



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Criminal Case 43 of 2003

REPUBLIC APPLICANT

VERSUS

MWAGA MASHUDI CHETE ACCUSED

J U D G M E N T

By an information dated 26.11.2003 the Attorney General informed the court that Mwaga Mashindi Chete was charged with the offence of murder contrary to Section 203 read with Section 205 of the Penal Code. The particulars given are that on 12.3.2003 a about 4.30 pm at Dupharu village Tamy location in Kwale District within coast province murdered Mwayama mashudi.

Plea was taken on 18.12.03. trial commenced on 26.5.2004 with an opening speech by the prosecutor, Assistant Deputy Public Prosecutor Mrs Mwangi. The prosecution called 5 witnesses in support of the charge.

On 12/3/2003 PW1 ws in a boma where there was palm wine drinking den. The deceased, Katui Tsuma, Ndegwa Kibao, Mwga Mashudi Chete and two other persons were also present. Mwayama Mashudi – deceased and Mwaga Mashudi Chete (accused) were brothers. The people were drinking palm wine. The brothers were sitting together and were talking. PW1 realized that these brothers could quarrel. PW1 told them to go home but the men continued to address each other threatening and accusing each other of witchcraft. Evidence is that after this exchange, accused jumped as if he would attack the deceased but PW1 tried to hold him back when he was resisted by the accused who cut his finger with the knife. Then PW1 released accused. It is PW1’s evidence that it was the accused who stabbed the deceased on the chest and on the stomach and on the back. The pathologist Dr Mandalya confirmed these wounds and his conclusion was that the death was caused due to the deep cuts and stab wounds to the body. Postmortem report is exhibited as exhibit 2.

Evidence is that after accused stabbed the deceased with a knife he returned the knife to the sheath and ran away. Other people in the drinking den left and a Mkokoteni was obtained to take the deceased to hospital but death occurred before reaching the hospital. The prosecution evidence is not controverted and the witnesses who accompanied the court impressed the court as trustworthy and reliable.

There is evidence that when the accused arrived at the drinking den he looked like drunk and he found deceased drinking and joined him.

In his defence the accused who was ably defended by counsel made an unsworn statement. He said that on material day he went to drink palm wine where he found Ndegwa Kibao and others. He was very

drunk. He said he had no intention to kill any of his brothers but had a grudge with PW1 in regard of a shamba in dispute. He further said he was arrested after 8 months (12/3/2003) to 22/11/2003) of the offence and when he met the police they asked for sh. 10,000/= which he failed to pay and that is why they arrested him. He explained his absence by saying he got a job for selling things.

This statement is unbelievable. He places himself at the drinking place on the 12.3.2003 but states he learnt of the incident on the morning of 13.3.03 and he denied that he ran away. It is clear that he was at the drinking place as witnesses who were present state. He mentions the names of persons who have been mentioned by prosecution as having been at the scene at the material time. The court finds that the defence of the accused does not in any way affect the prosecution evidence.

Furthermore, the court finds that the accused inflicted the wounds and injuries that caused the death of the deceased as the pathologist confirmed. However the circumstances surrounding the commission of the offence indicate that there was liquor drinking. The accused himself raises the issue of having been too drunk. There is no clear evidence to contradict this allegation, seeing that the incident took place in a palm wine drinking den.

In the circumstances, doubt is created whether the accused stabbed his brother intentionally or unlawfully.

I have no doubt that the accused did stab the deceased and that it is the result of these injuries that caused the death immediately as the deceased was being taken to the hospital, however it is doubtful if the accused acted intentionally or he was so drunk as not to know what he was doing. There was no evidence on this point. The accused was not arrested until after about 8 months.

I therefore find that the accused did not intentionally commit the offence as charged. However there is adequate evidence that he did inflict stab wounds on the deceased from which death occurred. This was unlawful act and under Penal Code Section 202 read with Section 205 thereof, I find the accused guilty of manslaughter and I hereby convict him accordingly.

Mr Chuphiza address to the court in the sentencing:

Accused is a young man 48 years married to two wives with a total of 7 children most at tender age. All the family relies on the accused person. We request for lenient sentence.

Mrs Mwangi:

This is a serious offence. The family of deceased is also suffering. Consider appropriate sentence. He should be treated as a first offender. We have no record of his previous convictions if any.

Court:

On taking consideration of the mitigation and the expressed view by the state, the offence of manslaughter is very serious. A person's life was lost by the unlawful act of the accused. I therefore consider that an appropriate sentence is called for.

I do not fail to consider that the accused has been in custody since November 2003. I therefore sentence accused to serve imprisonment for five (5) years from today.

Dated the 14th September 2006.

J KHAMINWA

JUDGE