



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
CRIMINAL CASE NO. 16 OF 2009

REPUBLIC.....RESPONDENT

VERSUS

SAFARI KAZUNGU KATOI..... ACCUSED

JUDGEMENT

Safari Kazungu Katoi (the accused) is charged with the offence of murder contrary to section 203 of the Penal Code as read with section 204 of the Penal Code that on 21st August 2009 at Katama Village, Chakama Location, Malindi District of the Coast Province, murdered Loise Charo. The accused denied the charge and was represented by Mr. Muisyo, advocate. Mr. Ogoti appeared for the State at the beginning of the hearing, but he was transferred from Malindi and Miss Waigera took over to complete the prosecution case. By the date of the defence hearing, Miss Waigera had left the Attorney General's Chambers and joined the bench and so Mr. Kemo took over the matter.

The accused was married to Loise Charo Ngaira (the deceased). On 21st August 2009 at about 12.00pm, Katoi Kazungu Katoi (PW1) a brother to the accused saw the accused and the deceased sitting outside their house. Shortly, PW1 saw the accused beating Loise, he hit her with an axe, then took their young child to PW1, while holding the axe, saying he was going to make a report to the police. PW1 did not see the accused and the deceased argue or struggle, all he saw was the accused raising the axe and hit the deceased. PW1 was at a distance of about 15 metres from the couple when the incident occurred.

On cross-examination PW1 explained that earlier in the day, accused had gone with the deceased to Yao area to burn charcoal. He also informed this court that although accused and deceased had disagreements in the past, those were over very minor issues such as washing his clothes, and PW1 had never seen accused beat the deceased in the past.

This is what PW1 stated in cross-examination;

“When we arrived home, I passed accused seated outside with his wife, I passed them but was still within the homestead and they were within my view. I heard a sound of one being hit. I turned and saw accused hit deceased with the axe. The sound I refer to was his wife screaming and I rushed to where they were, to find deceased already on the ground. Yes I did not see accused hit deceased, but there was no one else, deceased lay on the ground and accused had an axe in his hands”

On re-examination, PW then stated as follows:

“I witnessed accused killing the deceased as I was not far from them. I saw him strike deceased on the head”

Chengo Kazungu (PW2) another brother of the accused arrived home just at 12.00pm on 21-8-09 and his testimony was this:

“On arrival, I saw the accused. He killed his wife and was holding an axe. He said he had killed her and was going to report himself to the APs at Chakama. He took his axe and left. We followed him and found him at Chakama Police station”

The accused’s brothers informed the police officers that accused had killed his wife, so he was arrested. On cross-examination PW2 told this court that he found her lying dead within the homestead, and accused as the only other person present.

Pc Obed Koskei (PW3) confirmed that while on crime standby at Malindi Police station on 21-8-09, at around 3.00pm, he received a report of murder at Chakama area.

He proceeded to the scene accompanied by other police officers and found the body of Loise Charo lying dead outside Shakaola forest at a semi-permanent tent. Scenes of crime personnel took photographs of the scene. PW3 recovered an axe which was alleged to have been the murder weapon. His observation of the body was that deceased had a swollen head and blood was oozing from the mouth. The accused was already at Chakama AP camp under arrest.

A postmortem was carried out by Dr. Omondi who has since left Government Service and is now employed by Aga Khan Hospital, Nairobi. Dr. Chepsim Daniel Koech (who worked with him and was familiar with his handwriting and signature,) testified as PW4, and produced the P3 form. The postmortem report stated that externally the head and neck were swollen and there was blistering of the skin extremities. There was dried blood in the ears, mouth and nose.

Internally, there was a swelling on the head and a body mass on the left temporal and parietal region. There was a deep cut seen at the occipital region – all other systems were normal. As a result, the doctor formed the opinion that the cause of death was severe head injury due to intracranial hemorrhage secondary to trauma.

In his defence, the accused gave unsworn evidence saying that on 21st august 2009, he was at his place of work, where he deals in charcoal – he was accompanied by his wife. He later sent her to go home and prepare food while he remained to do the work.

He then left for home, and as he approached, he heard his child crying. On arrival, he found the child standing three (3) metres way from the mother who had fallen. He tried to call her out but she did not respond. He was greatly distressed because he loved the deceased and they had never disagreed. When other people came, he told them what he had found, then he left to go and make a report at the police station.

