REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL CASE NO. 12 OF 2006

REPUBLIC …….....…..….PROSECUTION

VERSUS

KAZUNGU CHENGO KARISA…….....……. ACCUSED

****

JUDGMENT

The accused person **KAZUNGU CHENGO KARISA** faces a charge of **MURDER CONTRARY TO SECTION 203 AS READ WITH SECTION 204 OF THE PENAL CODE.** The particulars of the charge are as follows:-

" on the 20th day of April 2006 at about 10.00 a.m. at Gotani village milimani Sub location in Kayafungo location in Kilifi district within the Coast Province, murdered KAEMBE KENGA KARISA"

The accused was first arraigned in court on 23/10/06 and entered a plea of 'not guilty' to the charge.

The prosecution led by the learned state counsel called a total of nine (9) witnesses in support of the charge. **MR. MUTUNGI** advocate appeared for the accused.

The deceased Kaembe Karisa was an aunt to the accused. On the material day **PW2 KASCHANA SAIDI KENGA** told the court that she and the deceased who was her mother-in-law went out to their farm at 7.30 a.m. They worked the farm until 9.00 a.m. when they returned home. As they rested under a tree the accused came up to them and demanded to be paid the money owed to him by the deceased's husband who was his uncle one **KENGA HAMISI SALIM** –**PW1**. The deceased told the accused that her husband who had traveled to visit a friend the previous day was not at home. The accused then snatched the jembe which the deceased had had in her hand and continued to demand for payment of his money. The deceased began to walk towards the chiefs camp (no doubt to report the disturbance). The accused followed her wielding the jembe and **PW2** also followed them both. Accused chased away **PW2** who ran into the bushes shouting for help. Neighbours respondent to her cries for help and when they got to the scene they found the deceased lying dead on the ground with cut wounds to her hands and her head. The accused was also standing next to the body still holding the jembe. Police arrived at the scene and arrested the accused and took the body of the deceased to the mortuary.

Upon completion of the police investigations, the accused was charged with this offence of murder.

At the close of the prosecution case the accused was found to have a case to answer and was placed on his defence. He gave a sworn defence in which he stated that he had no recollection of having killed the deceased.

The offence of murder is defined in S.203 of the Penal Code as follows:-

"***any person who of malice aforethought caused the death of another person by an unlawful act or omission is guilty of murder"***

From this definition the offence of murder has two key ingredients

1. The unlawful killing of a person which forms the *actus reus* of the offence and

2. Malice aforethought which forms the *mensrea* of the offence.

In this case the name of the deceased is given as **KAEMBE KENGA KARISA** and the fact of her death cannot be in any doubt. Several witnesses saw her body. These witnesses included **PW1 KENGA HAMISI,** the deceased husband, **PW2 KASCHANA SAIDI** the deceased's daughter-in-law as well as several other neighbours all of whom knew the deceased very well and were all able to identify the body of the deceased.

The cause of death of the deceased is also not in any doubt. **PW2** told the court that she saw the accused chasing the deceased wielding a jembe. All the prosecution witnesses who saw the body of the deceased spoke of seeing cut wounds on her hands and her head. **DR K. N. MANDALYA** is the pathologist who carried out the post-mortem examination on the body of the deceased. He too noted "a deep cut on the right side of the head, 7cm long, deep cut on the left forearm with fracture of forearm, fracture of right side of head with depressed segment". He opinioned that the cause of death was "intracranial hemorrhage due to skull fractures". The post-mortem form duly filled and signed was produced as an exhibit **Pexh 1**. The findings of the pathologist are consistent with the evidence that the deceased was bludgeoned to death using a sharp heavy object like a jembe. There is no doubt that the unlawful act that led to the death of the deceased was an attack on her a person using a jembe which jembe was produced in court as an exhibit

Pexh 2

Though there was no eye witness who actually saw the accused strike the deceased the circumstantial evidence directly points at the accused as the perpetrator. **PW2** told the court that the accused confronted the deceased demanding to be paid money owed to him by the deceased's husband. She saw the accused chase the deceased wielding a jembe. Her attempts to follow them (and probably intervene) came to naught because the accused threatened her with the same jembe, causing **PW2** to run into the bushes in order to save her life. It is instructive that **PW2** told the court that she saw accused grab the jembe which the deceased had in her hands having just returned from the shamba. All this occurred in broad day light. It was 9.00a.m. The accused was a person well-known to **PW2** as he was a relative. She had ample time and opportunity to see him well. I find no apprehension of a mistaken identity. There is also evidence from several other prosecution witnesses who got to the scene immediately after the incident. They all testify that they found the deceased lying dead on the ground and the accused standing next to her body holding a jembe above his head.

PW3 NGIRA KENGA and **PW6 KAHINDI NZUNGI** both told the court that they spoke to the accused and persuaded him to drop the jembe after which they apprehended him and tied him up. All these witnesses are neighbours and/or fellow villagers of the accused and were able to positively identify him in court.

