



-Circumstantial evidence
-Proof of murder weapon

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL CASE NO.6 OF 2010

REPUBLIC.....PROSECUTOR

-VRS-

KARABU JAJI.....ACCUSED

JUDGEMENT

KARABU JAJI(the accused) faces a charge a murder contrary to section 203 of the Penal Code as read with section 204 of the same code, that on 23rd day of February 2010, at Konjora area, within Kilifi District of the Coast Province, murdered **LUKUNI HANGA MWANZANI**. (Pw 1) a younger brother of deceased testified **JAMES HANGA MWANZANI** had died after falling sick with an infection of the spine, which diagnosis had been made at Kilifi District Hospital upon an X-ray being carried out. James died just as they arrived at the doorstep of the hospital.

On 23rd February 2010, they buried him, so Pw 1, his brothers and elders were just sitting, condoling after the burial. Pw 1 had asked everyone to disperse and return on 25th February – all left, except those who were drinking alcohol within his homestead. They begun drinking at 5.00Pm into the night – among them was the deceased. However Pw 1 was not drinking and after eating his supper, he went to sleep, leaving the deceased seated, drinking, all alone. Deceased was drinking about ten (10) feet away from where Pw 1 slept, when at about 11.00Pm, Pw 1 woke up to hear the deceased snorting. He came out to find him all alone as everyone else had left. Deceased was still seated on his chair, but his face stared upwards and he was bleeding from the back of his head. Pw 1 called him but he did not respond. Pw 1 then rushed to call his other brother **FAINI JAJI** who lived 20 metres away and informed him what he had seen. They returned to the scene and got a motor vehicle to take **LUKANI HANGA MWANZANI** to hospital however before they could even put him into the car, he died. A report was made to the area chief who then called poice and deceased's body was taken to the mortuary.

On cross-examination he stated that on the night in question, he saw the accused (who is his son) briefly, dancing at the disco which was hosted within the home. He also did not hear any claims that the deceased was responsible for his late son's death through witchcraft. He also explained that during the burial, there was no incident of violence nor did he get to hear that accused had armed himself with a knife and attempted to attack the deceased.

Pw 2 **FAINI (HANGA MWAZANI)** confirmed being woken up by Pw 1 on account of deceased who was bleeding from an injury on the head. He was still breathing but died as arrangements were being made to take him to hospital. He too had never heard claims that deceased was practicing witchcraft or was a witch, nor did he hear of such claims during or after the burial of Pw 1's son, whom he confirms had died as a result of a spinal ailment. He too never saw accused armed with a knife, threatening to kill the deceased nor did he witness a crowd restraining accused from carrying out such action. He confirmed on cross-examination that his brother (Pw 1) had said there would be no funeral vigil, so, many people had dispersed but a few were left lingering within the homestead. He did not know who attacked and injured deceased.

PC **CHRISTOPHER MOSOP** (Pw 5) of Kilifi Police Station was on crime standby when he received a report about the murder, he proceeded to the scene accompanied by Pc **PATRICK MATTAZA** (Pw 6). The Police officers observed that the deceased had severe head injuries and the body was covered with a lot of blood all over. They appeared to be blunt injuries. On inquiries from the crowd of people he had found at the scene, Pw 5 learnt that the deceased was leaving the compound when he was attacked by unknown people. He was rushed to hospital, but died on the way. Pw 5 could not immediately establish the cause of the murder but speculated that the murder had to do with the death of **JAMES JAJI** where deceased could have been accused of bewitching him. PC **MATTAZZA** eventually traced the accused to his grandmother's home which was about six (6) kilometres from his home. After being questioned, accused led the officers to an area near the sea, where there was a bush and he pointed to a spot, from where Pw 6 recovered a hammer – that was the murder weapon and was produced as exhibit 2.

Pw 3 **IP MJOMBA** who was in the arresting team told this court that he learnt accused was a single young man with a small makeshift hut at his father's homestead where he used to sleep. Accused had been at his grandmother's home for 2 days that is 24-26th February and it was this behavior that gave the police offices a lead to the arrest.

On cross-examination **IP MJOMBA** states that his informer said some of the accused's relatives had taken food to him and his accomplice (who was arrested) **SAIDI BANDA**. **IP MJOMBA** also got information that accused had earlier threatened to stab the deceased with a knife during the burial of his brother, but mourners restrained him.

