



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

CRIMINAL CASE NO. 16 OF 2002

REPUBLIC PROSECUTION
VERSUS
CHARO KARISA SALIMU ACCUSED

JUDGEMENT

The accused herein **CHARO KARISA SALIMU** faces a charge of **MURDER CONTRARY TO SECTION 203 AS READ WITH SECTION 204 OF THE PENAL CODE**. The particulars in the information are that

“On the 24th day of July 2001 at Mtsengo Village in Mwanangwinga Location within Kilifi District of Coast Province murdered KIBANJE SALIMU MWANYELE.”

The accused entered a plea of **‘not guilty’** to the charge and his trial commenced on 29th March 2007. At this trial the prosecution led by the learned State Counsel called a total of eight (8) witnesses in support of their case.

The prosecution case in brief was that on the night of 21st July 2001 at about mid-night the accused broke into his parent’s house, ordered his mother out and proceeded to slash his father **KARISA SALIM MWAYERI** (the deceased) with the panga. The deceased was badly injured but did not die on that occasion. Two days later on the night of 23rd/24th July 2001 the accused again went to his parent’s house at night and again ordered his mother to get out. He again slashed his father, this time killing him. The next day the accused went and called the sub-chief of the area who came to the home and confirmed that indeed the deceased was dead. He then called in police who came and took the body away to Msambweni Mortuary. The accused was also arrested and later he was charged.

As I have observed earlier in my ruling dated 26th April 2010, this case has had a very unfortunate history. The accused who has been in remand custody for the past ten (10) years has had to endure a de novo trial on two occasions. On 5th June 2003 the trial commenced before Hon. Justice J.L. Ouna and one witness testified. Following the retirement of the Honourable Judge from the Bench the trial started de novo before Hon. Mr. Justice Leonard Njagi on 29th March 2007. Hon. Njagi heard a total of eight (8) witnesses and was then transferred to Nairobi High Court. I then took over the matter and heard the defence of the accused in which he denied any responsibility for the death of his father. He states that on 24th July 2001 he returned from his place of work at 6.00 A.M. only to find a crowd of people gathered at his homestead. Upon enquiring he was told that his father had been slashed with a panga and killed. The accused then went to look for the sub-chief to inform him of the incident. The offence of Murder is defined by S. 203 of the Penal Code 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 provides for three ingredients of the offence of murder, all of which the prosecution is

obliged to prove beyond a reasonable doubt. These are:-

- (a) That there has been a death of a human person and that this death was the result of an unlawful act.
- (b) That the accused is the one who committed the unlawful act which led to the death of the deceased.
- (c) That the accused in committing this unlawful act had malice aforethought.

In this case the name of the deceased is given as **KARISA SALIM MWAYERI**. **PW1 JUMWA KARISA SALIM** 21st July 2001 and 23rd July 2001 she was alone with the deceased asleep in their house. On both nights she was ordered out of the house. **PW1**, no doubt fearing for her life complied with these orders and as she told the court ran into the bushes to hide. Upon her return the first time she found the deceased critically injured with three fresh panga cuts on his head which was bleeding profusely. On the second occasion, when **PW1** returned from her hiding place in the bushes she returned to find that the deceased had three new panga cuts again on his head. This time the deceased died from his injuries. **PW1** told the court that she was the wife of the deceased. She further told the court that the deceased met his death by being slashed with a panga. She narrates how on two nights

This evidence of **PW1** is corroborated in all material respects by **SIDI KAZUNGU**, who was a daughter-in-law to both **PW1** and the deceased. She told the court that on the morning on 22nd July 2001 her mother-in-law **PW1** came and told her that her father (the deceased) had been cut on the head three times and had been injured. **PW2** did go to check on the victim and confirms that she found him bleeding from cuts on her head. Once again on the morning of 24th July 2001 **PW1** again came and told **PW2** that the deceased had finally been killed. Again **PW2** went to their house and confirmed that the deceased was death.

Likewise **PW3 CHARO SALIM MWAYELE**, a younger brother to the deceased tells the court that on the morning of 25th July 2001 at 6.00 A.M. he was busy working in his shamba when **PW1** came to inform him that his brother had died. **PW3** rushed to the homestead where he found the deceased lying dead in his house.

PW4 GEORGE BENJAMIN MDACHI, the sub-chief of Kithengani Location tells court that on 25th July 2001 at 6.00 A.M. he was on his way to the home of the deceased to investigate a report he had received from the area youth that the deceased had been assaulted and badly injured. On his way there he met the accused who was the deceased's son. Accused asked **PW4** to issue him with a burial permit on account of the death of his father. **PW4** proceeded to the home where he found the body of the deceased lying on his bed. He noted that the body had cut wounds to the head.

PW5 SERGEANT LEONARD MBITSI confirms that the report of the death of the deceased was made to Kaloleni Police Station. **PW5** did visit the scene where he found the body of the deceased lying on a bed with severe cuts to the head. He collected the body and ferried it to the Mortuary for preservation.

