



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MALINDI

Criminal Case 6 of 2003

REPUBLIC.....PROSECUTOR

VERSUS

NYAMAWI MUNGA KANYAE alias KITSAO

MATANO DANIEL BARAWA alias CHANJO.....ACCUSED

JUDGMENT

The accused persons, Nyamawi Munga Kanyale alias Kitsao and Matano Daniel Barawa alias Chanjo, are both charged with murder contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars of the offence are that on that night of 14th and 15th September, 2002 at Kizingo Village in Mwarakaya Location – Kilifi jointly murdered Richard Mwatsuma.

To support the charge against the accused persons the prosecution called 19 witnesses. Both accused persons gave unsworn evidence in defence. The facts of the case as told by prosecution witnesses are that the two accused persons and the deceased went to for a drink separately at Kaluwanyale's (PW 3) home. Also present were Ngala Mwalungu Ngala (PW 9) and Nelson Chidzodi Mzungu (PW 9) – among others. Before going to PW 3's home the deceased had arrived at his home from work in the company of 2 unnamed persons who he left with his 12 year old son, Mwakai Mwatsuma Mlai (PW 13) while he went to buy palm wine for them. He bought several bottles (4 to 6) of palm wine, some of which he emptied in a jerry can which he took away with him. The deceased, after buying palm wine did not return home immediately. He settled to drink until his guests who were waiting for him at home had to leave at 6 pm having waited from 5 pm.

The deceased, on arrival at Kalu's home joined the two accused persons who had arrived separately but before him. PW2 left ahead of the deceased and the two accused persons. The witnesses who were present, heard the accused persons offer to take the deceased home. The same evening after the three had left Kalu's home, the two accused persons were found, without the deceased, having a drink under a cashew nut tree at about 8 pm by Gambo (PW 14). The body of the deceased was to be found the following day 10 metres away from the spot where PW 14 had seen the two accused person the previous night.

The matter was reported to the area Chief – Anthony Kazungu Albert (PW 7) and his assistant, Daniel Mwanje Mwazoa (PW 6) who in turn made a report of the incident to the police. P.C. Keya Rashid (PW 19) in the company of other police officers went to the scene and collected the body and exhibits. Dr. Michael Peter Mwita conducted post-mortem examination on the deceased person's body. He

observed that the body had a penetrating wound on the left side of the chest through the third rib measuring wide. The heart was pierced. There was a fracture of the lower jaw and a fracture of the spine. He attributed the death to massive haemorrhage due to the penetrating wound.

Further evidence was adduced to the effect that PW 2 having told the police that the two accused persons were the last people to be seen with the deceased he started to receive threats, which he reported to the area Chief. The two accused persons were arrested by APC Rama Juma (PW 10) and APC Nicholas Buko Buya (PW 11). Nearly three years prior to these events, the deceased had testified in a Kaloleni court where the 2nd accused was charged with assault and eventually sentenced to 12 months imprisonment. When the 2nd accused was finally released, it is alleged that he threatened the deceased who reported this to a village elder, Benedict Munga (PW 8). In his defence the 1st accused confirmed having gone to Kalu's home for a drink. That while there the 2nd accused arrived and shortly afterwards the deceased also came. That the three of them drunk until about 7 pm when they all left together. 20 m out of Kalu's homestead the deceased took the road leading to his home while the two accused persons took a different route to their respective homes. Another 20 m from the point where they parted ways with the deceased, the accused persons went separate ways leading to their respective homes. The 2nd accused on his part told the Court in his defence a similar version as that of 1st accused. He, however, denied issuing threats to PW 2 or to the deceased over the Kaloleni Court trial.

I have considered the evidence adduced by the prosecution and defence in this matter. There is no dispute that the accused persons and the deceased had a drink together at Kalu's home. There is also no dispute that the three left together. The deceased did not reach his home. His body was found the following day on a footpath leading to his home. The two accused persons maintained that they went a different route from that taken by the deceased. There is no direct evidence as to how the deceased met his death. His body had multiple injuries and he bled to death. The case therefore revolves around circumstantial evidence.

