



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

**Criminal Case 10 of 2008**

**REPUBLIC .....PROSECUTOR**

**VERSUS**

**HAMIDA DARA.....ACCUSED**

**JUDGMENT**

Hamida Dara (the accused) faces a charge of murder contrary to section 203 of the Penal Code as read with section 204 of the same code. The particulars are that on 17<sup>th</sup> April 2008, at Nyumba Tano area in Malindi Township within Malindi District of the Coast Province, she murdered Emmanuel Dino.

Accused denied the charge, she was represented by Mr. Angima advocate.

The accused is the wife to the deceased, having been introduced to the deceased (an Italian national) by one Abdul Mohamed Sadique. The deceased was aged 67 years, a resident pensioner who was not working, but lived on his pension – he was also popularly known as DINO.

On 17-4-08, at about 11.00am, Marifa Olive Katana (PW1), a 14 year old school girl, who lived in the same plot with the deceased and accused was outside her parents' house, reading, when she heard the accused (whom she describes as a neighbour) calling out for Chengo.

Chengo worked for a white man who lived three houses away from PW1's family. Chengo was at the back cutting a fence so PW1 went to inform him.

***“Chengo, you are being called by the person in the first house.”***

Chengo (PW2) confirmed that he was working at Leonardo Maniffati's home at the back near the staff quarter when PW1 went to tell him that there was noise at the accused's home. He ran there and could hear a lot of noise – he got to the door and noticed the accused had fallen on the verandah and was crying. He also noticed that Emmanuel Dino had fallen and was lying on his back, with his intestines hanging out. So Chengo ran back to Leonardo's place and pressed the alarm. It was his evidence that he never spoke to the accused, but when he had got to her house, she was crying, saying thugs had entered the home – describing them as one white man and two black men.

Kalume Kahindi (a houseboy at the Nyumba Tano Plot) was at his place of work on 17-4-08 at 11.00am, when he heard

screams coming from the deceased's house. He ran there and found a crowd already gathered and learnt that Dino had been killed. Accused said thugs had come to their home, although PW3 never saw any thugs nor hear any gunshots. At the time PW3 was in a house directly opposite/across the road from the scene.

Upon the report being relayed to police, (PW5) Cpl. Boniface Kiilu accompanied the DCIO Malindi to the scene and heard the accused say that three people had got into the house and killed the deceased after demanding for money which deceased did not have and that the robbers took away her phone and that belonging to the deceased. However accused also told police that she and deceased had quarreled in the morning regarding how his clothes were arranged – that made PW5 suspicious and from his own observation accused appeared to be in shock, her dress was soaked in blood which she said got soaked when she tried to pick the deceased's mobile phone – PW5 noticed a contradiction regarding the phones.

Accused also mentioned that deceased had scolded her, and she had gone to the kitchen to prepare lunch. So PW5 decided to go round the house and search for any exhibit. Immediately he got out of the door, from where the deceased was lying, PW5 noticed a piece of onion which was cut and had fallen about 3 metres from the door. On looking beyond, the chain link fence, just immediately after the cut onion, PW5 noted that there were two knives lying about 6-7 metres from the house – the police officers went round the fence and both PW5 and the DCIO noted that at the position where the two knives were, lay two mobile phones just thrown over the fence.

Scenes of crime personnel were called to take photographs and the two mobile phones (one Nokia and the other Samsung) were collected as exhibit.

At the scene where the two mobile phones were, there was another small knife – all these knives were produced as exhibits. What PW5 observed was that, the two long knives had blood and one of them was bent. He returned to the kitchen and recovered two other knives of similar make which the officers took as control sample ie for purpose of comparison with the blood stained ones. The two long bloody knives were taken to the Government Chemist for analysis. PW5 also observed that there could have been a struggle when the offence was being committed and he noticed fresh cuts on the accused's left thumb – so he formed the opinion that accused was involved in commission of the offence and she was immediately arrested.

What prompted the arrest and charge was further catalyzed by accused's earlier indication that the three attackers had come in a *tuk tuk*, which could not be supported by any evidence and PW5 wondered why robbers would come to steal then throw away the loot.

The injuries on the accused were confirmed by a clinical officer (Samson Ibrahim) who noted a cut wound on the left hand measuring 3cm, cut wound on the distal aspect of the left mid finger measuring 2cm and a cut wound on the lateral aspect of the left palm measuring 3cm in diameter. The wounds were not deep and were about four days old, probably caused by a sharp object. Upon cross-examination he was categorical that the injuries could not have been caused by a nail because a nail is a piercing object.

Meanwhile a postmortem was carried out on the body of the deceased and the postmortem form which was filled and signed by Dr. Ali Hussein, was produced by Dr. Sofia Mwinyishe. It noted that the body had stab wounds at the epigastrium, a perforated stomach, the left anterior chest and right anterior clavicle region, left shoulder and lumbar regions all had stab wounds. Internally the subclavicular vessels were damaged as a result of the stab wounds. The cause

of death was hemorrhagic shock due to excessive bleeding from the stab wounds.