The rule regarding circumstantial evidence was clearly set out in the case of **JAMES MWANGI – VS- REPUBLIC [1983] KLR 327** in which the Court of Appeal held that;

"***In order to draw the inference of the accused's guilt from circumstantial evidence, there must be no other co-existing circumstances which would weaken or destroy the inference"***

Here is a situation where the last person to be seen with the deceased was the accused. He is last seen chasing the accused with a jembe. Immediately thereafter the deceased is found dead with cut and fracture wounds to her hands and skull. The only logical conclusion that can be drawn from this set of facts is that it was the accused who killed the deceased using the jembe which was still in his hands. I find no evidence of any other co-existing and/or intervening circumstances that would serve to weaken or destroy such a conclusion. Therefore on the basis of the circumstantial evidence available, I do find that there is sufficient proof that it was the accused person who unlawfully caused the death of the deceased.

Proof of the '*actus reus'* or the unlawful act does not prove the offence of murder. The law requires that proof be availed that this unlawful act was committed with malice aforethought i.e. there must be proof of an intention on the part of the accused to cause the death of the deceased. **PW2** told the court that the accused who was a nephew to the deceased had come demanding to repaid his money by the deceased's husband. The deceased's husband was not home at the time. It would appear that the accused turned his ire on the deceased. However, there is no evidence of any pre-existing grudge or quarrel between the accused and the deceased.

In his defence the accused raises the defence of insanity. He tells the court that at the time when this incident occurred, he was not in his right senses. The accused claim to have had a history of mental illness. This defence cannot be light dismissed especially because several of the prosecution witnesses testified that they knew the accused to be a person who was mentally unsound.

PW1 the accused's uncle states as follows:

"I have known him [accused] since his birth. In his youth he was normal but when he grew up to adulthood he began to appear abnormal. He was fidgety and unreasonable. He appeared like he had a mental problem"

PW2 a sister in law of the accused states under cross examination by defence counsel;-

"***I had been married in that homestead for about ten(10) years. I had known the accused all this time. He appeared mentally unbalanced. He had been like this for a long time. I saw as if he was not mentally sound. Since the time I was married into that home I knew the accused as a person who was mentally unsound…."***

This opinion of the accused's mental state was not held by family members alone. **PW3** a neighbour told the court that when he rushed to the scene he found others murmuring that

"muaji ni mwenda wazimu"

i.e. the killer is a madman. Although none of these witnesses is a medical expert their testimony provides ample evidence that the accused was generally known to be mentally unsound by family and neighbours. The behaviour of the accused after the killing of the deceased lends credence to this opinion. Accused made no attempt to run away after the incident. He remained at the scene and was found holding the murder weapon aloft. This is not the normal behaviour expected of one who has committed such an offence.

There is persuasive evidence from **PW9 PC HASSAN CHIMWENGE**, the investigating officer that he too found from a personal assessment that the accused was mentally unstable. He reported that upon interrogation the accused would not answer questions and was incomprehensible.

PW9 took accused to a Psychiatrist for mental assessment. The initial report which was produced by consent and which was made by **DR ONGECHE** of Coast General Hospital and is dated 29/5/2006 i.e. shortly after the accused was arrested. The report notes the following

" **he [the accused] has been treated for mental and last admitted at Port-Reitz Mental Unit in September 2005. On examination, he had flat mood and had delusion of persecution with parnoia. (impaired) cognition with lack of insight.**

CONCLUSION – he is of unsound mind. Needs treatment. NOT FIT TO PLEAD"

This provides clear and incontrovertible evidence that at the time of his arrest the accused was examined and found to be mentally unstable. In the opinion of this medical expert the accused was 'not fit to plead' due to the mental impairment. This evidence provides very strong corroboration of the accused's defence that he was insane at the time when he committed the act which led to the death of the deceased. After this initial examination whilst in custody the accused was placed on treatment and a second examination was conducted by Dr. Mwango'mbe at Coast General Hospital. This report dated 13/9/2006(about 5 months after his initial examination) states

OPINION

FIT TO PLEAD. ***He has fully recovered***".

It is pertinent to note that it is only after receiving the appropriate treatment that the accused mental status improved to a point where he was found fit to plead.

S. 162(1) of the Criminal Procedure Code empowers a trial court to make an enquiry into the mental soundness of an accused person. From the evidence before me I am convinced that prior to his arrest and treatment and more specifically in May 2006 at the time he killed the deceased, the accused was of unsound mind. As such he did not have the mental capacity necessary to from the requisite *mens rea* for the offence of murder. Therefore in line with S. 116(1) of the Criminal Procedure Code I make a special finding that the accused was guilty but insane at the time he committed the unlawful act that led to the death of the deceased. As such I do hereby direct that the accused be detained at the pleasure of the President in line with S. 166(2) of the Criminal Procedure Code. It is so ordered.

DATED and Delivered in Mombasa this..25th day of …August 2011.

M. ODERO
JUDGE

In the presence of
Mr. Mutungi – for accused
Mr. Onserio – for state
25/8/2011