The Court will only rely on circumstantial evidence to support a conviction of an accused person if the evidence points irresistibly to the accused person's guilt to the exclusion of everybody else. Before drawing the inference of the accused person's guilt from circumstantial evidence, the court must be sure that there are no other co-existing circumstances which would weaken or destroy the inference of the accused person's guilt. See *R.V Kipkering arap Koske & Another (1949) 16 EACA 135*, *Simoni Musoke V R (1958) EA 715* and *Kimeu V R (2002) 1 KLR 756*. Does the evidence point irresistibly to the guilt of the accused persons?

To begin with, it was the evidence of PW 2, PW3, PW4 and PW5 that they all heard the two accused persons offer to walk the deceased with his jerry can containing palm wine as they left. They had made it clear that they were going to see the deceased brother, Katana Mlai for some job. The three left together.

In Criminal Cases the burden is always on the prosecution to establish the guilt of the accused beyond any reasonable doubt – and as a general rule the accused has no burden to discharge. But as was held in *Mkendeshwo V Republic (2002) 1 KLR 461*, in certain limited cases the law places a burden on the accused to explain matter which are peculiarly within his own personal knowledge. This is the import of Section 111 of the Evidence Act. It must, however be noted that the standard of accused's burden is on a balance of probabilities. Where the accused fails to discharge that burden, then the Court would be justified under Section 1119 of the same Act, to make a presumption that the accused knew the facts he ought to have proved.

In the instant case the accused persons have explained how they parted with the deceased. Have they discharged the burden as set out above on a balance of probabilities? I do not think so. They were to take the deceased home. What happened? They have not explained. Secondly from circumstantial evidence, the two were seen by PW 14 at 8 pm enjoying a drink under a cashew nut tree. This was shortly after the two accused persons left Kalu's home with the deceased at about 7 pm. I am satisfied that PW 14 was able to identify the accused persons. They offered him a drink which he declined. Both the 1st and 2nd accused are PW 14's nephews the sons of his brother. He therefore knew them and was familiar with

their voices. There was bright moon light. The body of the deceased was to be found the following day some 10 meters from the cashew nut tree where Pw14 had seen the two accused persons having a drink, which most probably belonged to the prosecution also called further evidence to show motive. For instance, it was alleged that since the deceased testified in the Kaloleni Court case against the 2nd accused, the latter has been issuing threats to him. The first threat was recorded by PW8 – the village elder. It was to the effect that on 26th November 2001 at between 4.00 am. And 5.00 am while walking home, the deceased noticed a young man following him. He identified him as the 2nd accused, who in turn told him that he would finish him. Because the deceased had a stick the young man did not go close to him. It is trite law that motive is an important element in the chain on presumptive proof and where a case rests on purely circumstantial evidence and may be drawn from facts, through proof of it is not essential to prove a crime. See Section 8 of the Evidence Act.

Although the 2nd accused denied nursing a grudge against the deceased for having given evidence in which he was jailed for 12 months. I am of the view that he had not forgotten it.

I am persuaded that the two accused persons acting in concert with common intention drunk with the deceased and did not mean to walk him all the way home. Their intention was to cause his death. After doing this both settled down to celebrate with the deceased person's palm wine. From the kind of injuries inflicted on the deceased there is no doubt that they intended to cause his death. After doing this both settled down to celebrate with the deceased person's palm wine. From the kind of injuries inflicted on the deceased there is no doubt that they intended to cause his death.

I am not persuaded by their respective defence which I hereby reject as untruthful. I am in agreement with the unanimous opinion of the three assessors that the accused persons are guilty of murder. I find that two accused persons guilty of murder, convict them accordingly and sentence each of them to suffer death in accordance with the law.

Right of Appeal within 14 days.

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

W.OUKO

JUDGE