



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MALINDI**  
**CRIMINAL CASE NO. 4 OF 2001**

**REPUBLIC.....PROSECUTOR**  
**VERSUS**  
**CHARO KATANA KITSAO .....ACCUSED**

**JUDGEMENT**

The accused (Charo Katana Kitsao) was charged with the offence of murder contrary to section 203 of the Penal Code as read with 204 of the Penal Code, that on 2<sup>nd</sup> day of February 2000 at Mukuyuni village Garashi Location within Malindi District, he murdered Ngumbao Kitsao Ndunda).

A total of six witnesses testified for the prosecution, while accused was the only witness for the defence.

On 2<sup>nd</sup> February 2000 at 8.00pm Kabibi Katana Kitsao (PW1) wife to the deceased was at her home in Garasha in the company of her daughter in law, and the accused. They were joined by her brother-in-law (husband's brother) named Ngumbao (now deceased). They shared a meal and thereafter the deceased requested accused's wife for water to drink and was given - accused is PW1's first born son.

Suddenly the accused picked an iron rod, and PW1 sensing danger, began pushing the accused away, accused aimed the iron rod at Ngumbao, but missed the target. He then took another and again aimed the iron rod at Ngumbao. It struck Ngumbao, stabbing him at the shoulder. PW1 described the metal rod as having a wooden handle and at the end of it was attached on sharp metal. Although the incident happened at night and PW1 confirms that it was dark, she was able to see what was going on because there was bright moonlight. She identified the two weapons (they are actually spears) in court, as the ones accused had used to launch his attack on the deceased. Upon getting hit, Ngumbao tried to walk to his brother's house, but was unable and he fell down. PW1 ran to tell her husband about the incident and he accompanied PW1 back to the house where they found the accused. Accused upon seeing them said: ***"Can't you take him to hospital, you are just looking at him like that"***

That shot proved fatal, as Ngumbao succumbed.

On cross-examination PW1 stated that accused and the deceased ate together and were discussing their own issues like father and son. As far as she knew there were no hostilities existing between accused and the deceased. Further that after throwing the first spear at the deceased, accused did not say anything, but when he threw the second spear, accused said

***"I will finish this issue"***

By then she was escorting deceased out of the house. She also realized that after deceased had been stabbed, accused ran back to the house.

Katana Kitsao (PW2) was inside his house when his wife (PW1) reported to him that his brother had been

stabbed first outside their boma. He rushed out and saw Ngumbao lying down and the spear which had been used was just a few yards away from him as well as the other which had missed its aim. He identified both spears in court.

Ag Supt. Leonard Limo Kimaiyo (PW5) who received the report, was a police constable at Malindi police station in the year 2000. He visited the scene at Mukunjwa and found the body lying facing upwards. He confirmed seeing an injury on the neck – on the left side just near the collar bone. He noted that two spears lay about six metres away from the body – one had blood stains.

CIP Isaa Manje (PW3) recorded a statement under inquiry from the accused. The statement was given in Kiswahili and in it accused disclosed that he had quarreled with his brother and even when he told his brother to leave him alone, the latter persisted, so accused got annoyed and he drew his spear, aimed it at the deceased's neck and deceased sustained fatal injury.

In his sworn defence, the accused simply stated that he did not murder anyone, and was not even at home at the time the incident occurred.

Mr. Shujaa for the accused, submitted that the evidence did not prove the charge beyond reasonable doubt because:-

(1) No evidence established that the injury inflicted on the deceased was caused by the accused or that it is the stab wound which led to his death.

He points out that PW1 merely heard a spear fly past her and strike the ground, then on looking far behind she saw a spear shaking on the ground and accused running back into the house but in effect she did not see accused throw the first spear or the second spear. It is his contention that since the area is bushy, the court should not rely on her assumption that accused was the one who threw the spear.

Secondly, Mr. Shujaa takes issue with the injury, saying there is no evidence that the stab wound led to the deceased's death because:

(a) From the postmortem report, the deceased died due to cardio pulmonary arrest, as a result of internal bleeding caused by the stab wound. However, Mr. Shujaa protests this saying it is an opinion not based on facts but on assumption because there was no evidence of internal bleeding.

He points out that although the postmortem report shows presence of a clear stab wound on the throat, there was no evidence that the wound severed major blood vessels so as to result in internal bleeding and the body was never opened up by the pathologist so as to come to that conclusion.

Mr. Shujaa is persuaded that because observations were made that deceased was foaming at the mouth, then it is possible that the foaming could have precipitated the death.

As for the purported recovered blood stained murder weapon, Mr. Shujaa submits that the same was not submitted to the Government Analyst to confirm that the blood belonged to the deceased and establish that it was indeed the killer weapon.

