



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL CASE NO. 27 OF 2000

REPUBLIC PROSECUTOR

- VERSUS -

SHIDA NGUMBAO KAGOMBO ACCUSED

J U D G E M E N T

The Charge facing the Accused person in this case is Murder contrary to Section 203 as read with Section 204 of the Penal Code, Cap. 63 Laws of Kenya. Section 203 states:

“Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.”

The particulars of the charge are that:

“SHIDA NGUMBAO KAGOMBO

On the 11th day of November, 1999 at Kazimbiji Village in Ganda Location within Malindi District of the Coast Province, murdered one

JAMES KARISA MAKANGA.”

The following 11 witnesses gave evidence to prove that charge beyond reasonable doubt:-

PW1 KADZO NGUMBAO (Kadzo)

The younger Sister of the Accused who was staying in the house of her deceased parents although she was married. The Accused also stayed there.

She was present when the Police and the Accused collected the clothes the Accused was wearing on the day of the alleged murder.

PW2 KATSOZI D/O BAYA (Katsozi)

The Sister-in-law of Accused married to the Accused’s elder brother PW3 Kenga. She was present when police and Accused went to her house and took her husband’s panga, the alleged murder weapon, from under their bed.

PW3 KENGA NGUMBAO KAGONGO (Kenga)

The elder brother of the Accused and cousin of the deceased who arrived at the scene of the killing from a Mnazi drinking den at 9 p.m. and found Police already there. He was among the relatives who accompanied the body to the mortuary and received it for burial. He identified the panga picked from his house as his own. He was also one of the 10 or so relatives summoned by the Assistant Chief and 7 of them locked up as suspects by the police.

PW4 CHARO KITSAO KAMBI (Charo)

Nephew of the deceased. He saw three boys beating drums at the deceased's home announcing to the entire village that the deceased and his mother were wizards/witches and would be given one week and then pangas and hammers would be used on them.

The following day at 7 p.m. he heard screams from a person in distress and on going there found his uncle the deceased cut down and bleeding. Other relatives came and a report was made to the police. He identified the body for Post Mortem.

PW5 KAHINDI KALAMA NZARO (Kahindi)

The deceased's neighbour who witnessed the beating of the drums (kupiga Mkokoto) at the deceased's home by the three boys who said they would kill and burn the houses of all witches. He and the deceased reported the incident to the Chief. The deceased was killed the following day.
PW6 DR. CHARLES MWANGOMBE (Dr. Mwangombe) The psychiatrist who examined the Accused and determined he was fit to plead.

PW7 PC GABRIEL KHAEMBA (PC Khaemba)

The Investigating officer from Malindi Police Station who received the report of the Murder at 8.45 p.m. and went to the scene and found the body of the deceased. He drew a sketch plan and collected the body. He interviewed suspects and accompanied the Accused to collect clothes and panga. He produced several other exhibits.

PW8 EDWARD KARIITHI MWIRICHIA (DR. MWIRICHIA)

The Medical officer of Health (MOH) Malindi who carried out the Post Mortem of the deceased's body and produced the report as Exhibit 8.

PW9 IP EDWARD MARAMBI (IP Marambi)

The Deputy O.C.S. Malindi who recorded the Charge and Cautionary Statement on 29.11.99 from the Accused. It was admitted in evidence after trial within trial as Exhibit 9.

PW10 IP JUSTUS KITETU (IP Kitetu)

Malindi Police office who received a statement under Inquiry from the Accused on 20.11.99. It was produced in evidence after Trial within Trial as Exhibit 10.

PW11 DR. FRANK MWANGEMI (Dr. Mwangemi)

Malindi Hospital Doctor who examined the Accused on 22.11.99 and certified a P3 Form produced as Exhibit 7. There is find no difficulty in determining the fact of death and the cause of it. For that there is the eye-witness account of Charo PW4 who was at his house at 7 p.m. when he heard screams from a person in distress:

“Nauwawa, kuja msaidieni, kujeni”.

