



- Circumstantial evidence
- Strong suspicion

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL CASE NO. 4 OF 2008

REPUBLIC.....PROSECUTOR

VERSUS

RAPHAEL KADENGE CHEREFU.....ACCUSED

JUDGEMENT

RAPHAEL KADENGE CHEREFU(the accused) is charged with murder contrary to section 203 Penal Code as read with section 204, the particulars being that on 23rd May 2006, within Marereni Village in Malindi District, he murdered **KATUMU KANADZO**.

Accused (who is represented by Mr Mushelle) denied the charge, and prosecution called a total of eight witnesses in support of its case. The deceased was the accused`s mother –in-law, as he had married her daughter on **DAMA KAZUNGU**, and a wife to **KAZUNGU KADENGE**(Pw 2). Apparently **DAMA** and the accused had some domestic problems and she had gone back to her parents home. On 23rd May 2006 while Pw 2 and his wife (now deceased) were at home at about 8.00Pm, the accused suddenly appeared in the homestead. Pw 2 was having supper outside, and when accused called out to him, he responded. He told PW 2 was having supper outside, and when accused called to him, he responded. He told Pw 2 he had come to either get back the dowry he had paid or get back his wife. Pw 2 told him.

“You will take your wife” which accused responded;- “where is she”

PW 2 told him she was inside the house, and since they were not talking in low tones, deceased who was inside the house could hear the loud exchange, so she came out and asked;-

“what is it”

Accused suddenly aimed an arrow at the deceased and shot her – she fell down. It was Pw 2`s evidence that accused had come armed with a bow and an arrow. Pw 2 decided to run away as he was in shock. Accused shot an arrow at Pw 2 twice, but missed the target. By now the deceased and her grandchildren were screaming and accused shot an arrow at them, but it did not hit anyone. Pw 2 returned where his wife lay, and found her taking her last breath – Pw 1 noticed that the arrow had struck her on the chest. Neighbours gathered and a call was made to the police – deceased died at the very spot she had fallen. In the melee, **ANWAR MWALILI**(a nephew to Pw 2) was shot on the left hand with an arrow said to have been released by the accused.

On cross-examination Pw 2 stated he had regarded the accused like his own child. He explained that accused, and his daughter had disagreed several times, and the deceased would try to reconcile them. It was also his evidence that whenever accused and **DAMA** disagreed, the latter would always go back to her parents home. After the last disagreement, **DAMA** had spent one whole month at her parents home, so Pw 2 had decided to look for money to refund the dowry accused had paid, because **DAMA** had sworn never to go back to live with accused. To that extent Pw 2 says he had even written an agreement in the presence of the area chief, but the date for making the dowry had not yet crystallized. He confirmed that the incident took place at 8.00Pm, when it was dark and there was no light outside but he recognized the accused by his voice, saying;-

“I know him so well, so even from his proximity to me, I could tell it was him. He was 10 metres away from me, like from the witness box to the court room entrance”

On further cross-examination, Pw 2 told this court that when his wife came out, she spoke as follows;-

“You have come to claim your dowry payment yet the period given has not expired”

When Pw 2 looked up, accused appeared angry although he could not tell whether accused was drunk. In all this, **DAMA** did not utter a word about the accused and it was Pw 2 perception that accused and **DAMA** did not want to separate and were merely playing mind games – his wife misread the signs and seemed to push for the couple`s separation (or at least that was the impression she created) – and Pw 2 quipped;-

“I think that is why accused killed my wife. To fortify this, my daughter went back to live with the accused, even AFTER he had killed her mother. I would say my daughter and accused love each other”

