



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL DIVISION

CRIMINAL CASE NO. 19 OF 2004

REPUBLIC.....PROSECUTOR

VERSUS

KENYA CHEA THOYA.....ACCUSED

JUDGMENT

The accused, Kenga Chea Thoya is charges with the offence of murder contrary to Section 203 as read with Section 203 of the Penal Code.

The particulars of the charge are that on 17th October, 2004 at Gede Village – Mtangani Location – Kilifi the accused murdered the deceased, Kauchi Katana Kitoo.

Evidence of PW1, Saumu Karisa Katana was that on the day in question at 9 am while walking to church with the deceased, they were confronted by the accused, who emerged from a thicket. He ordered the deceased who was his former wife to give to the witness the child she was carrying. When the deceased did not respond immediately the accused began to cut her with a panga. On seeing this the witness ran to the mother, Mwenda Karisa Katana, PW2 – who was walking behind them. When PW2 got to the scene, the deceased was already dead with PW1’s child strapped on her back. She unstrapped the child and returned home, leaving the deceased’s body at the scene. She informed her husband, who in turn went to make a report to the area Assistant Chief Charo Koto (PW 3). PW 3 informed the accused’s brother about the incident and the brother, Changara Cheya, PW4 undertook to look for the accused. On the fourth day after the incident at 3 am the accused went to PW 4’s house. PW4 persuaded the accused to come with him to the police station where he was arrested.

Dr.Eric Mutua conducted the post-mortem examination on the body of the deceased. He noted two injuries. The head had deep lacerations on the skull with compound fracture of the skull. The second injuries were on the limbs. The left hand was almost amputated there were lacerations on the right hand.

Death, in his opinion was caused by severe brain injury and fatal haemorrhage from the cut wounds on the wrist.

In his unsworn statement in defence the accused stated that on the 16th October, 2004, a day prior to the incident, he had gone to the forest to collect timber, which were to be picked up by a lorry on Monday. He returned home on Tuesday to find his family in a state of worry as the Assistant Chief had gone to his home to look for him in connection with the murder of the deceased. He went to his brother who clarified why he was being sought for by the Assistant Chief. His brother took him to the police station where he

was arrested and charged later with the offence under investigation.

I have carefully considered the evidence tendered in this trial. I have equally considered the submissions by both counsel for the state and the accused.

The deceased person's death was caused by multiple injuries on the head and hands. The first matter for my consideration is whether the accused was responsible for inflicting these fatal injuries. There was only one eye witness. The Court, in dealing with the evidence of one eye witness, whether that evidence is a visual identification or recognition, must examine the same very carefully to ensure that any possibility of error is eliminated.

In the case of **Cleophas Otieno Wamunga Vs. Republic** Criminal Case No. 20 of 1989 at Kisumu, the Court of Appeal observed as follows:

“Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whether the case against the defendant depends wholly or to a great extent on the correctness of one or more identification of the accused which he alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification”

PW 1 was in the company of the deceased walking to attend a church service. She saw the accused emerge from a thicket with a panga in his hand. He asked the deceased, two times, to hand over the baby she was carrying to pw1. When she did not heed, the accused began to slash her with a panga. The incident took place at about 9.00 a.m. The accused was well known to the witness having been married to the deceased, who was an aunt to the witness. The accused also lived in a nearby home to that of the witness. The witness, in my opinion had sufficient opportunity to see the accused. The conditions for identification were favourable. It was in the morning at 9 am and present at the scene were only the deceased, the accused, the witness and two toddlers who were being carried by the witness and deceased.

The accused was known to the witness prior to the incident. The witness was able to recognize him. There could not have been any mistake on the part of the witness as to the identify of her aunt's assailant.

The accused raised a defence of alibi. In the light of what I have stated above, that defence cannot be available to the accused. The prosecution had tendered sufficient evidence to negate that defence. It is unreliable and untrue. I find that the accused was responsible for the fatal injuries inflicted on the deceased.

The accused person armed himself with a panga and laid an ambush for the deceased, from whom he had been separated. The nature of injuries on the body of the deceased, particularly on the head and hands point to the fact that he struck her several times. This can only mean that he intended to cause her death.

The first and third assessor returned a verdict of guilty of murder, while the second assessor returned a verdict of not guilty. The second assessor reassured that the accused having separated from the deceased who was an aunt to PW1, the latter told the Court falsehood due to bad blood between the two families. Secondly, he was of the opinion that PW1 did not have the opportunity to clearly identify the deceased's attackers as the attacked emerged suddenly and that she must have been in a state of fear.

Finally the second assessor expressed the view that due to the accused person's innocence he simply walked to the area Assistant Chief to inquire why he was being sought.

As I have already indicated PW1 had the opportunity to recognize the assailant who was known to her for several years. No evidence was led of the bad blood between the families. The accused did not voluntarily walk to the Assistant Chief. He was tricked by his brother. He had stayed away from home for nearly 4 days after the incident and only returned home at ungodly hour at 3 am on the 4th day.

For the reasons stated in this decision, I find the accused person guilty of murder as charged, convict him accordingly and sentence him to suffer death in accordance with the law 14 days right of appeal explained.

Dated and delivered this 28th day of July 2005 at Malindi.

Present

Mr.Okuto for accused.

Mr.Ogoti for state

All assessors

C.C.Gladys

Accused

W.OUKO

JUDGE