was not called as a witness, then what about the evidence of PW6, which was a direct connection with 1st accused and which has not been denied nor rebutted?

It is significant that 1st accused went to seek the services of PW6, on the very day that deceased was killed, in fact a short while before he met his death.

The prosecution has adduced evidence that clearly established the necessary *mens rea* as against 1st accused – he believed his uncle was responsible for the tragedies befalling his family, through the use of black magic and he clearly expressed his intention to do away with the deceased and indeed Albert Lughanje actually got killed.

1st accused relied on the defence of an alibi, but this did not shake the prosecution case because Mapenzi who claimed to have seen him within the compound between 6.30pm – 8.00pm confirmed that actually between those hours, she was INSIDE her house and by 7.00pm, darkness had fallen, so she cannot vouch that deceased did not leave the homestead killed the deceased, then return and join his family.

Secondly, it is not that deceased was killed at 7.30pm – he had been killed before 7.30pm, 7.30pm is the time his son stumbled upon his body.

Thirdly, 1st accused had an opportunity when he saw off his guests about 6.30pm, as it is not stated what time he returned after escorting his guests – the opportunity presented itself at 6.30pm, when he escorted his guests, accosted his uncle who was on his way home, attacked, and returned. The alibi defence does not dent the evidence offered by prosecution. And as Mr. Kemo points out, actually that alibi defence is weakened by the evidence of his mother in-law (DW6) who from her entire conduct in court, gave the impression that she was determined to save her daughter’s husband at all costs, she kept her eyes trained on 1st accused and a relative who was seated in court, seeking approval as to whether what she was saying was proper, and when she realized she had made a blunder, she put her hand over her mouth and stopped talking. I find her to be an unreliable and untruthful witness.

I have no doubt in my mind from the evidence presented, that 1st accused was involved in the killing of Albert Mlanda Lughanje. – the evident point inculpably to his being the culprit, the facts presented are completely incompatible with the innocence he tries to portray of a bereaved grieving parent, he killed his uncle to avenge the death of his father in the belief that Albert Mlanda Lughanje, was a witch.

As regards 2nd accused – he is connected to this matter because he appears to have been the link to the sorcerer. according to PW4, her cousin Daniel Wanje Ziro had told her, it was 2nd accused who had consulted a sorcerer and got the revelation that deceased was a witch. The evidence seems to suggest that 2nd accused was simply a busy body who decided to consult a sorcerer to unravel the deaths befalling the Lughanje family. There is no evidence to suggest that he had any ill motive with the information he got, that is why he had disclosed it to his brother Daniel Wanje Ziro.

According to PW6, on the day that deceased was killed, 2nd accused was not even within Mdondoni, rather both 2nd accused and 3rd accused are said to have been away on that day.

What was 2nd accused's role other than perhaps conveying to 1st accused the sorcerer's divination? The evidence doesn't disclose any. What was 3rd accused's role other than that his father had died – there doesn't seem to be any evidence pointing at him. In fact his defence witness placed him away from the scene at the time the incident most likely took place - at least between 5.00 – 8.00pm his moments are accounted for by himself and his witness (DW7).

There is no evidence whatsoever to prove that 2nd accused and 3rd accused were principal offenders or even aided and abetted in the murder of the deceased is only suspicion that they may have sympathized with 1st accused. Consequently the charge against 2nd accused and 3rd accused is not proved at all.

The upshot is that:

- (1) The evidence sufficiently proves the charge against 1st accused and he is convicted as charged
- (2) There is insufficient evidence to prove the charge against 2nd and 3rd accused and I return a finding of not guilty. Each is acquitted of the charge.

Delivered and dated this **9th** day of **March 2011** at Malindi.

H. A. Omondi
JUDGE

Miss Chepkwony for accused
Mr. Kemo for State
Court clerk – English/Swahili
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