He headed there and found it was the deceased lying down with blood flowing from his body. He was alive still but could not talk. Charo was accompanied by his two sisters and soon other relatives arrived at the scene. Many of them did not testify. It was dark and raining but they tried to assist the deceased to hospital by carrying him on a bed but they could not manage. Instead he and others rushed to the Police at Malindi Airport. On returning with police they found the deceased had died. He later identified the body for Post Mortem and received it for burial. The other relative who testified as having seen the deceased's body was Kenga PW3. He was returning from a Mnazi drinking spree at about 9 p.m. when he heard screams from 250 metres away and saw motor vehicle lights. He went there and found a gathering of people on the side of the road. Police were there. He saw a body on a bed and recognized it as his cousin's, the deceased. One of the policemen at Malindi Police Station who received the report at 8.45 p.m. by telephone from Airport police was PC Khaemba PW7. Within 10 minutes he was at the scene which was about 5 kilometres away. He found the body of the deceased in the middle of a feeder road serving the village only 50 metres from the deceased's home. He was the investigating officer in the Case. He collected the body to Malindi District Hospital mortuary and arranged for a Post Mortem the following day 12.11.99. It was performed by PW8 Dr. Mwirichia at 10.45 a.m. before releasing it to the relatives for burial the same day. I find that one James Karisa Makanga died.

As for the Cause of death the four witnesses who saw it and testified related the injuries they saw:

PW3 Kenga saw:

“ cuts on the arm, shoulder, head, back ”

PW4 Charo:

“Cut on the head, hands and body .”

PW7 PC. Khaemba:

“Several cuts on the left hand, fingers were slit .” Blood was oozing from the head. They were inflicted by a sharp object like a panga or knife.”

PW8 Dr. Mwirichia observed:

“A male African middle aged of good nutrition and physique. He was 1.8 metres tall. He had a shirt and trousers but the skin was peeling off due to Post Mortem changes. On the head region there were three deep cuts: -

(i) Deep cut approximately 10 cm x 10 cm at the base of the skull (Occipital area) and upper cervical neck. It went through the skull and brain exposing the brain tissue.

(ii) Deep cut approximately 15 cm x 8 c.m. on the parietal region of the skull penetrating into the brain. It cut across from ear to ear through the skull and brain.

(iii) Deep cut approximately 5 x 5 cm on the cervical area. It cut the neck anteriorly.

On the upper limbs: Right: Deep cuts slashing the two bones of the right hand . Left: Numerous cuts on the fingers.”

The injuries were about 24 hours old and he came to the conclusion that the cause of death was due to penetrating deep cut to the base of skull in the area of Medulla oblongata/cerebellum with severe haemorrhage from the deep cuts. In his opinion the injuries were caused by a sharp object. His report was produced as Exhibit 8. I accept the professional opinion of the Pathologist.

The more difficult question to decide is who caused those injuries and if it was the accused person, whether he did so of malice aforethought.

None of the witnesses gave any direct evidence that they saw the Accused committing the offence. What is relied on is circumstantial evidence. The other evidence that is relied on are two extrajudicial statements recorded from the Accused: that is; and statement under Inquiry recorded by PW10 IP Kitetu and a Charge and Cautionary Statement recorded by PW9 IP Marambi. The Accused denied in court that he had voluntarily made those statements and a trial within trial was held. In each case the statement was admitted in evidence and I reserved the reasons for that decision which I will give presently. It meant however that for the statements to acquire probative value there must be other independent evidence corroborative of it or unless the court for reasons to be stated believes it cannot but be true. What independent circumstantial evidence is relied on?

The deceased's Nephew PW4 Charo stated that he was present at some funeral of his grandmother some one week before the deceased was killed and overheard someone he could not recall say,

“after digging that grave they would dig another grave for Karisa Makanga (the deceased) because he was a wizard”.

