



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL CASE NO. 4 OF 2007

REPUBLIC.....PROSECUTOR

-VRS-

KAHINDI CHARO.....ACCUSED

JUDGEMENT

KAHINDI CHARO(the accused) faces a charge of murder contrary to section 203 of the Penal Code as read with section 204 of the same code. The particulars are that on 29th November 2009 at **KIEMBENI LOCATION, VITENGENI DIVISION**, within KILIFI DISTRICT of the COAST Province, murdered **SIDI BENJAMIN SAHA**.

The accused denied the charge and was represented by **MR MURANJE**(advocate). The trial begun on 25th July 2007 before Hon. Justice **N.R.OMBIJA** and was prosecuted by **MISS AMENGE**(State Counsel). At the time the assessors were;-

- 1) **NTINYORI KIAMBI**
- 2) **EMMANUEL MWAURA**
- 3) **EVANS CHENGO**

In the course of time, **MISS AMENGE** was replaced by **MR OGOTI**(the Assistant Deputy Public

Prosecutor, Malindi) and Justice Ombija was transferred from Malindi to Kitale and replaced by myself four witnesses had then testified. From 5th September 2009 the Malindi Bar boycotted all pauper briefs as a way of demonstrating their objection to certain directions which had been given by the then Honourable The Chief Justice, Honourable Evans Gicheru with regard to prosecution of **JUDICIAL REVIEW CASES** in Nairobi only. This resulted in the matter not being heard until sometime in early 2009 when the stalemate ended and members of the Malindi Bar resumed their briefs in murder cases.

On 25/05/09, **MR MURANJE** informed court as follows:-

“The matter is parheard, I have consulted with my client and I propose the matter proceeds from where it had reached after proceedings are typed. We will not be seeking to recall any witnesses”

The Court therefore took over the matter as requested and proceeded to hear the remaining witnesses, but without the assessors who were inadvertently left out in the matter, whereupon, two prosecution witnesses testified. I will address his omission at a later stage in the judgement.

The Prosecution`s case is that the accused and the deceased were a married couple. Accused was the last person seen with the deceased before she met her death. Pw 1 (**SAUMU SHAFI**) recalls that on 29/11/06 at about 6.00Pm, he was at home in the company of the deceased`s mother – both of them were outside. Deceased was inside the house. They were later joined by the accused who requested Pw 1 to call the deceased. Accused asked the deceased to give him some water. When the deceased brought the water, accused got hold of her hand and killed her. It was Pw 1`s testimony that the deceased had arrived in the morning complaining that she had quarreled with the accused – this was the reason why accused followed her. Accused had a knife which he used to attack the deceased. Pw 1 heard the deceased say “Mama, I am being killed” and accused then fled. Pw 1 was certain he has seen accused with the knife. He then said it was at 9.00am. On cross-examination Pw 1 stated that when the accused arrived, he (Pw 1) was inside the house, and while there, he heard the deceased say she was being killed and upon rushing out he found that accused had left the scene. He then stated.

“I did not see the person who killed the deceased”

He explained that there are were houses within the homestead that is his house, a house belonging to the mother of the deceased(**NYEVU**) and a house belonging to the deceased`s brother. The deceased`s body was found outside her mother`s house. Pw 1 admitted that in his statement to police he gave the name of the assailant as **KAHINDI KALUGO**(there seems to be an error in the typed record which read **KALINGEO** but the handwritten copy read **KALUGO**).

NYEVU SHAHA (Pw 2) the mother of the deceased told the court that on 29/12/08, the deceased arrived at her home at about 9.00am. Deceased told her they had a fight with her husband **KAHINDI CHARO KALUGO** (whom she pointed out in court as the accused). The deceased said she would stay at her parents home until the accused goes to fetch her. Shortly the accused arrived at about 9.00am and she too says that after the deceased brought him water, accused held her by the hand, took out a knife, and plunged it into her body. The deceased(**SIDI**) screamed that deceased was killing her. At this point Pw 2 was about 100M from the scene. She moved to the scene and found the deceased had fallen down on her face and was bleeding on the neck and shoulder.