He also argues that malice has not been established, as there is even no evidence of there having been a quarrel between the accused and the deceased and there is nothing to suggest that accused had prepared to commit the act.

As for the purported admission by accused to PW3, Mr. Shujaa points out that the charge and caution statement was not produced as exhibit and it therefore remains an allegation which this court ought to ignore.

Miss Waigera (Counsel for the State) submitted that all the elements constituting murder were established as:

(a) Malice aforethought was demonstrated by accused's action of intention to kill because he first threw a spear which missed, then threw the second fatal one. Further that this was confirmed by accused's witnesses

***“I will finish this issue.”***

As to the suggestion by Mr. Shujaa that the spear may have come from the bushes, Miss Waigera submits that it doesn't even arise because PW1 clearly stated in her evidence that the bushes were ahead of them whilst the spear came from behind.

What about cause of death? Miss Waigera argues that the postmortem report is clear on that, she urges the court to find that what accused told CIP Manje amounted to a confession and that court should convict him.

There is no dispute that the deceased and accused were together and had discussions whose content was not known to PW1 whether they disagreed during these discussions as purported in a statement he allegedly made to CIP Manje, or whether these were just father/son conversations is not clear – and even if they disagreed, then the subject of disagreement remains unknown. There is also no dispute that some spears were aimed at the deceased, one missed hitting him, and the other one struck him. There is nothing to suggest that before this “assault” the deceased had been in poor health.

What emerges for determination is:

- (a) who shot the deceased?
- (b) Has malice aforethought been established?

That the deceased sustained an injury on his neck region is not in dispute. Could the spear which struck the deceased have come from the bushes as suggested by Mr. Shujaa. PW1 offers the answer to this, on cross-examination when she says:

***“Yes, there is a bush around that place, but we were still at an open place and the bushes were ahead of us, so the spears couldn't have come from the bush”***

Inside the house were four people i.e accused, deceased, PW1 and accused's wife. Could the spears have been thrown by the accused's wife? I think not, because PW1 is clear – when she turned she saw the accused running back into the house – that conduct points to a guilty mind – if he had done nothing untoward, he would not need to run. She couldn't have made a mistake since she had been with the accused inside the house and in fact just when the deceased requested for water, the accused became hostile and picked the spear and it's at this point that PW1 begun pushing the accused away. So there was an open sudden display of aggression by the accused, who was already having a spear in his hand, there is nothing to suggest that the person PW1 was restraining away from the deceased was another stranger who had suddenly materialized into her house, shared a meal and held conversation with the deceased.

And upon striking the deceased, accused uttered the words;

***“I will finish this issue”***

Which confirms that he knew what he was doing. What's more if he had not intended to kill the deceased, there would be no reason in aiming the second spear upon realizing that the first one had missed its target, that second shot clearly demonstrates an intention to injure, and not just a minor injury – spears by their nature are stabbing objects whose impact ordinarily causes deep penetrating often fatal injuries – I find that the accused's action was intended to cause the deceased such grievous injury as to result in death. Even without the spear being taken to the government analyst for examination, there is direct evidence as to what transpired.

Then there is the issue as to whether the stab wound caused the death. Is it a mere coincidence that upon being struck by the spear, the deceased grew weak and slowly thereafter exited? I say nay. The postmortem report confirmed the injury and that deceased suffered cardio pulmonary arrest. When postmortem was performed the body was not opened up because relatives objected but the doctor linked this “arrest” to the stab injury which in his opinion caused internal hemorrhage. Dr. Mambo (PW4) explained that the position of the stab wound was located where vital major vessels pass and automatically once the vessels were punctured, it would result in heavy bleeding, my own assessment is that the heavy bleeding would either manifest itself by an external emission/flow of blood from the wound or an internal inflow. Supt Limo (PW5) who visited the scene stated on cross-examination that there was no BLOOD where the body lay (meaning it did not flow out of the body), the only blood was

just on the injured spot, (meaning if there was bleeding it went back into the body – that is what is referred to in medical terms as internal hemorrhage and it was therefore not unreasonable for the doctor to conclude that there was internal hemorrhage caused by the stab wound, which then resulted in both the heart and lungs failing hence the cardio-pulmonary arrest.

Of course the evidence by CIP Manje about a confession by accused holds no ground as the statement under inquiry was not even produced.

My finding is that the evidence has sufficiently proved both mens rea by the accused and the actus rea, to the extent that I have no doubt in my mind that it is the accused who murdered the deceased. His defence that he was not even at home during the event falls flat on its face in the light of evidence by PW1 – his defence is therefore rejected and he is convicted as charged.

Delivered and dated this **25<sup>th</sup> October 2010** at Malindi.

**H. A. Omondi**  
**JUDGE**