



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL CASE NO. 23 OF 2008

KARISA KITSAO KENGA

**MAX SIKUBALI KITSAO.....ACCUSED
PERSONS**

VERSUS

**REPUBLIC.....PROSECUTO
R**

JUDGMENT

KARISA KITSAO KENGA(1st accused) and **MAX SIKUBALI KITSAO**(2nd accused) are jointly charged with the offence of murder contrary to section 203 Penal Code as read with section 204 of the same code that on 25th day of October 2008 at about 1900hours at **KONJORA** sublocation, within Kilifi District, murdered **KITSAO KENGA MWANZANI**.

Both accuseds denied the charge and prosecution called a total of five witnesses to prove its case. The matter was prosecuted by **MR OGOTI**(the ADPP Malindi) upto taking of evidence by Pw 4. He was transferred from Malindi and **MISS WAIGERA**(State Counsel) took over to prosecute the evidence of Pw 5. By the time prosecution closed its case and defence case begun, **MISS WAIGERA** had left the State Law Offices and joined the bench, sitting in Homa Bay, so **MR KEMO** took over the prosecution. **MR OKUTO** represented the accuseds. This matter involves close family members – accuseds are cousins being sons of the deceased`s brothers) and deceased was their uncle (or as in the traditional reference in Mijikenda culture, there senior father).

On 25/10/08, the family members were at a funeral of **SERAH**, a daughter to **ALFRED TSUI NGUA**(Pw 1) who is also a younger brother to the deceased. She was a married woman, so Pw 1 was

accompanied by members of the larger/extended family (that is relatives) – which included his two wives and children. The funeral begun late because the deceased had died while pregnant, and a procedure had to be carried out to separate mother and foetus. Pw 1`s elder brother **KAHINDI** informed him that after the burial, there would be a family meeting as requested by his son **MOHAMED KAHINDI**. The burial process ended at 6.00Pm and **KARISA KITSAO** (accused 1) said the mourners should break into clans. This is because according to the Mijikenda traditions after burial the mourners congregate in groups to analyze the death and its cause. At the gathering **KARISA** told everyone to set down then asked.

“What else is left now that we have buried?”

The question was intended for Pw 1, but before he could reply, his elder brother **KAHINDI MBESHO** said that they ought to go to a traditional seer (sorcerer) to consult and be told the cause of death. Karisa asked;-

“Do you mean before her death you did not consult the seer?”

Someone responded that a seer had been consulted. Accused 1 then said.

“Then let us have the report”

AMANI KADENGE SIMBA(a son to Pw 1`s sister), was among those who had consulted the seer, so he got up to speak, but before he could talk much, he begun crying, so Pw 1`s son **SAMUEL CHAI TSUI** took over to report on the findings of the seer. H said the cause of the death was not from outside the home, rather the cause was from within the home. Everyone begun to say;-

“tosh, tosha”

“enough, enough”

KARISA (ACCUSED 1) then said,

“KAHINDI MBESHU, KITSAO KENGA MWANZANI and ALFRED TSUI(that is PW 1) move into the centre”

Accused 1 spoke out saying how the three named individuals had been brought up well to be responsible adults yet they were now bewitching and killing family members. He then said;-

“Today swear completely, because today is today” (Leo apeni kabisa sababu leo ni leo”

Accused 1 had something in is hand which Pw 1 could not see clearly as darkness was falling. Suddenly Pw 1 saw **KARISA**(accused 1) aim an object at his own father that is **KITSAO KENGA MWAMZANI**(now deceased) and he fell down **SIKUBALI** (accused 2) moved close, and Pw 1 got hit on the back and fell – he could not get up, and begun to crawl on his knees, eventually easing away from the crowd, then he fled. He heard his elder brother **KITSAO KENGA MWANZANI** saying;-

“Ahh, I`m dying”

PW 1 ran even faster – he could hear people running, so he dived into a hole and hid, eventually creeping into the bushes until 5.00am. Pw 1 had left his phone charging at **MAKOPARI**, so he went to collect it, then walked towards his home. On the way, he met some relatives, and greeted them, and they asked him where he was going to – he told them he was going home. They cautioned him saying:-

“Please do not go, your brother has been killed and burnt and right now people are looking for you, armed with poles and all manner of things, please turn back”

PW 1 heeded to warning and turned back until he got to a palm drinking den in **SOKOKE** and joined the revelers, who also warned him to keep off the area because people were looking for him to kill him. Pw 1 came to Malindi, then moved on to **GALANA** to save his life. The area sub-chief kept urging him to go back home as police were looking for him but Pw 1 was reluctant because he feared for his life. Pw 1`s children would call to say some of his property was missing but he was too fearful to leave his haven. Eventually he went to the police station and recorded his statement.

