



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
CRIMINAL CASE NO.3 OF 2008

CHARO KALU THINGAAPPLICANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

CHARO KALU THINGA (the accused) is charged with Murder contrary to Section 203 Penal Code as read with Section 204 of the same code. The particulars are that on 18th September 2007 at Nakwala Sub-location in Kilifi District of the Coast Province, jointly with another not before court, murdered **MWADIDO THINGA**.

Accused denied the charge – he was represented by Mr. Mushelle, Advocate. The accused is a son to the deceased. The evidence of **JUMWA DONDO** (a mother to accused) is that she was at home the whole day when she heard noises and followed the general direction to find out what was going on. She met the accused who was running – he had a stick in his hand and he hit her with it, on the head and also back and arm. The accused had arrived from Mombasa where he had gone to see his sick brother and he arrived crying.

Pw 1 was going to meet him on account of his weeping - at the time he was accompanied by his brother **RANDU**. All Pw 1 can recall is that it is the accused who assaulted her and she passed out. She identified the sticks in court. She woke up at Kilifi District Hospital where she had been admitted and that is when she heard other patients saying that at the time she was brought to hospital, her husband had already been killed. She got to hear that it was accused who had killed his father, claiming that his father and Pw 1 were witches. She confirmed that even at home, the accused had previously claimed that his parents were witches and that he would kill them. After being discharged from hospital Pw 1 went home and confirmed that her husband was dead – he was buried while she was still in hospital.

On cross-examination Pw 1 clarified that accused is actually her step-son, being a child to her co-wife. Further, that by the time she met the accused, her husband had already been killed and accused was out to finish her. However she stated;-

“I did not see who actually killed my husband.....I only woke up in hospital to hear people saying my husband had been killed because he was a witch and that I had also been beaten for the same reason.....”

She denied that either of them were witches but confirmed that there were allegations in the village that they were witches and were responsible for their children`s deaths. Incidentally on the day of attack,

accused arrived weeping because his elder brother had died. **KATITE MGENJA** (Pw 2) – a village elder did not witness the incident, but only got information from two school girls who told him that deceased had been killed by his sons. **CHARO** and **RANDU**. He proceeded to the scene and observed injuries on the head of the deceased, whose limbs were broken and he was bleeding. He also found Pw 1 lying unconscious and tried to revive her by pouring water on her. When she stirred he realized she was still alive and he rang the area chief. He then went to **CHARO** and **RANDU** whom he found armed with sticks in a hostile and aggressive mood – they were chasing away everyone. He too identified the two sticks which were produced in court as exhibits, as the ones the accused and his brother had.

On cross-examination he stated;-

“Accused and his brother were standing within the homestead and barring people from accessing the home, they would wield the sticks menacingly. I saw the sticks, at the time, they were blood stained, that is what I saw”

KANZE CHARO(Pw 3) was in her shamba at about 4.00Pm on 18th September when she saw people running from her home and upon rushing there she was told;-

“Your father and mother have been killed”

She did not ask who had killed them, but when she got home, she ***“met the killer who asked me what was making me cry. By the killer, I mean CHARO(the accused in the dock).”*** He ordered her to keep quiet and had a stick in his hand. He declared he had killed their father and their senior mother. Pw 3 wanted to ask him why, but he appeared harsh, and in an aggressive mood, so she held back. It was her testimony that accused was very harsh and aggressive and people were running away from him, so she too ran and hid, resurfacing only when a motor vehicle came to collect the bodies. She too identified the two sticks in court, as the ones accused had – incidentally Pw is Pw 3`s biological mother.

SIDI KARISA(Pw 4) a daughter- in-law to the deceased did not witness the incident **NELSON KITHI KALU**(pw 5) a son to the deceased attended the Post mortem which was carried out on the body of the deceased on 20/9/07. He identified the body to the Doctor for purposes of Postmortem, but walked out midstream as he could not stand the process of post mortem. The Postmortem was performed by Doctor **MUTINDA** at Kilifi District Hospital. His significant findings were that the body had a blood stained shirt and shorts. Externally there was a deep cut at the frontal aspect of the head. There was a fracture of the skull with rugged edges whose fragments extended to the right eye, causing facial deformities. There was exposed grey matter and a bruise on the posterior aspect of the head, indicating use of a heavy object. The cause of death was severe head injury secondary to depressed skull fracture and subdural haemorrhage. The Postmortem form was produced as exhibit 3 by Doctor **BARBRA MAMBO**(Pw 7) who had worked with Doctor **Mutinda** and was familiar with his handwriting and signature – defence counsel had no objection to this.

