



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CRIMINAL CASE 4 OF 2010**

**REPUBLIC.....PROSECUTOR**  
**-VERSUS-**  
**BAHA KAHINDI KARISA.....ACCUSED**

**JUDGEMENT**

**BAHA KAHINDI KARISA**(the accused) faces a charge of murder contrary to section 203 of the Penal Code as read with section 204 of the Penal Code that on the nights of 16<sup>th</sup> and 17<sup>th</sup> day of November 2006 at CHANGANDE village, Kaloleni location, within KALOLENI DISTRICT of the Coast Province, murdered **SAMUEL KADENGE RUWA**.

The accused denied the charge. **MR LUGHANJE** advocate, appeared for the accused whilst the State was represented by **MR KEMO**. The evidence of Pw 2(**EDWARD KENGA**), a nephew to the deceased(in the sense that the deceased was married to Pw 2`s aunt), is that on 16<sup>th</sup> November 2006, he accompanied **ANDERSON NYANJE**, and **SAMSON CHARO** to **MZEE LEWA**`s home where there was a funeral. He found the deceased, **KAZUNGU KARISA**, and **KITSAO**, at the funeral gathering – they were drinking palm wine. Pw 2 joined them but as he does not drink alcohol, he consumed soda. They sat together and shared a meal at 5.00Pm, and at 5.30Pm, **SAMSON CHARO** and Pw 2 left for their homes, leaving the deceased and others at the funeral gathering. His evidence is that he left the deceased in good health and only got to learn from his wife on 17/11/06, that deceased`s body was lying dead on the road though he did not know who had killed him. **ANDERSON NYANJE**(Pw 3), another relative to the deceased confirms that he was in the company of deceased and Pw 2 and **SAMSON**, and the latter two left, he remained with the deceased and **KAZUNGU KARISA** until about 9.00Pm when they got so drunk that they could not even walk and they all decided to spread out a makuti mat and sleep there. The deceased slept next to Pw 3. When Pw 3 woke up at about 1.00am, he realized that he was alone – deceased was missing, Pw 1 had by now sobered up. At 6.45am when Pw 3 finally, got up, he learned about the deceased`s death and proceeded to the scene where the deceased lay with a depression on his forehead. It was Pw 3 evidence that while at the funeral gathering deceased did not quarrel with anyone nor did he see anyone come to call the deceased.

On cross-examination Pw 3 stated;-

***“When I stood from sleep, I released deceased was missing. I had now sobered. I thought he had sobered up and had gone to his house, so I did not search for him”***

**MATHIAS NGUMBAO KITSAO**(Pw 4) told this court that he knew both the deceased and the accused as his fellow villagers. He has known the accused since his childhood which is about 30(thirty years ago). It is his evidence that on 23<sup>rd</sup> November 2006 at about 7.00Pm, while at his home in CHALANI

village, KALOLENI, **BAHA KAHINDI**(the accused) went to seek help from him in his capacity as an uncle (because accused`s mother is a cousin – sister to Pw 4). Accused told Pw 4 that on 16/17<sup>th</sup> November he and others had done something bad and he feared that things might backfire on him, so he needed Pw 4 to find him a witchdoctor or a senior government official to help him out of the serious problem this request was due to the fact that Pw 4 was an ex-army officer.

PW 4 told accused;-

***“I’ll take you to a witchdoctor, but you must disclose to me who the other people you did this bad thing are”***

PW 4 explains that this was just a gimmick to get accused to build trust in him but the witchdoctor he had in mind was police – as a matter of fact, he reported the matter to police as he did not approve of accused`s conduct. Pw 4 reported the matter to police on 30<sup>th</sup> November although accused had gone to see him on 23<sup>rd</sup> November – he explained that the interim period was because he wanted all the accused`s colleagues to come out and confess their involvement. However accused`s colleagues were reluctant to meet Pw 4, saying he was a wrong number who should be cleared. Pw 4 further stated on cross-examination

***“.....BAHA came to me seeking for help and even his colleagues confirmed they had participated in some wicked deed. He wanted intervention from some Senior Government Officer who could intervene in the event that the case was taken up by the authorities, so that matters end up in his favour. It was Pw 4`s further evidence that accused claimed he had been hired by MAJIMBO CHENGO KARISA at a fee and they would bring the money to PW 4 to take to the witchdoctor.***

Meanwhile **PC SIGNOLA MICHEAL NZAI** (Pw 7) a son to the deceased recalls having spoken with his deceased father on 23/11/06 at about 12.00Pm when the latter indicated that he was preparing to attend a funeral in the neighbourhood and requested Pw 7 to accompany him. However Pw 7 had other commitments and could not oblige him. Pw 7 gave deceased Kshs.100/- to use for drinks. At 7.00Pm on the same day Pw 7 got inquiries from his elder brother **FREDRICK NZAI** who wanted to know whether their father had returned. He had not but their family was not unduly alarmed as they assumed he had slept at his in-laws home.