AMANI MWALIMU BADI(Pw 3) is a nephew to the deceased(in the sense that her husband was Pw 2`s younger brother so in the traditional Giriama set up he would refer to her as his junior mother in the same vein refer to Pw 2 as his junior father). On 23/5/06, at about 8.00Pm, Pw 3 was at his parents homestead, when he heard noises coming from Pw 2`s homestead. Pw 3 and others rushed there, and saw his other grandmother named **DAMA**(who is not the one prosecution had called in this matter as Pw 1 but was stepped down when prosecution realized that she was not a compellable witness) screaming and saying that the deceased had been killed by Pw 2. Pw 3 checked and saw deceased lying on the ground with an arrow sticking on the left side of the breast. This particular **DAMA** was a grandmother to Pw 3, and she announced that cousin **DAMA**(Pw 1) was going to be killed in another room by the accused. Pw 3 went to check for her, and found someone standing next to the door of the kitchen. He did not know who it was, but the person shot an arrow at him. Pw 3 pushed the door, and moved into the kitchen, then he removed his jacket and pushed the door so as to prevent the person from accessing him. That is when

he noticed some blood trickling down the garment he was wearing and realized he was bleeding from the wrist. It was his evidence that the culprit was the accused because he had been seen shooting arrows.

On cross-examination Pw 3 confirmed that he did not know who shot the deceased as he found her lying down, already dead. He also did not see the person who shot his hand but believed accused was the culprit because Pw 2 said he had seen him.

JULIUS KAINGU YERI(Pw 3) an in-law to the deceased, was among those who rushed to the scene upon hearing screams coming from Pw`s homestead. On arrival, he asked Pw 2 what the noise was all about and was informed that accused had shot the deceased she had died on the spot. He saw deceased lying on the ground dead – she was bleeding, but as it was at night, he could not see the injury and furthermore she was fully dressed. He too did not see the person who killed the deceased.

SIMON MWALIMU BADI(Pw 7), a relative to the deceased was among the persons who responded to the screams coming from the homestead and on arrival found that deceased had been shot with an arrow – accused was mentioned as the culprit. He saw the deceased staggering at the door, unable to come out, and there was an arrow stuck to her chest. Before Pw 7 could assist her, he heard that his niece (that is accused`s wife) was in another room, with an arrow wound inflicted by the accused. A tin lamp was lit, but each time Pw 7 tried to take it outside (because it was dark), the wind would sniff it off neighbours also came to the scene and helped Pw 7 to carry the deceased to the roadside, so that she could be rushed to hospital while at the roadside, trying to get transport, the deceased breathed her last. Shortly, Pw 3 appeared running, with an injury on his wrist – he was bleeding profusely and saying he had been shot with an arrow by **RAPHAEL KADENGE**. Pw 7 rushed Pw 3 to his elder brother who has skills of detecting poison using traditional herbs, and the bleeding was controlled. Eventually Pw 3 was taken to hospital, and deceased`s body was taken back to her home.

Meanwhile **RAPHAEL** had disappeared from the year 2006 upto 2008 when he was arrested. When the deceased`s family members went to see him in cells, accused said to them;-

“For now, celebrate my arrest, but when I come back, you will know me”

According to Pw 7, when he got to the scene all he heard the deceased say was;-

“these are my children, these are my children”

On Cross-examination Pw 7 confirmed that he did not witness the shooting but he heard accused being mentioned as the culprit. It was his evidence that accused and his wife **DAMA**, had frequent domestic squabbles leading to **DAMA** frequently returning to her parent`s home, and it had reached a point where dowry was to be returned in July 2006. He denied the suggestion by defence counsel that some of deceased`s family members beat up the accused, saying it was the accused who went to the homestead and caused mayhem.

After accused disappeared, the community police comprising **JAMES KATANA NYALE**(Pw 6) and **KAHINDI CHARO**(Pw 8) amongst others, set out to search for the accused after receiving information that he had been sighted in **POVUNI** village in **FUNZA** sublocation. Pw 6 was able to locate the accused at the home of one **MZEE KATANA SHOMELLA**, and he was apprehended.

In his unsworn testimony, accused confirmed that on 23/05/06, he visited his in-laws so as to discuss over issues regarding him and his wife who had been taken away from his home a month earlier. When he had sought to know why, his in-laws set a date for a meeting where it was said they would disclose the reason for their action. On arrival at the homestead, he met his parents in-law- and his wife, this was at about 7.30pm. They told him his sisters-in-law had left and they would have to wait. After ½ hour they had not come and those present agreed to proceed with the meeting. His wife was summoned and Pw 2 spoke to her. She also did not seem to know why they had taken her away. Just then, his sisters in-law arrived and

begun asking their father;-

“What has he come to follow up here?”

