REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL CASE NO. 24 OF 2007

REPUBLIC...PROSECUTION

=VERSUS=

DONALD AMWAYI SHIRAKU alias KANDAMAJI.................................ACCUSED

JUDGMENT

The accused **DONALD AMWAYI SHIRAKU** alias **KANDAMAJI** faces a charge of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE.** The particulars of the charge are that:

"On the night of 17th/18th October 2007 at Kalalani village, Mwavumbo Location in Kwale District, within Coast Province murdered ATHUMANI BAKARI"

The accused who was arraigned before court on 30th October 2007 entered a plea of ***'not guilty'*** to the charge. His trial commenced before **HON. JUSTICE F. AZANGALALA** on 22nd July 2008. The Honourable Judge heard a total of six (6) witnesses before he was transferred to Eldoret Law Courts. It was at that point that I took over the hearing of this matter. The prosecution led by **MR. ONSERIO**, learned State Counsel called a total of ten (10) witnesses in support of their case. **MR. MUSHELLE** Advocate appeared for the accused person.

Briefly the facts of this case are that on 18th October 2007 at about 2.00 A.M. a man called **KAMANZA** came to awaken **PW2 BAKARI SAID MUNYOKI** and informed him that his son **ATHMAN BAKARI** (the deceased herein) had been badly beaten up. **PW2** got up immediately and rushed to the scene. He found his son lying on the path with severe injuries to the legs torso, and head. **PW2** set about seeking help to take the deceased to hospital. Police were called in. The deceased who was still alive by then was rushed to Msambweni Hospital where he unfortunately died the same night whilst undergoing treatment. Upon completion of police investigations into the matter the accused was arrested and charged.

At the close of the prosecution case the accused was found to have a case to answer and was placed on his defence. The accused gave an unsworn defence in which he denied the charges against him. He insisted that on the material night he had himself been attacked by thugs and injured. It is now upon this court to determine whether the prosecution have proved the charge of murder as against this accused person.

The offence of murder is defined in S. 203 of the Penal Code of Kenya as follows –

"Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder"

This definition establishes three crucial ingredients to prove a charge of Murder

(1) Proof of the fact of and the cause of death of the deceased

(2) Proof that the deceased met his death as the result of an unlawful act or omission by the accused

(3) Proof that said unlawful act or omission was committed with malice aforethought

The fact and cause of death of the deceased cannot be in any doubt. **PW2** the father of the deceased has confirmed that on the night in question, he went and found his son Athumani Bakari lying gravely injured by the road in the Mkulo area. **PW2** further confirms that though efforts were made to rush the deceased to hospital for medical attention, he unfortunately passed away that same night. This evidence is duly corroborated by several other prosecution witnesses. **PW3 MUTISYA BAKARI** a brother to the deceased also told the court that he went to the scene and found his brother lying in a pool of blood. **PW4 KAMANZA MWATSAKA** is the neighbour who alerted **PW2** and **PW3** about the incident. **PW3** confirms that he heard a commotion outside his house on the material night. He went out to check and found the deceased lying on the ground badly injured. All these witnesses have identified the deceased whom they knew very well.

Conclusive evidence on the cause of the deceased's death is provided through the evidence of **PW10 DR. ANDERSON KAHINDI** who produced the post-mortem report **Pexb5**. The witness confirms that the body of the deceased had fractures to the legs as well as severe injuries to the head. The cause of death was stated to be ***"cardio pulmonary arrest due to excessive bleeding due to fractures and cut wounds***". From this evidence I do find as a fact that the deceased herein met his untimely death as the result of the unlawful act of being assaulted by some person[s].

There was no eye witness to the attack on the deceased. The closest to an eyewitness was **PW4 KAMANZA MWATSAKA** who told the court that on the material night he heard a commotion and went outside to check. He found the accused whom he named as Mkanda Maji standing outside with his wife. The deceased was lying on the ground. The accused alleged that the deceased had been sleeping with his (the accused's wife). The deceased who was injured requested **PW5** to take him to hospital. **PW4** had no transport so he opted to go and inform the deceased parents. Indeed **PW2** the father of the deceased confirms that it was **PW4** who came to his house on the material night to inform him that his son had been beaten up.