On cross-examination Pw 1 explained that there were two family groups which held the post burial analysis meeting – one comprised his family members and the other comprised his in-laws. Further that accused 1 was the chairman of the meeting and also the main speaker while others were just contributing. It was also his evidence on cross-examination that no one was drinking at the meeting. He told this court that during his daughter`s illness, some of his relatives had gone to consult a sorcerer and also to establish the cause of death – among them were his sister **KIBIBI SIMBA**, his brother **KENGA CHARO MWAMZANI** and **SAMUEL TSUI**(Pw 1`s son). The two accuseds did not go to consult the sorcerer (seer) but they wanted to know the results of the sorcerer`s (seer) findings. He further testified that at the meeting, **AMANI**, begun to say that the sorcerer`s (seer) findings was that the cause of death did not come from outside the home(at this point Pw 1 explained that there are two homes) and no specification was made as to which home was being referred to because the crowd begun saying:-

“tosha, tosha, and among those who said “tosha” was accused 1, as a matter of fact, he was the first one to say “tosha” before the rest of the crowd joined in. The other family clan (actually the in-law) held their separate meeting and Pw 1 is very clear in his mind that it is **NOT** the group of his inlaws who became agitated and started the fight – he was categorical that the fight was started from within his family`s group. He also pointed out that accused 1 kept saying “leo ni leo” (today is today) and the others would follow in a chorus – infact there was active participation in the group which now acted like a mob.

He further explained that initially when the meeting begun everyone was seated, but as darkness fell and the three brothers were ordered to move into the centre of the gathering, everyone stood up because the meeting was becoming volatile and everyone was anxious. He attempted to help the deceased who was the first one to be attacked, but he got hit on the head with something which resembled a stick. He was confused, rather alarmed especially as the crowd of family members begin chanting in unison:-

“kill him, kill him”

and once Pw 1 ran away, he did not know what went on behind him, but while at a distance of 5-6m, he heard deceased say:-

“I am dying”

Pw 1 now assumed everyone was chasing him as he felt that his life was in danger and that everyone was hostile to him. He recalls hearing accused 1 say loudly;-

“leo mtakiona’

So for 3 months Pw 1 remained in hiding at MADUNGUNI, in Malindi District. He had got to learn of **KITSAO KENGA MWAMZANI**’s death and his parting shot on cross-examination was;-

“Accused 1 was the main speaker, which means he knew something more about the issue, he claimed ‘you do not want to bring up your own children Today is the end of it” - which meant he had planned something for us”

On re-examination, Pw 1 clarified that the people who made reports about the seer’s findings never mentioned any names. **KAHINDI CHARO MWANGALA** (Pw 2) is the in law to Pw 1 (his son having married Pw1’s daughter who was being buried on the day the incident in question took place). Infact the funeral ceremony was conducted at his home and he confirmed that his in-laws attended the burial, among them being Pw 1, the deceased, the two accuseds and many others. He confirmed that the two families held separate post burial meetings far from each other (at least they could not see each other) – he approximated the distance at about 300 metres apart. The group could not hear each other’s discussion, and his group had finished their deliberations. As Pw 2 waited for his inlaws to go and make a report about their deliberations, he suddenly saw a fire from the meeting place where his in-laws were. He got alarmed and proceeded to the place, accompanied by his brothers, only to find a body burning. He called the village elder who in turn called the sub-chief. Pw 2 could not make out who was burning because the fire covered the face. On cross-examination he stated that he did not notice any commotion from the other group, before seeing the fire and by the time he got to the scene, everyone in the group had fled – all he found was the burning body. He denied suggestions by defence counsel that his family group, had issued any threats to the other group. He was arrested and kept in custody.