Pw 2 said he was the one who had summoned accused, so as to address issues between him and his wife. His sisters-in-law begun protesting, saying they did not want to see him in the home. Accused`s wife spoke, saying she had not come on her own violation but upon being summoned by her father. The other sisters demanded that she declares her stand on whether she would leave the accused. At this point, accused`s says, his sisters in-law all begun beating him, even as he pleaded with them to leave him alone, vowing that he would never return. However more relatives joined, some in beating the accused while others pleaded that he be spared. This resulted in two camps – one supporting him and another vilifying him, and a fight broke between the two groups. Since it was dark, accused got an opportunity and fled to his home, having sustained injuries. He slept and in the morning he learnt that in the melee that ensued at his in-law`s home, his mother-in-law got shot with an arrow. Accused was saddened as he realized there had been an intention to kill him, so he got too scared to even go and condole with the family. Instead he remained home for one month, and after the funeral, his wife returned and they continued living together for 1½ years. On 12th January 2008, he was arrested and charged with killing his mother-in-law. It is his contention that his father-in-law (Pw 2) claimed that he was the culprit because all the other people who were involved in the fight were his own children and children of his brothers.

There is no dispute that accused went to the home of Pw 2 on the night of 23/05/06 at about 7.30Pm. It is also a common ground that his presence there concerned issues to do with his wife. The point of departure is that whereas prosecution`s case is that he went there on his own accord, giving an ultimatum to either get his wife back or be given an immediate refund of the dowry he had paid, accused insists it is Pw 2 who had summoned him to the home so as to disclose to him why they had taken away his wife.

It is also not in dispute that deceased was shot in the chest with an arrow and died from that injury as per the findings of **DOCTOR ALI** who performed the post mortem and filled the Postmortem form produced as exhibit 1. The doctor`s observation on that body was that there was an arrow in the anterior chest wall – left side on the upper zone with bleeding. The arrow had penetrated the chest through the trachea into the left lung and penetrated the upper lobe. This is consistent with the evidence of other prosecution witnesses regarding the nature of injury and the weapon causing it. The doctor formed the opinion that the cause of death was a collapsed lung due to transection of the trachea.

The issue for determination is who shot the deceased with the arrow, and why? Accused`s counsel, **MR MUSHELLE** submitted that accused was not residing in the area, and was therefore a stranger. It was his contention that it was Pw 2`s fellow villagers who armed themselves with arrows and shot the accused, while some beat him up and it is most likely that the arrows shot by some of the villagers who had responded to the screams from the homestead, stuck the deceased. **MR MUSHELLE** points out that it was dark night and no one saw the accused release an arrow aiming at the deceased and the accused is merely being framed up by the villagers. Counsel further states that nearly all the witnesses who testified did not see the accused shoot the deceased and the court should find that prosecution has not proved its case, and acquit the accused.

This matter is based purely on circumstantial evidence which the court has to consider critically. Is there any other likely explanation as to who could have shot the deceased other than the accused? The Prosecution`s position that accused is the culprit is pegged to the following circumstances;-

(a) Accused had gone to the home making demands which he insisted had to be met immediately. He appeared angry.

- (b) He targeted the deceased who seemed to be the one set to ensure that his wife left him – which is why the minute she spoke, asking accused why he had come for the dowry before the set date, he immediately shot her
- (c) He then followed his wife into one of the rooms, and when pw 3 attempted to rescue her, he shot Pw 3 as well
- (d) After the incident, accused disappeared for close to two years before he was finally traced

What militates against these set circumstances are;-

- (a) No one saw the accused carrying anything in his hands, nor did anyone see him actually release the arrow –(although the shooting coincided with the deceased`s utterances as she was stepping out of the house)
- (b) He was alone, in an environment where he could easily be overpowered by Pw 2`s relatives.
- (c) It is his in-laws who seemed opposed to his living with **DAMA**, and this is confirmed by the fact that even **AFTER** the death of the deceased who is **DAMA`S** mother, she returned to live with the accused until his arrest, and in any event, even when called to testify, she was categorical to the State Counsel, that she would not testify against the accused whom she still regards as her husband and whom she still lives with (ii) Pw2`s own evidence is that accused and **DAMA** did not really want to separate, and that it is the deceased who created an impression conveying eagerness to facilitate the separation.
- (d) Accused`s disappearance from the area had nothing to do with a guilty mind, but was driven by self preservation, because having been attacked by most of his wife`s in-laws, he preferred to keep away.