However on 17<sup>th</sup> November after children had left for school, they came back to report that they had seen their father`s body lying dead along the road. Pw 7 proceeded to the scene and observed that deceased had an injury on the right eye which appeared to be dented. He relayed information to police and the body was collected for the same. When Post Mortem was performed, Pw 7 realized that the deceased`s had been smashed at the back and brain matter oozed out – this was not detected by Pw 7 initially because the deceased had a Muslim cap on his head. Since Pw 7 was on leave at the time and being a police officer he called his relatives to sound out what could have led to the murder of his father. He called the deceased`s three wives and one of them disclosed that there had been a disagreement between deceased`s younger wife and a certain lady(i.e wife of **KAZUNGU**`s brother) over some land which had been given to her to till. The deceased`s younger wife suspected that Deceased had an affair with **KAZUNGU**`S wife who was married to **KARISA KAZUNGU**`s brother name **KAHINDI i.e KARISA KAHINDI**. There were also claims that **MAJUMBO CHENGO** alleged the deceased was responsible for the death of **KALUME KARISA** through witchcraft.

Ultimately **MATHIAS NGUMBAO** gave Pw 7 information that **BAHA KAHINDI** had approached him requesting him to find a withdoctor to cleanse some Kshs.10,000/- he had been given by **MAJUMBO CHENGO** so as to kill the deceased, and that he could not use the money until it was cleansed, because he bore no ill will towards the deceased. Pw 7 passed this information to police. On cross-examination Pw 7 stated he did not know who killed his father and even the rumours about the withcraft and illicit love affair came after deceased had met his death.

**PW 1(FESTUS ANDERSON KADENGE RANDU)** is the one who had identified the body of the Deceased to the Doctor for Post mortem to be conducted. He is a son to the deceased and was a police

officer at the time of the incident, although he has since retired. His evidence is that an uncle of the accused by name **CHENGO KARISA MZAMIL** *alias* **CHENGO MAKUTI** had passed away in July 2006, and within a short time, his brother **KALUME MAKUTI** also passed away – these were cousins to the deceased and both had been sick. When **KALUME** died, a son of **CHENGO MAKUTI** by name **FESTUS MAJUMBO KARISA**(who had some grudges with the deceased herein) begun showing open hostility, including not responding to greetings by the deceased.

Pw 1 later learnt that it was **CHENGO** who had hired his father`s killers, although he was reluctant to disclose his source of information. **PC KENNEDY OWINO**(Pw 6) carried out investigations and realized that there were many people connected with the death – accused being among them but his investigations did not give him enough evidence to prefer a charge against anyone, so he passed the file to State Law Offices Malindi for recommendations. The State Counsel recommended an inquest and after the same was conducted at Mariakani court, the accused was charged.

A post mortem conducted by Doctor **MANDALIA** disclosed that deceased had a deep irregular cut on the right side of the head extending to posteriorly to the back of the head, which burst open the skull thus spilling out the brain matter. Internally there was a crush injury to the skull with exterior fracture, bilateral base of skull fracture, fracture of cervical spine and brain showed cerebral incerations with haemorrhage. The cause of death was intracranial haemorrhage due to skull fracture due to head injury. The P3 form was produced by **DOCTOR GANDU**(Pw 5).

The accused in his unsworn defence told this court that between 8<sup>th</sup> November 2006, he was sick and admitted at a Malindi Hospital. When he got home on 17<sup>th</sup> November 2006, he met women who were talking loudly saying there was grief at his home and upon inquiring from them, he learnt that someone had been killed at Matsengo. He proceeded to the scene and joined the curious onlookers to witness what had happened, then police came and collected the body. He went to his home and carried on with his usual chores until 23<sup>rd</sup> November 2006 at 5.00Pm when he got involved in an altercation with his uncle **MATHIAS KITSAO NGUMBAO** who was beating his(accused) younger brother and had even tied his hands with a rope.