Pw 3 (**SHIDA KASIWA MANGALE**) a neighbor to two accuseds whom he refers to as fellow villagers who attended the same school with him – he has known them for 20 years. He also knows Pw 1 because he was his teacher, so he has known Pw 1 for all his life. The deceased **KITSAO KENGA MWAMZANI** was known to him because his brother had married **KITSAO**(deceased) daughter’s so he had known deceased since childhood that is about 30 years. He was among the mourners who attended the burial of **KADZO NGUA**(daughter of Pw 1). He confirmed the meeting of the two family groups which was to carry out a post burial analysis. He was in the opposite group, and was among those who noticed a fire from the place where the other group was meeting while they were waiting to receive a report about their deliberations. He too saw the buring body and could not recognize the person because the fire covered the face. He confirmed that he had seen Pw 1, the two accuseds and deceased among the group of inlaws who were at the post burial meeting.

On cross-examination he told this court they had expected **MZEE NGUA**(Pw 1) to report back to them regarding their deliberations – while waiting he did not hear any noise or commotion – he just noticed the fire and when they went to find out, they realized that everyone had fled. Initially they had thought that the other group had lit a fire to warm themselves, and what alerted them was when they saw people running away from the meeting scene. All he knows is that he saw the accused go with their clan members from the meeting but as to what they said or did, he cannot tell.

Pc NEWTON MJOMBA who visited the scene confirms finding a body burnt beyond recognition. He had accompanied the investigating officer to the scene and was able to gather information that the cause of the killing was due to allegations that the deceased had bewitched the late **KADZO**, who was a daughter to his brother and that during the meeting, the three brothers i.e deceased, one **MBESHO** and Pw 1 were attacked by members of their family including the two accuseds. On cross-examination he explained that he was not able to interview **MOHAMMED KAHINDI MBESHO**, as he got injured during the commotion and his whereabouts remain unknown. He also told this court that he also did not

get to interrogate **AMANI SIMBA** and **SAMUEL CHAI TSUI** who were connected to the incident as they too ran away and their whereabouts remain unknown. He stated on cross-examination that after arresting the two accuseds, Pw 2, Pw 3 and the other suspects just melted away. The 2nd accused was so affected upon seeing his father set ablaze that he collapsed immediately after the incident and was trampled upon by people. He was admitted in hospital. Accused 1 was arrested when he went to ask for the body of the deceased at the hospital so as to take it for burial. Actually accused 1 did not go directly to the hospital, but he was hovering in the area near the police station and had sent one of his relatives to find out whether police could release the body for burial and that is the lead which ended up in his arrest. A Postmortem done on deceased by **DOCTOR ONDIEK** showed that deceased had extensive deep and superficial burns over 80% of the body and that is what caused his death.

Both accuseds gave unsworn testimonies and had no other witnesses to call. 1st Accused confirmed receiving news about the death of his sister **SARAH KADZO NGUA TSUI** on 24/10/08. He was so shocked because she had only been married recently and he had not heard of her ailing. He attended her burial on 25/10/08, which was conducted at 6.30Pm. His younger sibling **KENGA KITSAO** called him to attend a family meeting which he says was convened by his elder brother **MOHAMMED KAHINDI**. He stated that the purpose of the meeting was to determine whether they were to mourn or to condole. 1st Accused suggested that they should condole, because mourning involved unnecessary expenses. However his father **TSUI NGUA**(Pw 1) did not support that because he expected some money. Their in-laws were also having their own meeting. Shortly he saw people running towards them – they were being beaten. 1st Accused ran away because the violence was excessive and everyone was fleeing. He later got to learn that his cousin (2nd Accused) had fallen down and was lying on the ground. 1st Accused called his brother in laws **CHENGO KAHINDI, CHARO** and others to help him raise 2nd accused who was unconscious. 2nd Accused was rushed to Kilifi District Hospital in a critical condition and admitted there. On 26/10/08, 1st Accused got a phone call informing him that his father **KITSAO KENGA** had been killed – the call was made by **YONA KAHINDI** 1st accused then left 2nd accused in hospital and rushed to the police station – he was interrogated at the police station and locked up. That is when he saw his sister-in-law`s father and his sons **KAHINDI CHARO, MANGALE SUNDA, KASUWA MANGALE** and **KATANA CHARO MANGALE** in the police cells. The next day, all the others were released except 1st accused, who was eventually joined by 2nd accused and both were charged with this offence.