Against these two possible sets of circumstances, several issues arise that must be reasoned out.

- (1) Did Pw 2 call a meeting restricted to just himself, his wife, his daughter, accused, and his daughters – in-law? Would not one reasonably expect accused to attend such summons at least accompanied by a relative or friend, especially as he was already aware of the hostility from his in laws
- (2) Did accused elect to go to Pw 2`s home at night, uninvited, so as to catch everyone by surprise, and take advantage of that to shoot the deceased who seemed to be his nemesis.
- (3) Pw 2 made reference to some of his other children being present, yet none of them were called to testify. What about **DAMA** senior who was mentioned by Pw 3 and Pw 7 to the effect that upon their arrival at the scene, they found her there, and according to Pw 3, she said it was Pw 2 who had shot the deceased, whereas Pw 7 claims she said it was accused who had shot the deceased. Unfortunately she was not called as a witness to clarify which of the two claims was her correct version and whether such version was borne from having witnessed the incident or through hearsay. Could she have given evidence adverse to prosecution hence her being left out?
- (4) Pw 2 says he had got so fed up of the perpetual disagreements between his daughter **DAMA**, and the accused, that he had finally set down a date to refund the dowry and he had even reduced that decision into writing and made the area chief aware. The area chief too was not called to testify and confirm this –

which leaves room for a possible explanation, that the much hyped domestic wrangles between accused and **DAMA** were a creation of his parents in law. Perhaps the chief, if called as a witness, would have given evidence adverse to prosecution. This position finds support in the case of **BUKENYA & OTHERS V UGANDA Cr App 68 of 1972 . EACA 549** which stated as follows;-

- (a) *The prosecution must make available all witnesses to establish truth, even if their evidence may*

be inconsistent.

(b) When the evidence called is inadequate, the court may infer that the evidence of uncalled witnesses would tend to be adverse to prosecution

(5) Then there is the matter regarding **DAMA** trotting back to go and live with the man who had purportedly killed her mother in her presence, after she had allegedly fled away from him for a whole month and vowed to her father that she would never go back to live with him – so much so that dowry was to be refunded. Yet almost immediately after the slaying, without any prompting, she slinkered back into accused's arm! That conduct is completely inconsistent what prosecution attempts to tout as being the motive for accused killing the deceased.

(6) Did accused go to into hiding and become a fugitive, or did he just feel insecure because of the open hostility shown by a large number of his in-laws, that he decided to keep away? As a matter of fact, the evidence is not that he felt safe to return to the area where the incident had occurred – it is that information was relayed regarding his whereabouts.

On may wonder, if his in-laws assaulted him so badly, why did not he report to the police? There are several possibilities, chief among them being that having got back the object of his heart (that is **DAMA**) there was no need to create further animosity. Secondly reporting the incident, would be a dead give away as to where he was, and which would compromise his security.

Since it was a dark night, and it is not clear what position accused stood in relation to the deceased, could someone else perhaps have been hiding in the shadows, targeting the accused, missed the aim and accidentally shot the deceased? That is another possibility. Did accused vow the finish everyone else once he came out of prison? Why then did police not take further action and charge him with threat to kill yet he was remanded in custody?

My finding is that there are too many loopholes, too many possibilities that suggest someone else other than the accused could have aimed the fatal shot – or may be it was the accused. The mens rea is not water tight, the circumstances do not point inculpably to the guilt of the accused. And to the exclusion of any other rational/ or possible explanation. There is great suspicion that he may be the culprit, but suspicion, no matter how strong, is not sufficient to sustain a conviction on the charge of murder. My finding is accused is not guilty. Accused shall be set at liberty forthwith unless otherwise lawfully held.

Delivered and dated this 6th day of June 2011 at Malindi

**H A OMONDI
JUDGE**

Mr Mushelle for accused
Mr Kemo for State