The counsel for the accused, Mr. Muisyo submitted at the close of the case that the charge against the accused had not been proved beyond any shadow of doubt. It was his argument that the evidence by PW1 and PW2 was contradictory, because whereas PW1 said he saw the accused standing next to the body of the deceased, holding an axe, and that he saw the deceased, holding an axe, and that he saw the accused kill the deceased but found him standing near the deceased’s body with an axe in his hand.

It is Mr. Muisyo’s contention that the action by accused of taking himself to the police post should be an indication that he is not guilty of the act alleged.

Mr. Muisyo’s submissions is that there was a conspiracy by PW1 and PW2 (who are the accused’s own

brothers) to pin the accused and get rid of him. He takes his argument further and suggests that it is PW1 and PW2 who committed the offence or someone else with the knowledge of the two witnesses and wonders why it is that there is no other independent witness.

Mr. Muisyo points out that the accused took himself to the police post along with the murder weapon and that police just decided to arrest him without carrying any investigations the moment they saw the murder weapon and that accused ought to be acquitted.

Mr. Kemo in response submitted that the prosecution case has been proved beyond any shadow of doubt as PW1 had clarified that he heard a sound followed by the deceased screaming and rushed to the scene only to find the deceased dead. Further that PW2 was forthright about what he witnessed and contrary to the claim by defence that the witnesses contradicted each other, PW2's evidence simply confirmed what PW1 stated.

He urged this court to find that the circumstances under which the accused was found holding the axe next to the body of his wife shouting after she had screamed, leaves no doubt that it is the accused who must have assaulted the deceased. Further that this is fortified by the fact that accused was all alone with his wife and their baby, so no one else could have assaulted the deceased with such ferocity.

Mr. Kemo submits that the cut wound on the head, (which the postmortem confirmed led to the deceased's demise) leaves no doubt that his infliction using the axe, was intended to do grievous harm to the deceased and the accused must have known that such action would result in the deceased's death therefore malice aforethought has been established.

There is no dispute that the accused and the deceased left PW1 and PW2 in the forest earlier and proceeded to their home. There is also no dispute that upon arrival of the two witnesses to the home, they found deceased lying dead with a cut wound on the head while the accused held an axe in his hand. There is also no dispute that deceased had a cut wound on her head, which the doctor found to have been the cause of her death.

The issue for determination is simply this – who inflicted that fatal injury on the deceased. PW1 initially said he witnessed the accused striking the deceased with an axe, however he later clarified on cross-examined that what he heard was a sound followed by the deceased screaming and on turning he saw deceased lying dead with the injury on her head while the accused stood next to her holding the axe. This scenario was confirmed by PW2 who was in the company of PW1 as they arrived home.

There is nothing to suggest from the evidence presented, that someone else could have come into the homestead and attacked the deceased. When they arrived at the homestead, according to PW1, accused was seated with his wife (deceased) outside and he passed them, then followed the sound which drew his attention. Even if PW1 did not actually see the accused strike the deceased, is there any other plausible explanation as to who could have struck the deceased (other than the accused who was in her company), so soon after PW1 had just gone past them when she was still alone?

The theory being developed by Mr. Muisyo that there was conspiracy by the two brothers against accused, has no basis – it has not been suggested that the brothers had disagreed, or had some existing grudge, in fact according to PW1 they all used to go to the forest together to burn charcoal. It is not clear where Mr. Muisyo expected the prosecutor to get an independent witness when the incident happened on the homestead shared by the three brothers.

What is referred to as a contradiction is actually not a contradiction – each witness referred to what he saw, not what the other saw and PW1 on re-examination was categorical that he saw the accused hit deceased with the axe as he was no far from them. To resolve this apparent shifting position by PW1, I am inclined to consider the circumstances – there being no other person in the compound and accused stood there next to the body with an axe in his hand. Defence does not dispute that the axe was the murder weapon – if it is not what was used to stab the deceased, then of course the natural question is – where did accused get it from and how then did he decide it was the weapon of assault.

My finding is that the circumstances point to the accused as the one who inflicted the injury on the deceased, and no one else and he handed over the axe to PW3 (Pc Koskei) who produced it as exhibit 1. His defence does not dent the prosecution's case at all and in my view is an afterthought cleverly crafted to absolve him from what he had done – I reject that defence.

Consequently I am persuaded beyond any reasonable doubt that accused did murder his wife Loise Charo on 21st August 2009 and he is convicted as charged.

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

H. A. OMONDI
JUDGE