In his unsworn defence, accused told this court that he is a 17 year old student and recalls that on 22/02/10, while at Fumbuni in Kwanjora, he woke up to the news that his brother **JAMES** had died the previous night. They buried him on 24/02/10 and in the evening after the burial, he went to sleep. At 11.00Pm, his brother **FIKIRI** woke him up saying their senior father had been assaulted and injured. He accompanied **FIKIRI** to see their injured senior father so as to make arrangements to take him to hospital and they even accompanied the deceased to hospital. The next day he went to school because they had exams and returned at 4.00Pm to his grandmother's home because it was near the school. After a short while, he got a message that his senior father had died. Accused told his grandmother, he would remain at her home as he needed to read for exams. After some days, police woke him up at 3.00am and took him to the police station.

MR LUGHANJE submitted on behalf of the accused, that the defence has no problem as regards the fact that deceased died, due to injuries inflicted on him, but he maintains that accused is not the person who caused the deceased's death. He pokes holes especially at the evidence offered by **IP NEWTON MJOMBA** (pw 3) who tried to introduce evidence suggesting that accused confessed to the crime, but abandoned it upon realizing that the same did not measure up to the required standard and regulations governing confessions, and his evidence should remain as ordinary evidence of prosecution witness which ought to be disregarded by the court. He pointed out that the witness had introduced a hammer in

the matter, without bothering to expand on the circumstances leading to its recovery nor was a sketch map of the area where it was recovered, produced in court, further that it was only the informer and police officer who were present when the recovery was made. It is also his contention, that the hammer, although alleged to have had blood stains, was never sent for analysis to determine whether the blood on it belonged to the deceased.

MR LUGHANJE urged this court to treat the accused as a truthful witness and that there is no reason why the police should consider the accused's relocation to his grandmother's home as an act of hiding from police. **MR LUGHANJE** submits that prosecution have not proved that accused had a hand in the deceased's death, and no matter how strong the suspicion is, it cannot be a basis for conviction and if the prosecution sought to convert such suspicion into circumstantial evidence, then it would have to be strong.

The State Counsel **MR NAULIKHA** submitted that, the State had proved its case and that upon arrest, accused freely led the police (Pw 3 & Pw 4) accompanied with six others, to the recovery of the mason hammer hidden in a bush. He urged this Court to consider that the hammer was hidden approximately one kilometre from the homestead where accused was apprehended.

MR NAULIKHA also urged this court to consider the evidence of Pw 4 who told this court that after the death of accused's younger brother **JAMES MVERA**, he and accused, visited a witchdoctor who told them that it was the deceased who was responsible for the death of his brother – so the reason for accused killing deceased was that Deceased was suspected to be a witch and was seen as being responsible for the death of accused's brother.

MR NAULIKHA also pointed out that the postmortem report indicating that the injury was caused by a blunt object was infact consistent with the position taken by prosecution that the object used to inflict the injury was a hammer. He sees no rational explanation regarding accused's sudden disappearance in his grandmother's home (6km away) immediately after the deceased's death and contends that the circumstances are such as to lead to the irresistible conclusion that having committed the offence, he sought to hide at his grandmother's home and also hid the murder weapon. He draws from the decision in **KIHUNGU v R CR APPEAL NO. 1697 OF 1983 KLR** where the court held that;-

1. Circumstantial evidence is very often the best evidence and cannot be impugned merely on the ground that it is circumstantial.
2. The exculpatory facts were incompatible with the innocence of the appellant and inculpable of implication upon any other reasonable hypothesis other than the appellant's guilt.

There is no dispute that the deceased died as a result of fatal injury inflicted on the head using a blunt object. No one witnessed the attack since the deceased was left alone outside, imbibing some inebriating liquids. What drew attention to his plight was the snorting and groaning sounds he was making and which alerted Pw 1. There is also no dispute that he was killed immediately after the burial of accused's brother **JAMES JAJI HANGA**.

The information gathered and used to have accused face trial, was pieced up from bits of information and incidences which must be tested to confirm whether they qualify to be considered as circumstantial evidence or strong suspicion. Circumstantial evidence is that set of events prevailing which when taken in totally leads to the irresistible conclusion that the person accused, alone, is the author of the offence, to the exclusion of any other reasonable explanation as to the involvement of anyone else. Suspicion is having a set of facts which suggest that the person might have been involved in the offence but leaves room for other possibilities. From the evidence of Pw 1 (who is a father to the accused, and a brother to the deceased), accused had been within the homestead during the day but;-

“at night I did not see him as he was dancing at the disco with his friend. I saw him briefly that night dancing to disco music before I went to sleep”

Pw 1 denied hearing any allegations linking the death of his son **JAMES** to the deceased through powers of witchcraft. He also insisted that during the burial ceremony there was no incident of violence where accused threatened the deceased with a knife and had to be restrained by other mourners. Pw 2 **FAINI HANGA MWANZANI** (another brother to the deceased) also stated on cross-examination that he never heard claims that deceased was a witch or was practicing witchcraft – there were no such claims before, during or after the burial. He too denied that accused threatened to kill the deceased during the funeral ceremony and never had accused say that deceased was responsible for **JAME`S** death through witchcraft. He did not know who attacked the deceased. No other mourner who perhaps may have seen accused threaten deceased with a knife or even witness accused being restrained from such attack testified as a witness for prosecution.