2nd Accused told the court that he did attend the funeral, and the eventual post-burial meeting. He was overwhelmed by emotion over his cousin-sister death – she had died while in pregnancy and he watched her body dissected so as to remove the baby – a procedure he had never witnessed before and which greatly traumatized and saddened him. So overwhelmed was he, that he collapsed near the grave. However he recovered sufficiently to attend the post burial meeting where he just sat listening to discussions and decisions made on the way forward. It is his evidence that the deceased`s father wanted them to mourn(which could involve monetary contributions) while the younger generation favoured condoling. At 7.00Pm, he saw a group of people approaching them in a charged mood, and everyone ran for safety, as missiles were being hurled all over. As he ran for safety, he got hit by an unknown person and he felt dizzy and fainted. When he woke up, he realized he was at Kilifi District Hospital, and his elder brother 1st accused was seated near him – he remained in hospital for four days. He wonders;-

“How could I kill my own father who I lived with in Kilifi and had never disagreed with?”

Both the defence and State Counsel adopted the same submissions they had made at the earlier stage when the matter was set for ruling. **MR OKUTO** submitted on behalf of the accuseds that despite there being evidence of Pw 1 have attended the funeral in the company of his wives and relatives, no other witness was called to testify and no explanation was even given for such omission. Pw 1 also made reference to **MOHAMMED KAHINDI** as the person who had requested for the meeting, yet he was never called as a witness. **MR OKUTO`S** contention is that the court cannot construe a threat or evil intention by accused 1 simply by looking at the innocuous question he posed at the post burial meeting that;-

“What is left now that we have buried”

Or any of the other utterances attributed to him thereafter. He also urged this court to bear in mind that the two accused never went to consult the seer(sorcerer) over their sister`s death and that the claim of such consultation should be taken with a pinch of salt, since the “consultees” that is **AMANI & SAMUEL TSUI** never testified nor were they arrested. **MR OKUTO** wonders how it is that out of more than forty people who attended the meeting, no other person, other than Pw 1 testified. His submissions is that the only reason no one was called as a witness is because if they were to be called, they would have give evidence adverse to prosecution.

Defence counsel also pokes holes at the evidence of Pw 1 saying that the sequence of events, the charge and terrifying atmosphere and Pw 1`s confused State, made it impossible for him to reasonable decipher what was going on and he cannot be treated as a credible or reliable witness.

As for Pw 1`s three month disappearance, **MR OKUTO** argues that it was a well calculated move intended to create a false impression that he had run away and hid for his own safety, when in actual fact he had a hand in the death of the deceased and was simply waiting for things to cool off. **MR OKUTO** proposes that since no one actually witnessed the murder of **KITSAO KENGA MWANZANI**, then it must be deemed that he was burnt by a mob. Further that there is material contradiction in the prosecution case because whereas Pw 4 claimed that 1st accused hit the deceased with a wooden bar and 2nd accused lynched the deceased – that was not the evidence of Pw 1.

MR OKUTO argues that even circumstances leading to accused`s arrest as narrated by **IP MJOMBA** do not demonstrate conduct of a man with a guilty mind. His contention is that the ingredients constituting malice aforethought, as contemplated by section 206 of the Penal Code have not been fulfilled at all, so as to prove a charge of murder and accused should be acquitted.

There is no dispute that the accuseds and the deceased attended the burial of their relative **KADZO NGUA** on 25/10/08 and thereafter they were present at the post burial meeting. Whereas prosecution case is that the post burial meeting was in fulfillment of the Giriama(Mijikenda) custom of analyzing the death of the departed soul and theorizing on its cause), the accuseds insist that the purpose of that meeting was to decide on the way forward in terms of further activities related to the event that is whether to mourn or to condole, and that there was a disagreement as in which approach to adopt.

The court must determine what the purpose of the meeting was, because it was while this meeting was going on that hell broke lose. Apart from Pw 1, there is the evidence of Pw 2 and Pw 3 (also members of the Mijikenda group – Giriama to be precise) – who were also at the burial of **KADZO**. They too held a meeting, although separately, and both confirm that this is a practice within the community during which an analysis is carried out as to what really may have caused the death (that despite there being a post-mortem report). They too had held a separate meeting, made their conclusions and were waiting for a report from the other group`s deliberations. I am persuaded that the meeting was held to analyse the perennial cause of Kadzo`s death in keeping with Giriama tradition, and not to decide whether people ought to mourn or condole.

