



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL CASE NO. 7 OF 2009

REPUBLIC PROSECUTION

=VERSUS=

MANYESO KAZUNGU ACCUSED

JUDGEMENT

The accused **MANYESO KAZUNGU** faces a charge of **MURDER CONTRARY TO SECTION 203 as read with S. 204 OF THE PENAL CODE**. The particulars of the offence are that:

“Between the nights of 18th and 19th January 2009 at Milingoni Village, Chalani Milingoni sub-location of Kaloleni location within Kaloleni District of Coast Province murdered CHARO INZANO MSHENGA”

The accused who was represented by **MR. MBUYA** Advocate entered a plea of **‘not guilty’** to the charge and his trial commenced before me on 28th July 2009. The State led by **MR. ONSERIO**, learned State Counsel called a total of ten (10) witnesses in support of their case.

The brief facts of the prosecution case as narrated by the witnesses was as follows. On the evening of 18th January 2009 the deceased together with other family members took their evening meal and after a while they all retired to sleep. The deceased slept alone in his hut whilst his two wives slept together in a separate hut. The deceased’s sons and daughters-in-law also had their own houses within the same compound. At about 12.00 mid-night several of the witnesses who were sleeping in the deceased’s homestead state that they heard the voice of the deceased cry out for help saying **‘Nauliwa peke yangu’** meaning **‘I am being killed alone’**. However no single family member came out of their houses to assist the deceased or to find out what the problem was. The following day on 19th January 2009, they all awoke and noticed blood-stains at the deceased’s door. The family still took no action. Nobody bothered to open the door and check whether the deceased was alive or dead. **PW5 MWENDA INZANO CHARO** the elder wife of the deceased went to report the matter to the sub-chief. The sub-chief did not come until the following day on 20th January 2009 and opened the door. The dead body of the deceased was found lying on the floor in his house covered with clothes and makuti leaves. The body had cuts all over. Police were called in. The police came and removed the body to the mortuary where a post-mortem examination was conducted. Upon completion of police investigations into the matter the accused was charged with the offence of murder.

At this point the prosecution having closed their case, this court has to determine whether the evidence on record is sufficient to warrant putting the accused to his defence. In other words has the State

established a prima facie case against the accused person?

The offence of murder is defined in S. 203 of the Penal Code thus:

“Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder”

The prosecution is required therefore to prove the following

- (1) That a death has occurred
- (2) That that death was the result of an unlawful act or omission
- (3) That said unlawful act or omission was committed with malice aforethought.

As in all criminal cases the onus is upon the prosecution to prove all the above three ingredients beyond a reasonable doubt.

The fact of the death of the deceased cannot be in any doubt. Apart from his wife **PW5**, the deceased's sons, daughters in law and grandchildren all gave evidence and all testified that they saw the dead body of the deceased when it was removed from his house. In addition these witnesses all testify that they saw cut marks all over the said body. The identity of the deceased likewise is not in any doubt. All the relatives give the name of the deceased as **CHARO INZANO MSHENGA**. Therefore as I have stated earlier the fact of the death of the deceased cannot be in any doubt whatsoever.

The next crucial question to be answered is what was the cause of the death of the deceased. **PW10 CHIEF INSPECTOR CHARLES KIPTANUI** is the investigating officer who went to the scene where he saw the body of the deceased. He confirmed that he saw deep stab wounds on the body of the deceased. The cause of death was expounded further by **PW9 DR. NGALI MBUVUKA** the Provincial Pathologist based at Coast Provincial General Hospital who conducted the post-mortem examination on the body of the deceased. He too confirms the presence of three deep cut wounds to the head and one cut wound on the left hip. His opinion was that the death of the deceased was caused by **“severe head injury due to deep cuts to the head”**. The post-mortem report duly filled and signed by **PW9** was produced in court as an exhibit **Pexb1**. It is clear from this evidence that the deceased did not die of natural causes or of misadventure. The deep cut wounds to the head coupled with the evidence that the deceased was heard to cry out saying that he was being killed is proof enough that he met his death as the result of an unlawful act i.e. an attack on his person by what **PW9** opined to be a **“long sharp object like a panga”**. Some person or persons attacked the deceased while he was alone in his hut and brutally hacked him to death. I am satisfied that the **‘actus reus’** of the offence of murder has been sufficiently proved.

The next burden placed on the prosecution is to prove that it was the accused who so brutally attacked the deceased and caused his death. The accused like most of the other prosecution witnesses was a relative to the deceased – he was the deceased's grandson. Out of the seven (7) witnesses who were in the homestead on the night the deceased was killed not a single one has been able to identify as the perpetrator of this offence. Out of those prosecution witnesses who actually mention the accused none is able to show any nexus between the accused and the death of the deceased. **PW5** the wife to the deceased told the court that the accused took his evening meal with the rest of the family after which he went to his house to sleep. It is only **PW8 JUMWA CHARO** who makes any sort of attempt to link the accused to this incident. He told the court that on the material night the accused said **‘Hapa kutakuwa na kitu’** i.e. **‘something will happen in this homestead’**. **PW8** did not elaborate on what this ‘something’ was. It is strange that out of all the family members who were present at the time it is only **PW8** who supposedly heard the accused utter these words. Neither **PW5** nor **PW7 DAMA ACHAKAWA** the deceased's daughter-in-law heard the accused utter any such words.

Other witnesses only made vague insinuations that the accused may have been involved in the murder of the deceased. **PW2 JUMA SAMUEL KATANA** told the court that one **‘Hamisi Kenga’** told him that he (Hamisi) and the accused had **‘finished’** or killed the deceased. Firstly the said Hamisi was not called to testify and infact was never traced by the police at all. This therefore remains hearsay

evidence which is not admissible as evidence in this case. Secondly under cross-examination **PW2** appears to change his mind and instead says that Hamisi told him that it was he (Hamisi) who had killed the deceased. This time no mention is made of the accused. The testimony of **PW2** is totally unreliable and this court will not put any trust in him.

Whereas it is stated by **PW5** , **PW7** and **PW9** all of whom were in the homestead on the material night that the deceased called out saying that he was being killed all of them are unanimous that the deceased did not name the person or persons who were killing him. In other words the deceased did not name the accused at all. **PW10** the investigating officer claims that he received information that there was a pre-existing grudge between the accused and the deceased due to allegations that the deceased was a witch. However all the family members deny any knowledge of such a problem between the two.

From my own analysis it is clear that the family members have decided to put up a screen of silence over the events of that night. I am convinced that they knew more than they revealed to this court. It strikes me as very odd that the family patriarch is killed in his house at night, blood-stains are seen at his door, yet no family member bothers to open the door and check on the condition of their father. It is not until 2 days later that the sub-chief comes and finds the old man dead in his house. Nobody bothered to respond to the deceased's cries for help yet there were adults in the compound. **PW4 TAABU KARISA** a daughter-in-law to the deceased admits under cross-examination that her proposal to call the police was shot down by the deceased's own wife. It is as if the family wanted the deceased to die. In any event there is no evidence to point at the accused as the one who attacked and killed the deceased. To put him on his defence would be tantamount to calling upon the accused to fill the gaps in the prosecution case. I find that no prima facie case has been shown against the accused and I enter a verdict of '**not guilty**' in accordance with S. 306(a) of the Criminal Procedure Code. The accused is acquitted. He is to be set at liberty forthwith unless he is otherwise lawfully held.

Dated and Delivered in Mombasa this 13th day of June 2011.

M. ODERO
JUDGE

In the presence of:
Mr. Mbuya for Accused
Mr. Onserio for State