SAFARI CHARO MULINDA(Pw 3) an uncle to the accused testified that on 29/11/06 while at home, accused went to see him at about 5.30-6.00Pm, saying his wife had run away in the morning and he wanted to go and fetch her. Pw 3 told accused not go to at that time as it was already night, and advised accused to go the following day. Accused ignored his advise and went. So Pw 3 followed accused to his mother-in-law`s home and found the accused seated, while deceased was standing. He confirms that Pw 2 was also within the homestead. While at a distance of about 100 metres, Pw 3 heard deceased scream **“I**

am being killed". Pw 3 ran towards the scene and saw the accused running away. The deceased fell on her face and died. At the time that the incident took place, Pw 3 estimates that it was 6.00Pm.

ALFRED SAFARI NDERI(the assistant chief of KAEMBENI location) testified as Pw 4. He received the report concerning the incident from Pw 1 who said deceased had been stabbed to death by her husband **KAHINDI CHARO LUGO** who then ran away. This information was eventually relayed to police who came and collected the body as is confirmed by the evidence of **CORPORAL PATRICK SITUMA**(Pw 5). **CORPORAL SITUMA** testified that on arrival, he saw the body of the deceased, lying 4 metres from the door of her mother`s house. The body had a stab wound in the armpit, on the belly and on the neck. **DOCTOR SAMUEL GANDU** (pw 6) produced the Postmortem form which had been filled by **DOCTOR NASSIR FAIZA**, as the latter had left Kilifi District Hospital, for further studies at the University of Nairobi. The Postmortem performed on 30th November 2006 made the following findings.

Externally, the body had multiple penetrating cut wounds – one in the right axilla, measuring 9x6cm, one in the left clavicular region measuring 13cm deep and under the elbow region measuring 13x9cm. Internally, the respiratory system had blood in the diaphragm and a severed aorta. All the other systems were normal. The cause of death was multiple cuts with severing of the AORTA (which is a main artery from the heart and from which all the other arteries flow).

In his unsworn testimony, accused told this court that on 29/11/06 at about 7.00am, his late wife left his home to go to her parents home for a social visit. On 4th December 2006, he received a letter indicating that he was required at her parents home. He met APS who told him that his wife had been killed and they wanted to find out from him what he knew about it. He told them he had no idea as she left home to visit her mother. They wondered why he had not gone to check on her for the period she was away and on that account he was arrested and charged with her murder. He denies the charge saying he never killed his wife.

There is no dispute that deceased had left her matrimonial home and gone back to his parents home on 29/11/06, in the morning, and that by evening, she lay dead at her parents home, with multiple stab wounds. Had deceased gone there because she had disagreed and fought with the accused, or was it a simple social visit. Pw 1 and Pw 2 say the deceased told them they had quarreled and fought, and deceased had vowed not to go back until accused comes to fetch her. It is not only the deceased`s parents who state this position – accused`s own uncle (Pw 3)says accused went to see him and told him he had quarreled with his wife who had then left for her parents home, Accused said he would go to fetch her, and his presence in the home of Pw 1 that very evening is confirmed by Pw 1, Pw 2 and Pw 3(who followed him). This evidence therefore places the accused at the scene.

Accused`s next move was to lure the deceased to get close to him – this he achieved by making a request for water, hence ensuring close proximity. Pw 1 whose house was 150m from where the couple were, says he saw accused holding a knife. He did not witness the actual stabbing, but what followed in quick succession leaves no doubt that no one else inflicted those wounds other than the accused. This is because all the other witnesses that is Pw 1 -3 knew the accused very well, it was not yet dark when he arrived, it being 6.00Pm. All saw him stand close to deceased as she stretched out her hand to give him the cup of water, Pw 2 saw him hold the deceased`s arm, followed by screams from deceased that she was being killed. There is no evidence to suggest:-

(a) That there was another person standing close to the deceased other than the accused

(b) There is no evidence to suggest that deceased had disagreed with anyone else, other than the accused. Deceased had vowed not to go back unless accused went for her, and his appearance at the scene, coupled with his request to her to give him water, won her trust on accused – she actually believed he would appear to her parents home with friendly and honourable intentions.

