



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CRIMINAL CASE NO.1 OF 2008**

**REPUBLIC.....PROSECUTOR**

**-VRS-**

**1. JACOB KAINGU**

**2. IBRAHIM KAINGU**

**3. CHENGO KAINGU.....ACCUSED PERSONS**

**JUDGEMENT**

**JACOB KAINGU (1<sup>st</sup> ACCUSED), IBRAHIM KAINGU(2<sup>ND</sup> ACCUSED) and CHENGO KAINGU(3<sup>RD</sup> ACCUSED)** are jointly charged with murder contrary to section 203 Penal Code as read with section 204 Penal Code, the particulars being that on 21<sup>st</sup> December 2007 at about 8.30Pm, at KICHWA CHA NYATI village in MILORE sublocation, Mlima wa Ndege Location in Kilifi District, of the Coast Province, jointly murdered KAHINDI KATUTI (the deceased).

The accuseds denied the charge, they were represented by **MR MURANJE**, advocate. Initially, prosecution was conducted by **MISS WAIGERA**, but she left the State Law Offices to join the bench, and **MR KEMO**(the SPPC) took over the matter. Prosecution called a total of six witnesses in support of its case. The deceased was elder brother of the accused`s father, so in the traditional Giriama set up, they would refer to him as **SENIOR FATHER**.

**KARISA KAINGU TIVA** (Pw 3) brother to the accuseds described himself as a pastor. It was his evidence that on 21<sup>st</sup> December 2007, he was at their Milore home – their mother had just been buried on that day, and since he was exhausted by the day`s activities, he went to sleep at 8.00Pm. Later on he heard a lot of noise and commotion, and upon coming out, he saw the three accuseds who were approaching his house. They informed him that their senior father had been killed. Pw 3 inquired as to who had killed him, but accuseds did not know. Pw 3 proceeded to the scene and confirmed that he was indeed dead, so he told them to report to the area chief. Pw 3 observed that deceased was lying just outside a house

belonging to one of the members of the family. There was slight moonlight and Pw 3 noted injuries on the deceased's head. Since the moonlight was not very bright, Pw 3 borrowed a torch, which he used to illuminate the body and see the injuries. **KAHINDI KADOTI**(Pw 2) is the father of the three accused and he confirms that deceased was his elder brother. He was at his second wife's home resting when he heard a woman wailing.

***“ndugu yangu uminiweza”***

He followed the sound of the wails and realized it was his sister –in-law (that is wife to his brother). He then proceeded to where elders were gathered and noticed that the deceased **KAHINDI KATUTI** was not among them – which surprised him, so he asked “where is everyone?” and he was informed that his brother **KAHINDI** had been murdered at a drinking den. He did not know who had killed his brother, and he felt the pain of that loss, as he was the one who had brought the deceased into that area, so as to get him a wife. When he went to the scene of murder, he found the body alone – no one else was near it.

This witness testimony was a departure from what he had recorded in his statement to the police, and the State Counsel applied that he be declared hostile so as to enable her cross-examine him. In that statement, he had said how after the burial of his wife, he left the three accused, deceased and several other people drinking while he went to look for a place to rest as he does not drink. He denied telling police that his attention was drawn by commotion caused by people who were running and he rushed to the place where he had left the deceased and his three sons. He however confirmed rushing to the drinking den and finding the lifeless body of his brother, but denied telling the police that the three accuseds were standing next to the body and that one of them was holding a stick. He also denied telling police that it was his three sons who had killed the deceased insisting that the police made an error to include that in his statement. In essence he disowned the contents of the statement which implicated his sons, saying he is illiterate, he spoke as police recorded, and the statement was never read back to him what they had recorded. He maintained that what he had said in court was the truth. **JUMA KALUGO** (Pw 4) a relative to the accuseds and a son of the deceased, as well as a village elder received the report about the deceased's death. This report was relayed to him by Pw 2 (accused's father) who said **KAHINDI** had been killed by **JACOB, IBRAHIM** and **CHENGO**. He went to draw the body which lay on the ground with bleeding head injuries. There were people at the scene and he learnt that the three accuseds had gone to report the incident to the chief.