Steven Malude Oibe (PW7) who is an analyst at the Government Chemist laboratories received the kitchen knives (three in number) and blood samples of the deceased and the accused.

He also received a brown kitenge and a blue-white checked pair of long trousers. His findings were that all the items were heavily stained with human blood of group A except for one knife marked C which had no blood stains. The blood sample of deceased was found to be of group A. The blood sample of the accused was found to be of group B. From his findings, PW7 observed that the blood stains on the knives, and on the clothing items all matched with blood sample of the deceased's blood group. Based on these, he formed the opinion that those blood stains could have come from the deceased after being stabbed – his report is produced as exhibit 6.

The accused in her unsworn defence informed the court that she is 25 years and confirmed having been married to the deceased. It was her testimony that on the morning of 17<sup>th</sup> April 2008 at around 7.00am, the deceased left to go to town and returned at 8.00am. At about 10.00am, she went to the kitchen to prepare lunch, leaving him in the sitting room. After a few minutes, as deceased was heading to the kitchen where she was, two gangsters entered into the house through the right door. Between the sitting room and the kitchen, they manhandled the deceased and one of them took her kitchen knives and stabbed the deceased around the stomach. Accused rushed to save him by trying to snatch the knife from one of the gangsters but she was overpowered by them.

Instantly, her husband fell down, and she was pushed by one of the gangsters, resulting in her falling on top of the deceased. When she had tried to snatch the knife, it cut her on the palm and when she fell on the deceased, his blood got into contact with her clothes. She screamed and rushed to the sitting room where her phones were and when she tried to make a call, one of the gangsters snatched the phone from her hands.

She shouted for her neighbour Chengo. After the gang left, she went back to her husband and tried to shake him to see whether he was alive and realized he had died. Thereafter Chengo came and she narrated to him what had happened and he called police who arrested her.

At the close of the defence case, Mr. Angima submitted on behalf of the accused that the evidence did not prove that accused committed the offence. He pointed out that there was no independent witness to the killing as PW2 and PW3 came to the scene after the killing, and that although they were neighbours to the couple, they were not drawn to the scene by any commotion or noise. He pointed out that the only one who testified to witnessing the killing is the accused, and her evidence was that her husband was killed by three men who invaded their home and that his was the same account she had given to the police officers.

He argues that the DCIO Supt. Kariuki was dismissive of the accused's account of events without any good reason and just took immediate steps to place the accused in custody, thereby denying himself the opportunity of investigating the matter further.

It is Mr. Angima's contention that the mere fact that murder weapons were found within the vicinity, does not prove it is the accused who threw them there. He points out that the knives were dusted (presumably for finger prints) but the result

was negative yet the DCIO did not give evidence of the negative result in his evidence in chief and this only came out on cross-examination. Mr. Angima urges the court to find that withholding such evidence was prejudicial to justice.

As for the blood soaked clothes to which the police seem to place such a high premium, Mr. Angima submits that when accused's spouse had been attacked and was hurt, the most natural response was for her to hold him and try to assist him, and there was no way that she could have avoided getting soaked with blood. It is his contention that no motive has been established by the evidence presented so as to justify a charge of murder and the covert act which is actually murder, has not been proved and the mens rea is totally lacking.

Mr. Angima poked holes at the theory developed by Supt. Kariuki that there was a quarrel between the deceased and accused, saying that was speculative and it should be disregarded. He further argues that the prosecution attempt to rely on circumstantial evidence is weak as there is another possible explanation for the killing implied in the circumstances – he has invited this court to consider the case of **Wesonga v R HCC No. 34 of 2000 and R v Kipkering Arap Koseki ECA 11949 at page 145** do find that the facts here, are not incompatible with the accused innocence to the exclusion of a reasonable hypothesis, which is that deceased may have been attacked by robbers.

There is no dispute that on the morning of 17-4-08 at Nyumba Tano Area, the deceased was stabbed several times while inside his house, resulting in his death.

It is also not in dispute, that at about the time the deceased was killed, the accused called out loudly for neighbour by the name Chengo.

The issue for determination is who inflicted those fatal wounds

PW1 (whose family's home neighbours the couple) was outside just about the time the incident took place and she heard accused calling for Chengo.

On cross-examination she said she did not see accused while she was calling for Chengo.

Chengo on cross-examination stated that he could not tell whether the thugs accused alleged to have invaded their home had actually entered the home because he could not see activities in that compound from where he was, as his view was blocked by other houses in between.

Kahindi (PW3) who worked in the home across deceased's compound also stated that he would not know whether someone entered into that compound then left. Abdul Sadique (PW4) who had introduced the couple to each other gave a little insight into the kind of relationship the couple had, as he lived with them for 28 days after their wedding and having known Dino (deceased) for nine years.