CORPORAL TITUS MUTUNGA (Pw 6) received the report about the incident and proceeded to the scene where he found the body of the deceased lying in a pool of blood. He interrogated persons at the scene who confirmed to him that the accused (**CHARO**) together with his brother **RANDU** were seen in the vicinity, each armed with a piece of timber which they used to attack their father and their step-mother. The two pieces of timber were near the body of the deceased. Pw 6 drew a sketch plan showing the body and the exhibits. He also took the unconscious Pw 1 to hospital. The witness produced the sketch plan and the pieces of timber (also referred to as sticks) as exhibit. He learnt that **CHARO** and **RANDU** (who is still at large) were accusing the deceased and Pw 1 of being witches, following the death of one of the deceased`s sons who had been admitted at Mariakani hospital.

Eventually the District Officer of the then Kilifi District **GABRIEL WAMBUA KIONI**(PW 8) got information from a member of the community police that accused had been spotted in Bamba. He then made arrangements for accused`s arrest and accused was apprehended and handed over to Bamba Police Post – he was eventually charged.

Accused in his unsworn testimony told this court that on 18th September 2007, he was at Bamba Trading Centre selling inside a shop when at about 3.00Pm, he received a phone call from home informing him of his brother **ALEX KALU'S** death, in Mombasa. He left to go home, but on the way, he received another phone call informing him that his father had been badly beaten when he went to condole with the bereaved. It is his evidence that he does not know the assailants or the reason for the assault. When he got home, he found a crowd surrounding his father who was in critical condition, and as they were preparing to take him to hospital, he breathed his last. They then sent someone to inform the village elder Mzee **KATHITHA MRENGA FUNDI** and eventually police came and collected the body. After the burial he went back to his usual errands until 27/11/07 when police collected him and took him to Bamba Police Station to record a statement about his father's death. He insists that he knows nothing about the murder of his father.

No one witnessed the actual assault on the deceased, and the prosecution's case is based purely on circumstantial evidence. Mr Mushele for the accused, submits that the evidence was just hearsay and is not sufficient to convict the accused, so he should be acquitted. The State did not respond. The circumstances on which the prosecution based its case are:-

- a) Accused had previously alleged that his father and his senior wife (pw 1) practiced witchcraft and were responsible for deaths within the family.
- b) Accused had vowed that due to that practice, he would kill both of them
- c) A brother to the deceased died that very day and as soon as news about his death reached the family, decease and his wife were attacked
- d) Several witnesses saw the accused armed with a stick, which he wielded menacingly as he displayed an aggressive and hostile mood, ordering everyone to go to their own homes
- e) Deceased was found dead with injuries, shortly within the same period when accused was displaying his combative attitude

Under section 203 Penal Code, any person who of malice afterthought causes the death of another person by an unlawful act or omission, is guilty of murder. Malice aforethought, under section 206 Penal Code is deemed to be established by evidence proving any one or more of the following circumstances:-

- a) an intention to cause the death of or previous harm to any person, whether that person is actually killed or not
- b) Knowledge that the act or omission causing death will probably cause the death or grievous harm to some person
- c) an intent to commit a felony
- d) an intent by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony

The intention to cause the death was expressly made known to Pw 1, by the accused, and the motive behind such intention was his belief that deceased and Pw 1 were using powers of witchcraft to cause deaths of family members. This is given credit by the fact that immediately upon learning of his brother's death, accused proceeded home in a very charged mood and his encounter with Pw 1 who was going to receive him and join him in wailing for the departed, was met with a violent attack by accused, who left her for dead. No one saw him attack the deceased, but from the set of circumstances, the chain of events was not broken, proving out clearly that he attacked his father with the very sticks he had, and left him for dead, in the same manner and pattern that he dealt with Pw 1. All the witnesses confirm he was armed with the sticks/timber as he harshly ordered everyone to go back to his/her own house while wielding the stick, and this caused everyone to steer way from him. The act of assaulting Pw 1 and the deceased with the sticks had such serious impact as confirmed by findings of the Doctor in the Postmortem report and which suggests very clearly that the force used by the person inflicting the injury was certainly intended to result in death or grievous harm – which is what happened to the deceased.

Accused's own conduct upon realizing that his father was dead does not suggest that he was traumatized by his father's death, as he infact ordered his sister **KANZE CHARO** (PW 3) to keep quiet when she was crying over the loss of her father. His defence that he was not present when his father got killed, or that he is not the one who killed him are dented by his own conduct after the incident – he disappeared and was only traced later by the area District Officer, courtesy of information from a member of the local

community policing group.

The circumstances in my view point inculpably to the guilt of the accused, to the exclusion of any other reasonable or probable explanation that someone else could have committed the offence other than himself. His defence does not shake the prosecution`s case and my finding is that the evidence proves the charge against accused beyond any reasonable doubt. Consequently his defence is rejected and he is convicted as charged.

Dated this 30th day of May 2011

**H A OMONDI
JUDGE**

Read on 06/06/11

Mr Mushelle for accused

Mr Kemo for State

c/c-Gladys Swa-Eng