Pw 4 also proceeded to make a report to the Chief, he seems to have arrived there before the accuseds because his evidence is that after the Chief had made a phone call to the OCS, the three accuseds arrived. **JACOB** reported that they had killed the deceased and they wanted the chief to take them to the police station. They claimed that Deceased was responsible for their mother's death. The Chief's response was:-

***“now it is night, you will sleep here, all of you, and we will go to the police station the next day”***

The Chief of Mlima Ndege location is **TAABU KARISA CHAI** (Pw 5) and it was his evidence that on 21/07/07 while at his home, **JUMA KALUGO** (Pw 4) reported to him that **KAHINDI KATUTI** had been killed, the reportee mentioned the three accuseds as the killers, and that they too were on their way to make a report about the same incident, but had used a different route. The three accuseds arrived shortly thereafter and said they had killed their senior father for bewitching their mother, so they wanted Pw 5 to take them to make a report at Kilifi Police Station. Since there was no police officer present, Pw 5 persuaded accuseds to remain until the next day when they all went to the police station and reported their involvement in the incident. **PC ABURE YUSUF**(Pw 6) was at Kilifi Police Station on 21/12/07 at 9.30am when the three accuseds arrived, accompanied by Pw 4 and Pw 5 on allegations that the three had killed the deceased. Pw 6 proceeded to the scene and found the body, which he noted had the head crushed (that is the forehead) and fragments of the skull were at the scene just next to the body. The

suspected murder weapon (that is a log of wood produced as exhibit 2) was also next to the body. He removed the body to Kilifi District Hospital and kept the blood stained log as exhibit, although he never submitted it to the Government Chemist for analysis.

**DOCTOR BARBARA MAMBO** (Pw 1) produced the postmortem form (exhibit 1) on behalf of **DOCTOR GACHUI** who had performed the postmortem on the body of **KAHINDI KATUTI** – the said Doctor having since left Kilifi. The findings were as follows;-

**EXTERNALLY:** The skull was broken and brain matter oozing out of the fractured area;

**INTERNALLY:** There was a compound fracture of the frontal bone. Cause of death was due to head injury secondary to assault.

On cross-examination Pw 1 explained that a head injury with brain matter oozing out was fatal, so despite the Doctor not entering any results about the other body organs of the deceased: that was not a critical point and would not affect the fact that the cause of death was the injury observed. On cross-examination by the court, Doctor Mambo stated;-

***“It is very unlikely that someone with the kind of injuries deceased had, survives such injury”***

The accuseds all elected to remain silent and had no witnesses to call. The pivot of the prosecution case was the accused`s own conduct – that they owned up to the killing in the presence of Pw 4 and Pw 5. The prosecution gives the motive for such killing, as the accuseds firm belief that the senior father (now deceased) was responsible for their mother`s death – their mother having just been buried on that day.

No one who may have witnessed the killing has been called as a witness, and Pw 2 and Pw 3 who initially seem to have told the police that accuseds had confessed to them about the murder, denied ever making such claims, and infact Pw 2 disowned his statement to police, and both said, then statements were never read back to them as to enable them confirm or correct their contents. If these were confessions, then of course they failed to meet what is contemplated by section 25A, 26 and 29 of the Evidence Act – which is to the effect that the confessions would

(a) have to be made in the presence of a designated person as for section 25A and 29.

(b) the same needed to be reduced into writing.

Of course the likelihood that accuseds actually owned up to the killing reigns high, more so by the very conduct of their immediate family members that is Pw 2 and Pw 3 – who create the impression of wishing to save the skin of their own kin, and I would easily have used this against the accused, had thus been followed up with the recognized procedure under the Evidence Act regarding confessions, ultimately there isn`t sufficient evidence to sustain a conviction, and I make a finding of not guilty. The three accuseds shall be released forthwith unless otherwise lawfully held.

**Delivered and dated this 8<sup>th</sup> day of June 2011**

**H A OMONDI**  
**JUDGE**

Mr Gekanana holding brief for Mr Muranje for accused  
Mr Naulikha holding brief for Mr Kemo for State  
c/c-Randu

All accuseds present