Lastly and most importantly on this point is the evidence **DR. BARBRA WANJIKU** a Medical Practitioner based at Kilifi General Hospital. She told the court that an autopsy was conducted on the body of the deceased by one **DR. MWITA**. Upon examination the body was found to have five multiple deep panga cuts on the skull. Further the body had multiple fractures to the skull and deep cuts penetrating into the brain. The conclusion was that the deceased died as a result of severe brain damage due to deep cuts in the brain and multiple skull fractures due to panga cuts. From the weight of this evidence there can be no doubt whatsoever that the deceased did indeed die and further that his death resulted from cuts to the head inflicted by a panga. I do so find.

The next key ingredient for a charge of murder is the identity of the perpetrator – the person who committed the unlawful act that led to the death of the deceased. **PW1** who was the only eye witness to the incident named her son who is the accused as the person who inflicted the fatal wounds on the deceased. **PW1** told the court that it was her son '**Charo**' who came to their house at the night of 23rd July 2001 and ordered her to leave the house. I have no doubt that **PW1** being the mother of the Accused was able to recognize him. **PW1** further told the court that she recognized the voice of the accused which she knew very well. **PW2** told the court that on the morning of 24th July 2001 **PW1** came and told her "**Charo finally killed his father**". Likewise **PW3** told the court that in reporting the incident to him, **PW1** told him that the deceased "**had been cut by her son Charo**". **PW5** Sgt. Leonard Mbitsi recorded

the statement from **PW1** on 30th July 2001, barely three days after the incident. As would be expected the information given by **PW1** in that statement would be more accurate because it was made so soon after the event. In her statement **PW1** confirmed that when he came to their house the Accused had a panga in his hand. All these witnesses **PW1**, **PW2** and **PW3** positively identify the accused in the dock as Charo the son of the deceased. Whilst it is true that **PW1** did not witness accused inflict the fatal cuts on the accused, the circumstantial evidence points only at the accused. In the case of **JAMES MWANGI –VS- REPUBLIC 1983 KLR 327**, the Court of Appeal in discussing circumstantial evidence 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.”

This is a case where on two different dates the accused comes to his parent’s house armed with a panga. He orders the only other person in the house his mother **PW1** to leave. **PW1** flees for her life into nearby bushes. Shortly thereafter she returns to the house and finds the deceased badly injured with cuts on the head (on the first occasion) and on the second attack she finds the deceased dead. It cannot be a mere coincidence that on both occasions it was the accused who came to the couple’s house and ordered his mother to leave. In his final submissions Mr. Gichana, learned counsel for the accused advances the theory that a third party may have sneaked into the house and slashed the deceased. I do not buy this theory even for a second. It is unfathomable that on two occasions when the accused comes to his parent’s house in the dead of night, some unnamed third party is conveniently lurking close by waiting to attack the old man, what possible reason would accused have had to come armed with a panga to his parent’s house. The only logical conclusion was that the accused had the intention to commit some attack, which infact he did. The panga used in this attack was recovered and was produced before the court as an exhibit **Pexb1**. **PW4** the sub-chief in his evidence told the court that it was the accused who himself handed over to him this panga. Once again it cannot be a mere coincidence that accused invades his parent’s house at night armed with a panga, his father sustains critical injuries from panga cuts leading to his death, and the very next day accused voluntarily hands over a panga to the authorities.

The question arises, which question was indeed raised by defence counsel in his cross-examination of the witnesses, as to why the other occupants of the home **PW1** and **PW2** made no effort to alert authorities and seek help after the first attack on the deceased. Both **PW1** and **PW2** explained that they fearing going out to report the attack because the accused had warned that he would kill anyone who left the compound to report the matter. This question was also put to **PW4** the sub-chief who explained further by stating

“Our women get easily frightened especially when they are threatened with death. In this case if there was a death threat, the women would not dare leave the homestead to go and inform anyone.”

It is not only women, but any person would be frightened upon being threatened with death. The circumstances under which this threat was made must also be taken into account. Both **PW1** and **PW2** believed that the accused had savagely attacked the deceased with a panga. In their minds therefore this was not an idle threat. I have no doubt that both believed that if they moved out of the compound the accused would truly kill them. Their inaction under these circumstances is more understandable. I am satisfied that the circumstantial evidence points squarely at the accused and only the accused as the one who inflicted upon the deceased the panga cuts that led to his death.