As a result of that encounter his uncle swore to ensure that he got hanged and only his clothe would be returned home. On 2/12/06 at 6.00Pm, his uncle **MATHIAS** went to the accused`s home accompanied by police officers and he was arrested.

It is not in dispute that **SAMUEL KADENGE RUWA** was found lying dead along a path on 17<sup>th</sup> November 2006, with serious head injuries. No one witnessed how he met his death and the evidence presented to this court is purely circumstantial – built on certain events and utterances which suggested that accused had a hand in the death. The accused`s counsel **MR LUGHANJE** submitted in writing, that the evidence of Pw 2 and Pw 3 did not aid in solving the mystery as to who killed the deceased – that is correct. However the evidence of the two witnesses show that at least as of 16<sup>th</sup> November 2006, the deceased was alive and well, and seems to have parted company with them later in the night after socializing at the funeral gathering. **MR LUGHANJE** criticized the evidence of Pw 1 saying it was at best hearsay based on allegations that **FESTUS MAJIMBO** had given the accused Kshs.10,000/- so as to eliminatethe deceased and that the evidence of Pw 7 PC **SIGNOLA NZAI**, should be treated in the same manner. It is also **MR LUGHANJE`S** argument that there are two possibilities as to what could have led to the fatal attack against the deceased;-

(a) Alleged claims of his dabbling in witchcraft to cause deaths of other villagers (b) a love affair with a fellow villager`s wife. **MR LUGHANJE** submits that given these two possible scenarios, then the court will never know whether it is the love affair or witchcraft issues that led to the fatal attack on the deceased. In any event the love affair claims was a report made to Pw 4 by one of the deceased`s wives who never testified in court.

**MR LUGHANJE** asks the court to treat the evidence of Pw 4(**MATHIAS NGUMBAO KITSAO**) with a lot of caution because he confirmed in court that he did not like the accused nor did he approve of his conduct and the court ought to take into account that Pw 4 evidence is a person with a grudge against the

accused. Do the circumstances in this case point to the accused only as the person likely to have had reason to kill the deceased, to the exclusion of any other person? Is there another reasonable hypothesis that can be advanced as to why someone would have wanted the deceased dead?

As correctly pointed out by **MR LUGHANJE**, Pw 4 on cross-examination confirmed that he treated accused with disdain, regarded him as a bad character with a bad reputation. This bad reputation seems to be only confined to the assessment of Pw 4 – not even the area chief or assistant chief or other villagers were called to testify and confirm whether the purported bad character of accused was a fact known to the entire village, or whether it arose out of personal differences which accused may have had with Pw 4. Then there is the allegation that accused had purportedly been hired by **MAJUMBO CHENGO KARISA** because the latter believed he had killed his two relatives – yet there is no evidence that such relatives had actually died.

Which then leaves open the second hypothesis – which is that the deceased was involved in a love affair with **KARISA KAHINDI**'s wife. Now in the two situations presented to this court – each is likely to draw violent reaction from the individual who feels offended by the alleged act. As Pw 7 stated on cross-examination;-

***“Having an affair with someone`s wife can lead to someone being killed. Being accused of witchcraft to harm others can also lead to the person accused being killed”***

It is little wonder then that **PC KENNEDY OWINO** was unable to pursue the matter further and the accused was only charged in court due to pressure from other quarters via the AG`s office. Of course there is suspicion that **MAJUMBO** probably hired accused to kill – but that is not the only conclusive theory – it could well be that an incensed **KAHINDI KARISA** hired someone to deal with deceased. The motive for the killing remains unclear, no one witnessed the killing, accused`s involvement or encounter with the deceased is not well demonstrated by the evidence presented to this court and there is really nothing on which to base the presumption that accused is the one who killed the deceased and not anyone else. My finding is that the evidence on record does not prove the case beyond reasonable doubt and the accused must benefit from the inconclusive evidence available. Consequently the prosecution`s case fails and is dismissed. I make a finding that accused is **NOT GUILTY** of the offence and he shall be set at liberty forthwith, unless otherwise lawfully held.

**Delivered and dated this 28<sup>th</sup> day of September 2011 at Malindi**

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

Mr Mayaka holding brief for Mr Lughanje for accused  
Mr Naulikha for state  
c/c Randu Swa-English  
Accused-present