The evidence linking accused to the offence comes from the two police officers who suggest that accused confessed to the offence and led them to recovering of a blood stained hammer. Three issues stand out from the evidence of these police officers;-

(a) Did what accused is alleged to have told **IP MJOMBA** amount to a confession or was it just ordinary information obtained in the course of investigation.

(b) Was there any proof that the hammer recovered had

(i) blood stains (ii) Human blood stains (iii) Blood stains from the deceased

(c) Did accused go into hiding? With regard to what he is alleged to have told **IP MJOMBA** –can this be regarded as a confession under section 25 of the Evidence Act, which states;- “a confession comprises words, or conduct, or a combination of words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence.

Section 25 A (1) recognizes that a confession or admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person, **unless** it is made before a judge, a magistrate or before a police officer (other than the investigating officer) being an officer not below the rank of Chief Inspector and a Third Party of the accused person`s choice. The scenario obtaining here certainly does not fall within what is contemplated by section 25A as (a) **IP MJOMBA** is the investigating officer in this matter (b) His rank is below that of Chief Inspector (c) If indeed it was a confession, then it has not been demonstrated that a Third Party of accused`s choice was present and of course it was not made in court. But there are situations when a confession may be made outside court – in which case section 29 of the Evidence Act provides that it would be taken by an officer above the rank or equivalent to inspector – which would then accommodate **IP MJOMBA** – However in the present instance this information fails the test because **IP MJOMBA** was the Investigating Officer thus the same did not meet the recognized stands for an admissible confession.

As regards the recovered weapon – it was said to have had blood stains and most likely was the one used to inflict injury. It certainly fits within the description of a blunt object. However this hammer was never taken to the Government Analyst for examination, analysis and cross-matching to confirming ;-(a) that the stains on it were actually blood stains (b) That if they were blood stains then they were HUMAN BLOOD (c) that the blood was of the same group as that of the deceased.

Without answers to these three elements then the proposition put forward that the recovered hammer was the murder weapon remains pure theory with a lot of possibilities. Of course accused was found at his

grandmother`s home, he had gone there after the burial of his brother – was he fleeing? Had he gone to hide or to visit? Or as he says it was more convenient for him to attend school from there because he was writing exams? May be or may be not – there are several possible explanations as to take away the circumstances from pointing inculpation to the accused`s guilt to the exclusion to any other possible explanation. Then there is the claim that accused had consulted a medium who disclosed to him that deceased had a hand in the death of his brother JAMES – his father and uncle (or junior father as is the popular phrase in this region, when referring to a brother to one`s father) deny hearing such claims or that accused had earlier during the day armed himself with a knife and threatened to kill the deceased and had to be restrained by other mourners – none of whom have testified.

From the evidence then;-

- (1) Malice aforethought or motive on the accused part remains a probability which has not been established by an iota of evidence
- (2) There is no proof that he was responsible for the act which caused deceased death, to the exclusion of another person.

His act of relocating almost immediately after accused`s demise raises strong suspicion – but the Court of Appeal has held time and again that suspicion, no matter how strong is not sufficient to sustain a conviction see **ELIZABETH GITIRI GACHANJA and 8 OTHERS V R CA** decision 20th May 2011 reported in KLR. The test to be applied when relying on uncircumstantial evidence is that the facts of the case must be incompatible with the innocence of the accused incapable of explanation upon any other reasonable hypothesis than that of his guilt, and the burden of proving facts which justify the drawing of an inference of guilt is always on the prosecution and never on the accused. Further, it is necessary for the court to be sure that there are no other co-existing circumstances which could weaken or destroy the inference of guilt. The present scenario does not meet this threshold.

The upshot is that the prosecution has not proved its case beyond reasonable doubt and this court makes a finding of **NOT GUILTY**. Consequently he is acquitted of the charge and shall be set at liberty forthwith unless otherwise lawfully held.

Delivered and dated this 10th day of June 2011 at Malindi

H A OMONDI

JUDGE