Apart from this circumstantial evidence there is also evidence of a **“dying declaration”** made by the deceased himself to his daughter-in-law **PW3**. She told the court that on the following morning when she went to see the deceased in house after the attack, the deceased spoke to her. Under cross-examination by defence counsel **PW2** stated

“When my mother-in-law came to deliver the message to me, I was alone. We are only two daughters-in-law. I went alone to see my father-in-law. The only words my father-in-law said were “I was cut by my son” but the words were coming out with a lot of strain”

In the case of **DZOMBO CHAI –VS- REPUBLIC CRIM APPEAL NO. 256 OF 2006** the Court of Appeal in deliberating on the question of a dying declaration held as follows

“A statement by a dead person as to the cause of his death or as to the circumstances in which the cause of death of the person comes into question is admissible under section 33(a) of the Evidence Act. Although the court can in law solely rely upon such evidence, there is however a rule of practice that a dying declaration must be satisfactorily corroborated to justify a conviction”

In this case the deceased made a declaration to **PW3** concerning the circumstances leading to his death. He named the person who had inflicted upon him the fatal injuries. Shortly thereafter the deceased dies. In my view this dying declaration is an admissible piece of evidence, moreso because it is not the sole piece of evidence implicating the accused which this court has to rely upon. There also exists the strong circumstantial evidence which I have discussed earlier as well as the eyewitness account given by **PW1**. **PW1** was the mother of the accused. It is unlikely that she would name him as being the one who killed his own father if in fact he did not do so. From the evidence adduced I am convinced beyond a reasonable doubt that it was the accused who committed the act of unlawfully slashing the deceased on the head with a panga which unlawful act ultimately led to the death of the deceased.

The last ingredient to be proved is the mental element of **‘mens rea’** of the offence of murder which is malice aforethought. Did the accused in committing this unlawful act have the necessary intent to kill the deceased? The fact that the accused went to the deceased house in the dead of night armed with a panga is in and of itself proof that his intentions were less than noble. If the accused only wanted to talk to the deceased he would have gone in the daytime and would not have been armed. The fact that accused took the trouble to arm himself with a dangerous weapon i.e. a panga is enough proof of mens rea. He knew that the deceased and his wife would most likely be in bed asleep. He clearly intended to catch them unawares and at their most vulnerable. It is pertinent that the accused attacked the deceased not once but twice. After the first attack on the night of 20th/21st July 2001 when accused slashed the deceased, he threatened family members not to seek help. He probably expected the deceased to die from his injuries. When the old man stubbornly held on to his life the accused made a second attack on the night of 23rd/24th July 2001. This time the accused went and inflicted deadly injuries on a helpless invalid, whom he had already critically injured only two (2) days earlier. There can be no doubt that the accused intended to finish off the deceased completely – he intended to kill him. His actions are clear proof of this intent.

In his defence the accused denies any involvement in either the maiming or killing of the deceased. In his sworn statement the deceased states that he came home from work at 6.00 A.M. to find his father dead at home. If he was arriving from work at 6.00 A.M. the implication is that the accused had a night job. He did not explain what job this is he was engaged in overnight. Accused tells the court that his mother **PW1** told him that some un-named men had come to their home during the night and killed the deceased. If this was the case why did **PW1** not relay the same story to the police and to **PW2** and **PW3**? It seems curious that **PW1** would tell such a tale to the accused but tell all the other witnesses a totally different story. I note also that this issue of strangers coming to murder deceased was not put to **PW1** by defence counsel in cross-examination at all. This part of the defence is clearly an afterthought. In an attempt to explain why his own mother would testify against him the accused claims that his relationship with **PW1** was strained following an alleged oath-taking ceremony in which the deceased was identified as a witch. **PW2** who lived in the same homestead denied that the accused and **PW1** had a strained relationship. Both **PW2** and **PW3** were questioned by defence counsel and both denied that the deceased participated in any oath-taking ceremony. This part of the defence is in my view a mere fabrication. On the whole I find that the accused defence lacks merit and I dismiss it.

The prosecution on the other hand have called 8 witnesses who gave clear, reliable and cogent evidence. These witnesses corroborated each other in all material respects. They all remained unshaken under cross-examination. I am satisfied that the prosecution have proved their case to the required standard and have discharged their burden of proof. The guilt of the accused has been proved beyond a reasonable doubt. I therefore convict the accused of this charge of murder contrary to S. 203 of the Penal Code of Kenya

Dated and Delivered in Mombasa this 25th day of October 2010.

Mr. Gichana for Accused

Mr. Muteti for State

M. ODERO

JUDGE
25/10/2010

MR. MUTETI: Treat the accused as a first offender.

MITIGATION BY MR. GICHANA: Accused is a 1st offender. Belief in witchcraft is rife in the Coastal region. We seek leniency. Accused is remorseful. This is a very old case and accused has endured a long trial.

M. ODERO
JUDGE

COURT

The accused made a very chilling and savage attack on his elderly father whom he ought to have been caring and providing for. Accused clearly intended to kill his father and committed a second attack when the latter was down with critical injuries due to his first attack. Accused showed no mercy to his old father and he cannot now cry to this court for mercy. His actions were abhorrent and against normal family relations. He deserves no mercy or pity from court. He is sentenced to death in compliance with S. 204 Criminal Procedure Code.

M. ODERO
JUDGE
25/10/2010