Pw 1 described the charged mood which prevailed during the meeting, the accuseds are his own nephews(traditionally the Giriamas, and I think in any African culture, the accuseds are referred to as his sons because they are his brother`s children). It is not in dispute that as the meeting progressed, violence broke out, and at the end of it, the deceased was left burning, Pw 1 had fled, and their other brother **MBESHO** has never been traced. All the other family members also fled from the scene.

Was the attack orchestrated by the two accuseds on account of their belief that the senior male members of the larger family were the cause of **KADZO`S** death, through use of witchcraft or was the attack initiated by some unknown persons? Or by Pw 1 as suggested by the defence counsel? Pw 1 has given a structured account step by step, regarding what eventually led to their being summoned into the centre of the gathering, the sudden vicious attack and melee that followed and which is consistent with evidence of Pw 2 and Pw 3 to the effect that the meeting purpose was simply to determine what the perceived cause

of **KADZO`S** death was. Among those who had consulted the sorcerer were **AMANI** and **SAMUEL TSUI**, and while it is true that the two were not called to court as prosecution witnesses the evidence of Pw 4(**IP NEWTON MJOMBA**) is that the two fled and have never been traced. So it is not correct to say that the reason why the other named pair was not called is because prosecution feared that they would give evidence adverse to its case. Malice aforethought was demonstrated by the utterances 1st accused made, and in the manner he worked up the crowd into frenzy.

I find no contradiction in prosecution witnesses evidence – Pw 1 explained that he saw accused aim an object at the deceased – whereas Pw 4 says 1st accused hit deceased with a wooden bar - Pw 1 never specified what the nature of the object he saw being aimed at deceased – and the bottom line is that both confirm. 1st accused handling an attack on the deceased. I have no doubt in my mind concerning accused 1`s role in the death of the deceased both by word and conduct.

As regards accused 2- was he a victim of circumstances, arrested because it was easing to access him in hospital. According to Pw 1 2nd Accused moved near the deceased after 1st Accused had hit the deceased, 2nd Accused moved close, then he (Pw 1) was hit on the back and he fell down.

Pw 1 does not seem to suggest that 2nd Accused was aggressive – and he move closer to try to protect his father or to attack his three “father`s” who were the target of the mob wrath. It is common ground by both prosecution witness (that is Pw 4 and the two accuseds) that in the course of the incident 2nd Accused was so overwhelmed by emotion that he passed out. So did he attack his father, then realize the seriousness of the action and faint? I rule out the possibility that the fell down and was trampled upon by the fleeing mob, because he has produced his medical records as defence exhibit, and which are dated 29th October 2008, signed by Doctor **LENA MATATA**. The defence exhibit is a discharge summary confirming that 2nd accused was admitted at Kilifi District Hospital in ward 3 on Saturday 25/10 /08 at 9.00Pm showing symptoms of headache and nausea. The diagnosis given was mood disorder – which is consistent with what 2nd accused stated in his defence, and what **IP MJOMBA** stated in his evidence.

Although Pw 1 was a single eye witness, taking into account his testimony, and the fact that this saga involved family, then I do not read mischief on the prosecution failure to get other members of the family who were present at the meeting to come and testify, especially because it is apparent that the majority supported the action taken at the meeting, symbolized by their full participation in the chants of “**tosha tosha**” “**leo ni leo**” “**kill him kill him**”. I found him a very clear and consistent witness whose testimony was unshaken even under strenuous cross examination – he was a credible witness. He had known the accuseds all their lives, as he was their “father” (that is brother to their fathers) and when the meeting after 6.00PM, darkness had not yet fallen. I find him credible. Consequently, my findings are as follows;-

(1) From the evidence adduced there is sufficient proof that accused 1 was involved in killing the deceased and he is convicted as charged.

(2) The evidence against accused 2 is not strong and leaves some loopholes and doubts – he therefore benefits from this doubt and is acquitted.

Delivered and dated this 27th day of June 2011 at Malindi

**H A OMONDI
JUDGE**