



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MALINDI

Criminal Case 22 of 2005

REPUBLIC.....PROSECUTOR

VERSUS

- 1. KARISA HARRISON**
- 2. JUMA KALUME NDORO**
- 3. CHARO GONA NDORO**
- 4. MWALIMU THABU KARISA.....ACCUSED**

JUDGMENT

The accused persons are charged jointly with murder contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars of the offence are that on 29th September, 2004 at Matsangoni the four accused persons jointly murdered Karisa Kahindi Kadenge.

Evidence was led to the effect that the deceased who was a boyfriend to Pw1 Zawadi Safari (Zawadi) joined her at a certain home where she was selling palm wine on the evening in question. While so engaged the accused persons jointed them and the 1st accused who was formerly Zawadi's boyfriend was not pleased when he called Zawadi but the latter showed no interest. The 1st accused then hit her prompting the other accused persons to start a fight with the deceased for no apparent reason. According to Zawadi the accused persons attacked the deceased with a knife causing injuries to his head and palm. This incident is said to have taken place in home of the parents of Furaha Rashid, Pw2 (Furaha) Furaha, on her part narrated how on the fateful night she was preparing an evening meal while Zawadi in the company of the deceased was selling palm wine. That at some stage the two left the homestead. Shortly thereafter the accused persons passed by greetings and proceeded towards the direction taken by Zawadi and the deceased.

Furaha retired to bed but was woken up by her sister Benderea who informed her that there had been a road accident in the neighbourhood. Zawadi was present and confirmed to Furaha that indeed a certain man had been knocked down by a motor vehicle. But when Furaha got to the scene she recognized the victim as the deceased. The area chief was alerted about this matter and on his part he reported to the

police. Traffic police officers came to the scene following the report that it was a road accident but while removing the deceased noticed an injury on the deceased person's head. They were of the opinion that death may not have been caused by a road accident. Investigations and the scene was handed over to the investigative branch of the police.

Dr. Dickson Mtungi Mwakangale conducted the post mortem examination on the body. He observed that the body had a bruise on the right shoulder, a dislocation of the backbone near the skull and a penetrating injury measuring 3 cm deep on the occiput region.

The cause of death in his opinion was cardiopulmonary arrest due to a fracture of the backbone at the base of the skull.

The accused persons gave unsworn testimony. Each one of them confirmed that they were together on the evening in question having attended a gospel crusade, from where they walked home, passing through Furaha's home and after one kilometer parting company to their respective homes. The following day, they said, they heard of a road accident which was said to have occurred the previous night. In the months of July and August 2005, approximately one year later, they were arrested and charged with murder. I have duly considered the foregoing evidence. Whereas there is medical evidence that the deceased died of injuries to the backbone, the central issue is whether the accused persons having common intent jointly inflicted those injuries and whether in doing so they had malice aforethought.

The only evidence is that of Zawadi. According to her there was a fight at Furaha's homestead in which the accused persons attacked the deceased and stabbed him with a knife. Although she was firm that she saw and recognized the knife as that of the 1st accused, she was unable to say who among the four accused persons actually stabbed the deceased.

It is also strange that although in her testimony she was categorical that apart from the four accused persons, the only other people who were present at the scene was herself, the deceased and Furaha. However on cross – examination Zawadi moved the scene from Furaha's homestead to the road although she maintained that the fight started at Furaha's homestead and the final blow was delivered near the main road. That version cannot be correct for two reasons. First Furaha did not witness any fight.

A fight involving five men and lady would be ferocious and noisy and Furaha would not have failed to notice it.

Secondly, if indeed the fight took place in Furaha's presence why was it necessary to inform her about an accident; why was she told that somebody not even the deceased who was a close friend to Zawadi had been knocked down by a motor vehicle.

The testimony of a single eye witness must be cautiously treated. Although there can be no doubt that Zawadi knew the four accused persons prior to the day in question, it is highly doubtful that she told the court the truth of what transpired leading to the death of the deceased.

It is unbelievable that she would be in a position to identify a small knife at night and be categorical that it belonged to the 1st accused without seeing who held it.

With the conflicting evidence, it cannot be said that the prosecution has established a case against the accused persons beyond any reasonable doubt.

All the three assessors returned a unanimous opinion that all the accused persons are not guilty of murder. That there was no evidence linking them with fatal injury from which the deceased died.

I respectfully agree with that opinion. I find that the prosecution has failed to prove the charge of murder against the accused persons and for that reason they are acquitted and will be set free unless lawfully held.

Dated and delivered at Malindi this 7th day of November, 2006.

W.OUKO

JUDGE

7.11.06

Coram

W. Ouko, J.

Mr.Angima

Mr.Ogoti/Miss Amenge

Assessors

Accuseds

CC: Gladys

Judgment delivered.

W.OUKO

JUDGE