The minute deceased got close to him, all persons who were present within the homestead heard deceased say she was being killed – the witnesses are very concise and clear on the words she spoke, and as she uttered these words, accused fled. But that is not all, as he fled, deceased keeled over and fell with multiple stab wounds, and she died on the spot. Accused`s action of fleeing demonstrates the conduct of one with a guilty mind. There is nothing to suggest that deceased had provoked the accused when she passed the cup of water to him. Opportunity had presented itself to accused to conclude their earlier quarrel or to teach the accused a lesson about fleeing to her parents home after a domestic disagreement. The motive behind the whole incident arose from their quarrel in the morning which had resulted in deceased`s flight. The action of stabbing deceased repeatedly and so deep (some wounds measured 13cm) using a knife leaves no doubt in my mind that the accused`s intention was to cause such grievous harm to the deceased, so as to either harm her or end her life.

His claims that he was not at the scene at the time of the incident find no foot, as he was clearly seen by Pw 1-3, and he had even announced to Pw 3 that he was going to the very scene. I am convinced beyond reasonable doubt that deceased`s death was authored by the accused and no one else. I therefore make a finding that accused is guilty as charged.

There is then, the procedural matter I had alluded to regarding the assessors who were not summoned to complete their participation in the trial. This was an oversight on my part, and I think neither the State Counsel nor the defence counsel realized that the assessors had been left out, otherwise I am sure one of them would have drawn this court`s attention to that omission. I am keenly aware of the Court of Appeal`s position regarding participation of assessors in murder trials under the now repealed provision of section 263-273 of the Criminal Procedure Code – where the superior court has held that where a matter begun with the assessors, then they must participate in the trial until conclusion of the same – even if the trial continues after the date of repeal. The significance of the participation of assessors was demonstrated by the Court of Appeal comprising Hon. JJA Okubasu, Waki and Aganyanya in the case of **ALEX KIOKO KINYUNGI V R CR APP. NO. 52 OF 1998** (reported in KLR monthly May 2010 edition page 6, and the case of **ABEL ABUNGA MWAMBI V R Cr Appeal No. 350 of 2010** (bench comprising Omolo, Waki and Onyango Otieno JJA).

So should this court *suo moto* declare the proceedings here a mistrial and have the matter heard afresh? I wonder whether this would be in line with the fair and expeditious dispensation of justice. Accused has been in custody since February 2007, the trial suffered several hiccups including transfer of the Judge who was dealing with the matter, to the extent that when he returned to the station to complete the trial, the prosecution witnesses (were unavailable – (the Hon. Judge having travelled from Kitale to Malindi). Worse still for the accused, he had to endure a period of uncertainty when the Malindi Bar had an indefinite period of boycotting pauper briefs. Surely would justice be done by declaring these proceedings a mistrial and ordering that the matter begin from the evidence of Pw 5 so as to accommodate the assessors, so as to include them in the process of summing up?

My view is that the then existing provision for assessors was a procedural technical requirement which would not affect the court`s findings, because the assessors opinions were never binding on the court and I am persuaded that it was due to this “*ceremonial*” role, that the criminal justice process eventually did away with them. If this court were to order that the trial begins afresh from the evidence of Pw 5, then I think the case may well celebrate five years within the court system, and I think this would go against the spirit and letter of the Constitution of Kenya 2010 section 159 (d) which specifically provides that Justice shall not be hampered by undue procedural technicalities – I think this is one such situation, so I will not declare the proceedings a mistrial and set aside the “un-assessed” portion, nor do I find it just enough to direct for accused being set at liberty.

Accused claimed to have been held in custody for 99 days but he did not specify which dates constituted the alleged number of days, and the information sheet did not have details regarding his date of arrest so as to enable me address the issue adequately. Having earlier made a finding that accused is guilty then he is convicted of the offence charged.

Delivered and dated this 8th day of **June 2011** at Malindi.

H A OMONDI
JUDGE

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