It is clear from this testimony that **PW4** did not actually see the accused beat up the deceased. However **PW4** is categorical that when he went out to check he only found accused and deceased there and the accused was alleging that the deceased had been sleeping with his wife. Although the time was 2.00 A.M. and it must have been dark at the scene **PW4** told the court that he was able to see and to identify all the parties well due to the security lights from the nearby railway station. The evidence therefore against the accused is circumstantial. He is seen standing over the deceased, who is lying fatally injured on the ground, the accused loudly accusing the deceased of sleeping with his wife. The only other person present at the scene was the accused's wife who being a spouse was not a compellable witness and did not come before this court to testify. The law regarding circumstantial evidence was well elucidated in the case of **JAMES MWANGI –VS- REPUBLIC [1983] KLR 327** where the Court of Appeal held:

"In a case depending on circumstantial evidence in order to justify the inference of guilt, the

incriminating facts must be incompatible with the innocence of the accused, the guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of guilt"

No doubt the accused must have been unhappy with the fact that the deceased (as he alleged) was sleeping with his wife. It is quite feasible that acting on this belief the accused may well have attacked and beaten up the deceased to teach him a lesson.

PW4 continued to state in his testimony that when police arrived at the scene at 11.00 a.m. the next morning and opened the nearby kiosk ran by accused's wife and where accused used to roast meat they recovered two pieces of wood and a white ***'CMC'*** branded t-shirt hidden inside an envelope. These items were recovered in the presence of **PW4**. Evidence of this recovery is duly corroborated by **PW9** **PC. CHARLES OTIENO** the officer who visited the scene and drew a sketch map which was produced as an exhibit. **PW9** confirmed that he searched the accused's kiosk and he recovered a CMC branded T-shirt **Pexb1** stuffed inside an envelope as well as two pieces of wood **Pexb5**. The branding on this T-shirt becomes very significant in the light of the evidence given by **PW5** **GLORIA ZUMA** who worked in the Sales Department at CMC Mombasa. **PW5** told the court that the company did distribute their branded t-shirts to all their employees and more importantly **PW5** confirms that the deceased was an employee of CMC Mombasa where he worked as a driver. She produces a list as evidence that a T-shirt was given to the deceased on 17th October 2007 (the very day before he died) and the deceased signed to acknowledge receipt of the same. It is not therefore far-fetched to conclude that the deceased was wearing or at the very least had in his possession the T-shirt when he met his untimely death. How then can it be explained that the deceased's T-shirt is found inside the accused's kiosk shortly after the deceased is brutally assaulted and killed. In his defence the accused merely issues a blanket denial that any items were recovered inside his kiosk. This denial does not dislodge the weight of evidence of the eyewitnesses to this recovery. The accused claimed that his kiosk had no door implying that any person may have placed the t-shirt there. However **PW4** was quite categorical that the only people he found at the scene were accused, his wife and the deceased. There was no other person there. Indeed it would be quite unlikely that there would be groups of people wandering about at 2.00 A.M. I therefore reject this defence as a mere denial. Based therefore on the weight of the circumstantial evidence I am convinced that the accused did beat up the deceased believing that the deceased had been sleeping with his wife. It was this assault which was the direct and proximate cause of the deceased's death.

Aside from the circumstantial evidence several witnesses told the court that as he lay dying the deceased named the accused as the one who had beaten him. **PW1** **SALIM TINGA CHIZABWE** told the court that he went to the scene where he found Mzee Athumani lying on the ground. He too confirms that upon arrival at the scene he met the accused and his wife there (this corroborates the testimony of **PW4**). In his testimony **PW1** states:

"The mzee [deceased] asked me to ask Kandamaji why he had assaulted him. Kandamaji did not say anything"

Under cross-examination **PW1** continues to say:

"I know accused as Kandamaji. I don't know his real name. I had known accused for about 1 year"

The deceased made the same declaration to his father **PW2**. In his evidence under cross-examination by defence counsel **PW2** stated:

"So when he heard Kandamaji's voice the deceased said he had been beaten by Kandamaji"

Likewise **PW3** **MUTISYA BAKARI** a brother to the deceased who also went to the scene testified that:

"As we talked with the deceased the accused arrived and the deceased said stated [sic] that he was the one who had beaten him. I took hold of the accused. He alleged that he had beaten the deceased

because he was committing adultery with his wife ….”