On cross-examination he stated that Dino lived with the accused for 28 days, (incidentally PW4 just left the home on 15-4-08 for a place known as Oda, and by 7-4-08 he learnt that Dino had been killed). While living with them, PW4 did language translation for the couple as Dino spoke only Italian and accused spoke only Kiswahili and did not understand Italian – PW4 spoke both languages.

The picture he creates of the deceased is that of a quarrelsome individual who would disagree with the accused and

sometimes he would get upset over small things like the mere fact of dishes not being clean. However he never threw tantrums or objects when angry.

I think this is why police decided to pursue in depth the issue of a purported quarrel between accused and deceased.

On cross-examination PW5 explained that when he asked accused whether the alleged gangsters had stolen any money, she said there was no money. The police officers dismissed the allegation about the gangsters arriving in a tuk tuk because:

- (a) tuk tuks are noisy modes of transport and the area is in a quiet location, so its arrival would have been noted.
- (b) None of the other people within the plot saw or even heard a tuk tuk arrive or leave.

Supt. John Nderitu Kariuki (Pw8) led the investigations and gave a detailed account of what he did – which corroborated the evidence of Cpl Kiilu except that from his observation of the house, he saw no signs of disturbance nor were the deceased's clothes disturbed. Having established that none of the persons within the neighbouring houses had seen or heard a tuktuk arrived, Supt. Kariuki doubted the robbery theory and upon checking, he noticed fresh injuries on accused's palm and he came to the conclusion that:

- (1) accused could not explain where she was during the alleged robbery i.e her position
- (2) there were no signs of disturbance inside the house, to suggest that intruders had been there
- (3) It was hard to fathom how the gangsters could have come to the house with cruel intent, yet without weapons, and he doubted that the knives recovered were brought by the alleged gangsters, since they resembled other knives which were in the kitchen.
- (4) The sharp cuts on accused's hands made him conclude that there had been a struggle between her and the deceased, and that was why her clothes were also blood stained.
- (5) One knife which was bent appeared to have been as a result of the struggle between the accused and the deceased and PW8 concluded that it was the one which caused the sharp injuries on accused's left palm. Then it meant that accused was the one who had murdered the deceased.

Just apart from the tuktuk, Supt. Kariuki on cross-examination stated that he also ruled out the possibility of intruders being behind the crime because if they had come from outside they could have been seen by neighbours as there is a communal gate used by many people, and despite accused alleging that the intruders had gone to steal, the house had not been ransacked. PW8 was able to establish from PW4, that deceased was a 76 year old man who was given to bouts of tempers over very minor issues and from his investigations, he gathered that a petty quarrel had erupted between accused and the deceased over some clothes which were not properly ironed.

He also contested the suggestion as to why he did not refer to the negatives results on dusting of the knives saying he did not introduce that negative report because the knives had no suitable finger or hand impressions – which I find to be a reasonable explanation – its not as though dusting done revealed finger prints which did not match those of the accused – it is simply that the impression were not enough to enable the examiner make any significant observations.

PW1 Cpl. Robinson Maina took photographs of the body at different angles and also a general view of the scene. The duty of this court is to consider the circumstances as described to the court and make a finding from that as to whether it points to the person/persons who inflicted the fatal stab wounds on the deceased. I find as a fact that at the time when deceased was killed, accused was with him inside the house. Did she inflict the injuries or was this the work of three

stealthy men who were neither seen nor heard by anyone else. The evidence is basically circumstantial evidence and the guiding case on that **Kipkering Arap Koskei and others v R (1949) EACA, 135** which stated that:

***“In order to justify on circumstantial evidence, the evidence of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt, and the burden of proving facts which justify the drawing of this inference form the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused.”***

So far the evidence led does not show that accused and deceased had a third party inside the house. Her claims about three gangsters are dented clearly by the well analysed reasoning and thorough investigations carried out by Supt. Kariuki such that there is no room for speculation and possibilities – the only possible explanation is that the accused inflicted the injuries in a fit of rage following a disagreement with the deceased over some unironed clothes – that was the reason for her reaction and that was the source of the noises PW1 and PW2 referred to.

It can not be sheer coincidence that not a single person – not even Marifa who was outside saw or heard a tuk tuk arrive or leave Nyumba Tano area. It cannot be a coincidence that Sadique (PW4) gave details of the deceased’s bouts of tempers over petty issues and the same is what emerges a having triggered a disagreement between the accused and the deceased.

There seems to be a lot of truth in what PW4 said that deceased was in the habit of quarrelling with the accused and it was the last statement from her. Her reaction would have been excused as provocation, except that the number of times with which the stab wounds were inflicted on the deceased clearly indicate an intention to injure grievously and this resulted in his death. I am persuaded that it is the accused who killed the deceased and not some mysterious three men as alleged by the accused.

Consequently, her defence is rejected and she is convicted as charged.

Delivered and dated this 12<sup>th</sup> day of **May 2010** at Malindi.

**H. A. OMONDI**  
**LADY JUSTICE**