



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

**MURDER CASE NO. 4 OF 2009**

**REPUBLIC .....PROSECUTOR**

**VERSUS**

**HASSAN NGUMBAO MASHA .....1<sup>ST</sup> ACCUSED**  
**KARISA KENGA KAZUNGU .....2<sup>ND</sup> ACCUSED**

**R U L I N G**

I have carefully considered the evidence tendered by prosecution witnesses as well as the submissions by the defence counsel Mr. Shujaa. The accuseds Hassan Ngumbao Masha (1<sup>st</sup> accused) and Karisa Kenga Kazungu (2<sup>nd</sup> accused) were jointly charged with murder contrary to section 203 of the Penal Code as read with section 204, that on 13<sup>th</sup> December 2008 within Pasiani village, Goshi location in Malindi District, they jointly murdered Kadenge Masha. The accuseds and deceased are members of one family – the deceased being their uncle (brother to their respective fathers) – the two accuseds are cousins. In this area the term “*baba mdogo* or *baba mkubwa*” is generally used in reference to a male who is a brother to one’s father.

The deceased had just left prison on 12-12-08 where he had served a term when two (2) days later, he met his death.

The evidence of Kitsao Masha (PW3) an older brother to the deceased was that deceased had just left prison on 12<sup>th</sup> December 2008 and had gone to a neighbour’s home, from where he sent for PW3 to go and see him. When PW3 went to the home of Mahaso (where deceased was) they spoke, and deceased asked whether the young men a home who did not want him were still hostile to him. PW3 confirmed that the hostility still existed and advised the deceased to remain at Mahaso’s until Monday when he would take him to the area chief to decide what to do with him.

On 14-12-08 at 6.00am the deceased’s son Mwalimu Kadenge (*who did not testify*) informed his uncle (*another brother to the deceased*) that while on his way to the shops, he stumbled upon the body of his father which lay dead along the path. The two accused accompanied their other uncles to the scene to see the body and escorted it to the mortuary.

This report was made to Kahindi Kazungu (PW1) and Ngao Kazungu PW4. All the witnesses who proceeded to the scene observed that deceased had a fracture on the right side of the forehead above the eye and he was bleeding.

A report was made to the area chief, Joseph Ziro Nyanje (PW2).

PW2 told this court that the deceased had differences with his family who claimed that he was a witch. It was his further testimony that deceased was unwanted by members of his family who kept chasing him

away saying he was a witch. He confirmed that at one point, he even called the deceased and interrogated him as to why he was living and sleeping in the forest, and deceased told him that if he slept in the homestead, his family members would kill him. Deceased further explained to him that the reason for this was because they claimed he was practicing witchcraft and that deceased even confirmed to PW2 that he was indeed a witch. So PW2 took him to the police station, and he was eventually taken to court and convicted and sentenced. It was upon release of that jail term that he met his death. PW2 also confirmed that from the date of his release, the deceased did not go to his home and went to the home of Kahaso Mwangala, a neighbour.

A postmortem performed on the body revealed that deceased had a deep cut wound on the forehead (left frontal region) with lacerations on the left supra orbital region and bruising around the left forehead. The deep cut wound extended beyond the skull and the cause of death was due to the severe head injury secondary to blunt and sharp trauma. Dr. Tayari Omar (PW7) produced the postmortem form.

There is no doubt that deceased met his death in a violent manner, just two days after his release from jail. It is also apparent from the evidence of PW2 and PW3, that there were hostilities displayed towards deceased by members of his family because of his practice in witchcraft, and that he feared for his life and safety. However no one witnessed his murder, even Kahaso was not called to testify as to when and how, or under what circumstances he left his/her home prior to his death. There is no evidence as to which specific family member had shown the hostility towards deceased.

APC Lipa Juma (PW6) merely got information from an old man (who remains un-named) that there were suspects involved in the murder of his brother and he needed assistance – that is how the two accuseds ended up being arrested.

Mr. Shujaa (for the accused) rightly submitted that there was no evidence connecting accuseds to the death of the deceased and that no witness mentioned them. Indeed the investigating officer did not testify, so the court was not given any reason as to why the two accuseds were arrested and charged. The State Counsel Mr. Naulikha had nothing to say in submission.

Really, I need not belabour the point, there is no case made out against either accused and they cannot be called upon to make a defence to the evidence tendered. Consequently they have no case to answer and are acquitted under section 306 (1) of the Criminal Procedure Code.

Delivered and dated this **18<sup>th</sup>** day of **October 2010** at Malindi.

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