



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MALINDI
CRIMINAL CASE 20 OF 2004

REPUBLIC.....PLAINTIFF

VERSUS

WAZIRI KAHINDI THOYA.....DEFENDANT

JUDGMENT

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

The particulars of the offence are that on 31st July, 2004 at about 22.00 hrs at Msangomali village – Kilifi, the accused murdered Charo Kitsao.

In proving the charge the prosecution called eight witnesses and the accused elected to remain silent. On the fateful night, the Court heard, Mramba Mitsanze (PW4) heard an argument near his house. He heard a person say “he wanted to finish him but I have finished him”. He came out and saw the accused, who he confirmed was saying the above words. The accused was carrying a piece of timber which was blood stained.

More or less at the same time, Jumaa Joseph Kenga (PW 3) while on his way to a local kiosk met with the accused who was carrying a piece of timber. He also noticed that the timber had blood.

The body of the deceased was found shortly afterwards with a smashed head. After the matter was reported to the local administration, a manhunt for the accused was launched. Towards the morning the accused was traced and apprehended by the villagers. His clothes were blood stained. A piece of timber was recovered hidden in his home.

He was taken to a Psychiatrist. Dr.Mwangome who on examining the accused found that he was suffering from psychosis. He observed that the accused was disoriented. For example he claimed he was a police officer and the police officer who had escorted him to the psychiatrist was a labourer in Vipingo. The doctor concluded that the accused was suffering from severe mental illness. Meanwhile post-mortem examination was conducted on the body of the deceased by Dr.K.N.Mandalya, who noted that the deceased person’s head on the left side was completely crushed. This caused bleeding over the brain, which in turn caused the deceased person’s death.

As I have already indicated the accused person elected not to adduce any evidence in defence.

I have carefully considered the evidence on record as well as submissions by both counsel for the state and accused.

The incident under investigation took place at about 10.00 pm. There is no direct evidence linking the

accused with the murder of the deceased. Evidence adduced was merely circumstantial.

For a Court to rely on circumstantial evidence to found a conviction, that evidence must, of necessity point irresistibly to the guilt of the accused person to the exclusion of any other person. At the same time there must not be co-existing circumstances which would tend to weaken or destroy the inference of the accused person's guilt.

The circumstantial evidence adduced in the instant case is that on the fateful night at 9 pm, Mramba Mitsanze (PW4) heard people abusing each other and one saying "he wanted to finish me but I have finished him". On coming he saw the accused. He saw him well with the aid of moonlight and head lights from two motor vehicle at the vicinity. He saw the accused, who was about 10 m from him carrying a piece of timber which he identified in Court. His clothes were blood-stained. The same night the police took the witness with others to the scene where the deceased person's body was lying. More or less at the same time, Jumaa Joseph Kenga (PW3) met with the accused (at 9 pm) the accused, who was talking to himself was carrying a piece of timber, which the witness identified in Court. He saw blood stains on the timber. He also confirmed that there was moonlight. He saw the accused at a range of 10 m. The blood stained timber was recovered from the home of the accused person.

There is no doubt that Mramba and Jumaa who knew the accused saw him on that fateful night carrying a blood stained piece of timber. The accused had blood all over his face and on the clothes.

Shortly afterwards the deceased body was found with crushed head. All this took place almost simultaneously. Then the same night the timber the accused had been seen carrying was recovered in his home. This evidence, in my opinion, points irresistibly to the accused person. I find no co-existing circumstances in the case which weakens the evidence against the accused. He was at the scene. The witnesses, Mramba and Juma did not see anybody else at the scene. The next matter is whether the accused had malice aforethought.

It was submitted by learned counsel for the accused that the accused was suffering from a disease of the mind at the time of the incident. That he was not responsible for his actions.

John Baya (PW2), who is a cousin to the accused and Mramba (PW4), who was the accused person's grandfather, both confirmed that the accused had, for some time suffered from mental illness. Dr.Mwangome, the consultant psychiatrist confirms that the accused suffered from severe mental illness called Psychosis. He examined the accused ten days after the incident.

A defence of insanity is available to an accused person who proves, on a balance of probability that due to his state of the mind he did not know what he was doing at the material time, or that what he was doing was wrong and so he could not have formed the intent to kill the deceased. See **Marii V R** (1985) KLR 710. I am satisfied from the evidence adduced that the accused had been suffering from mental illness. That on the material evening he was still suffering from this illness. I am persuaded that at the time he committed the act causing the death of the deceased, the accused was not responsible for his actions. There was no evidence of any misunderstanding between himself and the deceased. It is therefore clear that in attacking the deceased, the accused person did not know what he was doing or even that what he was doing was wrong.

The 2nd and 3rd assessors' opinion was that the accused is guilty. They however, did not consider the summing up that if they were satisfied that the accused was insane at the time of the incident, their finding would be that he is guilty but was insane.

The 1st assessor was of the opinion that the accused is not guilty on account of insanity. Again once it is shown that the accused was insane when he committed murder, it follows that he is guilty.

I make a special finding that the accused is guilty of murder but was insane in accordance with Section 166(1) of the Criminal Procedure Code. This finding will be reported for the orders of H.E. the President. Meanwhile the accused will be detained in prison.

Fourteen days Right of appeal explained.

Dated and delivered at Malindi this 5th day of October, 2005.

W.OUKO

JUDGE

5.10.2005

Coram

W.Ouko, J.

Mr.Shujaa for accused

Mr.Ogoti for the state.

CC: Gladys

All assessors present.

W.OUKO

JUDGE