

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

Criminal Case 53 of 2004

REPUBLICPROSECUTOR

VERSUS

JUMA MZURI CHOBUACCUSED

J U D G M E N T

Juma Mzuri Chovu, is before this court on information of the Attorney General on behalf of the Republic dated 10th December 2004 duly charged with the offence of murder contrary to Section 203 as read together with Section 204 of the Penal Code. It is alleged that on the 27th day of May 1999 at about 7.30 a.m. at Vikombani village, Miritini Location, Changamwe Division in Mombasa District, within the Coast Province, he murdered Mariam Kitsesho. When the case came up for hearing. The prosecution lined up the evidence of seven (7) witnesses in support of their case whereas the accused gave an unsworn statement in his defence without summoning the evidence of independent witnesses.

The first prosecution witness to take the witness stand is Ismael Mwanzala Kitoja (P.W. 1). He told this court that on 27.5.99 at 6.00 a.m. he met Mariam Kitsesho, the deceased, who told him that she was going to the house of Mzee Maganga a village elder to finalize a matrimonial dispute pending before the village elders. P.W.1 claimed that on the way he also met with Juma Mzuri Chovu whom he greeted as he proceeded to his place of work at Miritini. P.W.1 was later sent to Mombasa by his employer. While in Mombasa, P.W. 1 said that his colleague by the name Ismael informed him that Juma Mzuri Chovu (accused) had murdered his wife (deceased).

Upon getting that information, P.W.1 said he rushed to meet his brother Kitsesho Kitoja. They visited the scene and collected the body which had stab wounds all over the body. P.W.1 said the police recovered a knife from the scene which they took possession. Kassim Panga Joha (P.W.2) said that she was told by Regina Mwikali who had visited his home in the morning of 27.5.99 that she had seen Juma Chovu (accused) snatch the deceased's handbag before killing her. P.W.2 said that she further told him that Juma Chovu escaped through P.W.2's farm. P.W.2 said he immediately visited the scene and found Mariam already dead. P.W.2 then reported the incident to Mzee Mwangolo, the village elder. P.W.2 said he saw the police recover a blood stained knife at the scene of crime. The deceased's father, Kitesoshe Kitoja (P.W.3) said that there was a pending matrimonial dispute between the accused and the deceased before the panel of elders. He said that while the dispute was pending the deceased was in his custody. Inspector of police Daniel Chacha (P.W.5) the investigating officer, said that the accused was arrested on 16.11.2004 in connection with the deceased's murder. P.W. 5 said he investigated the domestic dispute between the deceased and the accused and discovered that the accused had suspected that the deceased had extra-marital affairs. P.W.5 took possession of the knife and the deceased's yellow skirt but he never subjected them to any form of examination. P.W.5 said that the accused was connected to the offence because he was seen near the scene of crime and that he had a grudge against the deceased arising from the matrimonial dispute. P.W.5 said he was unable to explain the reasons why the accused was not arrested until after five years. Chief Inspector of Police Elisha Otuchi (P.W.6) said that he visited the scene of crime on 27.5.99 after booking the report of murder. He produced a certified copy of O.B No. 31 of 27.5.99 in which it is indicated that Juma Sudi Chovu had murdered Mariam Kitsesho and fled his home. Dr. K. N. Mandalya(P.W. 7) carried out a post mortem on the deceased's body. P.W.7 formed the

opinion in the postmortem report he produced in evidence that the deceased died as a result of haemorrhagic shock due to stab wounds to the body. The post mortem report indicates that the deceased was stabbed over twenty times all over the body.

In his defence, the accused gave an unsworn statement. He said that on 27.5.1999 at 6.00 a.m. he left his house at Miritini to board a matatu to his place of work at Big Apple Tours & Safaris. He said he met Ismael Mwanzala (P.W.1) at the stage whom he greeted before he boarded the matatu. He said he was assigned duties for Malindi and in the evening he was informed of the sad news of the demise of his wife. On 28.5.99 the accused claimed he went to Pandya hospital mortuary where he met Mwanzala (P.W.1) and other relatives. He said that he was told that the deceased had been attacked by thugs at Kikombani area about 5 km away from her home. He said the body was released to the family and he even attended the funeral on 28.5.99. The accused confirmed that the deceased was staying with her parents and that their dispute was to be heard by the elders on 30.5.99. He said he was surprised to be arrested 5 years down the line. The accused's defence is that of alibi.

At the end of the evidence, both learned counsels did not make any submissions thus leaving the court to decide the case on the basis of the evidence tendered. I have considered the testimony of all the witnesses. What comes out clearly is that Mariam Kitsesho, the deceased, died as a result of multiple stab wounds. The number of stab wounds inflicted on her body clearly manifests malice aforethought on the part of the assailant. The attacker intended to murder Mariam Kitsesho. What remains to be answered is who inflicted these injuries? According to the evidence of Ismael Mwanzala Kitoja (P.W.1), he met Juma Mzuri Chovu (accused) on 27.5.99 at 6.00 a.m. At the same time he said he also met Mariam Kitsesho, deceased. Juma Mzuri Chovu, deceased (accused) admits in his unsworn statement that he met Ismael Mwanzala Kitoja (P.W.1) on 27.5.1999 at 6.00 a.m. There is also the evidence of the O.B. No. 31 of 27.5.99 that the accused's name had been mentioned to the police and that he had escaped to an unknown destination. The evidence from both sides indicate that the accused and the deceased being husband and wife at the time had a pending matrimonial dispute pending before the elders. It was supposed to have been finalized on 30th May 1999 but unfortunately the deceased was eliminated before then. It is very clear from the evidence that there was no eye witness who testified. Consequently, this case heavily depends on circumstantial evidence. Where the prosecution's case depends on circumstantial evidence the law is well settled that first the circumstances from which the inference of guilt is sought to be drawn must be established by cogent and credible evidence. Secondly, those circumstances should point to the guilt of the accused and thirdly, when the said circumstances are taken cumulatively they should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accuse and no one else. In a nutshell the inference of guilt should only be drawn where the facts said to incriminate the accused are incapable of any other rational explanation except the guilt of the accused and are wholly inconsistent with his innocence. In this case there is evidence that the accused was near the scene of crime but escaped after the death of the deceased to an unknown destination until 5 years thereafter. There was also evidence that the deceased and the accused had a matrimonial dispute. If indeed, the accused was innocent then why did he run away from his home. His conduct betrayed him. The circumstances lead me to only one conclusion, that the accused and no one else committed the offence.

The accused had raised the defence of alibi. I find that defence wanting. The offence was committed early in the morning of 27.5.99, the time the accused admits he met with P.W. 1. There is no evidence to cast doubt on the prosecution's evidence that the accused soon thereafter escaped to some an unknown destination. I disbelieve his alibi defence as a make up story.

In the end I find the accused guilty and convict him for murder as charged. I sentence him to suffer death in the manner authorized by law.

Dated and delivered at Mombasa this 29th day of February 2008.

J.K. SERGON

J U D G E

In open court in the presence of Mr. Wameyo h/b for Mr. Gakuhi for the accused and Mr. Monda for the state.