PW8 MUTINDA MUNYWOKI told the court that he too upon being alerted by **PW4** rushed to the scene on the material night in an effort to assist the deceased. He confirms he found the deceased injured and lying on the ground. **PW8** told the court that the accused who was also at the scene was engaged in a quarrel with one ***‘Saidi’*** a brother to the deceased. **PW8** states that the deceased told him:

“the man quarrelling with my brother is the one who beat me” – then he lost consciousness”

It is evident therefore that the deceased made this same ***‘dying declaration’*** naming the accused as the man who had assaulted him to several witnesses. S. 33 of the Evidence Act which allows a court to admit into evidence the statement by a person who is deceased relating to the cause and/or circumstances of his death provides as follows:

“33 Statements written or oral, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured or whose attendance cannot be procured without an amount of delay, or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases

(a) When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that persons death comes into question and such statements are admissible whether the person who made them was or was not at the time they were made, under expectation of death, and whatever may be the nature of the proceedings in which the cause of his death comes into question”

In the case of **DZOMBO CHAI –VS- REPUBLIC [2006] KLR** the Court of Appeal held that:

“Although the court can in law solely rely on such evidence [of a dying declaration] there is however a rule of practice that a dying declaration must be satisfactorily corroborated to justify a conviction”

In this case as I have stated earlier the declaration made by the deceased as he lay fatally wounded was not made to just one person. The fact that the deceased made the same declaration to at least three persons provides sufficient corroboration. The deceased named ***‘Kandamaji’*** as the one who had assaulted him. Although the accused\'s official names are ***‘Donald Amwayi Shiraku’*** his alias is given as ***‘Kandamaji’***. In his defence the accused denies that he has ever been known as ***‘Kandamaji’***. However this denial falls flat in the face of the testimony of all the prosecution witnesses that the accused was generally known as ***‘Kandamaji’***. Why would over six (6) fellow villagers refer to the accused by this name if it was not his name? It is quite common that people are referred to by nicknames in their villages which nicknames normally refer to the type of work which they do. All these witnesses have identified the accused in court as ***‘Kandamaji’***. They cannot all be mistaken. At no time during the hearing did the defence counsel seek to challenge this name whilst cross-examining the witnesses. Clearly this defence is an afterthought and is a belated attempt by the accused to deny his own nickname. I find as a fact that the accused was commonly known as ***‘Kandamaji’*** and that it is he to whom the deceased referred in his dying declaration.

Further corroboration of this dying declaration is provided by the circumstantial evidence which I had analyzed earlier on in this judgment. The accused is found standing next to the deceased who has been beaten to within an inch of his life. The deceased names the accused as the one who so assaulted him. A t-shirt belonging to the deceased is found hidden inside the accused’s nearby kiosk. From this set of fact no

alternative hypothesis can be drawn other than that it was the accused who beat and fatally injured the deceased. I do so find.

The final ingredient required to prove a charge of Murder is that of malice aforethought. **PW4** told the court that the accused believed the deceased had been sleeping with his wife. Ho doubt he felt angered by this and decided to unleash his anger on the deceased. The deceased himself told his father **PW2** that the accused blamed him for committing adultery with his wife. It could well be that the accused merely intended to give the deceased a thrashing to teach him a lesson and not to kill him. However from all accounts he inflicted horrific injuries upon the deceased. S. 206 of the Penal Code defines malice aforethought as follows:

"Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances –

(a) …………………………………………………………….………..

(b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused"

By so violently attacking the deceased the accused must have anticipated that grievous harm or death would occur. The medical evidence indicates that the deceased sustained several severe and life threatening fractures on his head and legs as a result of the assault. I am satisfied that malice aforethought as defined by S. 206(b) has been proved to have existed. As such I am satisfied that the prosecution have proved this charge of Murder as against the accused beyond all reasonable doubt. I therefore convict the accused as charged.

Dated and Delivered in Mombasa this 15th day of November 2011.

M. ODERO
JUDGE

In the presence of:

Mr. Mushelle for Accused
Mr. Onserio for State

MR. ONSERIO: We have no records. Accused may be treated as a 1st offender.

MR. MUTISYA: Accused is a first offender. He has been in custody for over 4 years. He is very remorseful. This court has a discretion in sentence. The death sentence is not mandatory.

COURT: Sentence is reserved pending a report from the Probation Department.
Mention on 29th November 2011.

M. ODERO
JUDGE
15/11/2011

29/11/2011
Before: Hon. Lady Justice M. Odero
Court Clerk – Mutisya
Mr. Onserio for State
Mr. Okonji holding brief for Mr. Mushelle for Accused
COURT: Probation Report not ready.
Mention 2nd December 2011.

M. ODERO
JUDGE
29/11/2011

2/12/2011

Before: Hon. Lady Justice M. Odero
Court Clerk – Mutisya
Mr. Onserio for State
Accused in person
Mr. Ngeno holding brief for Mr. Mushelle

COURT: I have considered the mitigation made on behalf of the accused. I have also considered the contents of the Probation Report. It is now well established that the death penalty is not mandatory sentence in Murder cases. Taking into account all circumstances I hereby sentence the accused to serve a term of twenty (20) years imprisonment.

Right of appeal explained.

M. ODERO
JUDGE
2/12/2011