The deceased was there at the time as well as other elders. One week later Charo saw three young men whom he said came to the deceased's home. The three were:

1. Kiingi Charo
2. Bahati Kaingu
3. Bahati Maro Machonga

They were hitting a drum and announcing to the entire neighbourhood that Karisa Makanga (the deceased) was a wizard and his mother was a witch. The three gave the two one week otherwise they would start using pangas and hammers. The three went round to other homesteads in the village and the deceased went to report the matter to the Chief. The other witness who saw the three boys beating the drum at the deceased's home before they went to his homestead was PW5 Kahindi. They came at 7 p.m. on 10.11.99. Kahindi however gave the names of the three as:

1. Kingi Charo
2. Kiingi Maro Kicheru
3. Bidii Kaingu Kazungu Chweya

The beating of the drum is a Giriama traditional manner of warning witches known as **“Kupiga Mkokoto”**. Kahindi also joined the deceased and they reported to the Chief. He was positive that the Accused was not among those who were beating the drums and announcing to the neighbourhood. The Accused was not related to those boys either. In his recollection the three boys were arrested by the police when the deceased was killed the day after their drum-beating.

As no one knew or saw who had killed the deceased, the Acting Chief of the area wrote letters which were distributed to more than 10 relatives of the deceased summoning them to his office. On arrival at the Chief's Office they were taken to Malindi Police Station where some were released but 7 of them were locked up as suspects. That included the Accused's brother Kenga PW3. The Accused did not receive his letter in time because the family had sent him to Gongoni area to report the death to other relatives there. He returned on the third day when he was given the letter and he went to Malindi Police Station where he was also locked up.

For eight days they were interrogated and recorded statements. For those days they were in custody, the sister of the Accused, Kadzo PW1, and the wife of Kenga, Katsozi PW2, were taking food to them.

On one of the days according to Kadzo, she arrived at the Police station to take food when one police

officer told her to go back home and bring the Accused's clothes. She had not spoken to the Accused before then. Then the police officer took her, the Accused, another police officer and the Assistant Chief and they all went together to the house she was staying in. It was also the house the Accused was staying in since it belonged to their deceased mother. The accused's own hut had collapsed. There were also other sisters and brothers living there.

The Accused's clothes were on a line inside the house and the Accused showed the police the clothes. They were the ones he was wearing on 11.11.99, the day of the alleged Murder. She identified the trouser which was shown to her in court but not the shirt which was not. She checked them at the house and there was nothing unusual about the clothes. In particular they did not have blood stains. She put them in a bag and the police took them.

Katsozi was also taking food to her husband and brother-in-law daily. She was there one day when a police officer approached her and told her to accompany them back to her house. She had not spoken to her husband or the Accused. Then two Police Officers, the Assistant Chief, the Accused and herself went to her house. The Accused went into her house and from under their bed he took out a panga and gave it to the police. It was her husband's panga – a sharp and long one given to him by his employer for cutting grass. Katsozi would also use the panga and she had seen it on 11.11.99 as it was normally kept under the bed or on top. Her brother-in-law, the Accused, was free to enter the house as it belonged to his brother. But she did not see him enter on 11.11.99. Katsozi saw the panga as it was being given to the police and it was not stained. Kenga whose panga it was said it was the only panga in the house and he had not used it for 5 days before his arrest. His wife sometimes used it to cut firewood. The Accused, as his brother can take anything from his house and use it but inform him. It is the police who asked him whether he had a panga and he confirmed he had one in his house. They wanted to know if it was blood stained. He had been arrested as a suspect.

The police account on the recovery of those items was materially different from Kadzo's and Katsozi's.

The Investigating officer PC Khaemba PW7 confirmed that he had locked up 7 suspects out of the number of relatives, brothers and cousins of the deceased taken there by the Assistant Chief. In the course of interrogations and the recording of statements he saw the Accused's statement under Inquiry stating that he was ready to produce the Murder weapon.

On 18.11.99, the Accused volunteered to take the police to his residence. He, the Accused and another police officer then took a car and went to the Accused's home. There they found his Sister-in-law Katsozi whom they requested to open the house for the Accused to collect the weapon. He entered the house alone as they all stood outside. It was at 11 a.m. when the Accused pulled out the panga from under the bed and gave it to PC Khaemba. It had no stains. According to PC Khaemba, Katsozi did not know the panga was there. From there they were led by the Accused to the house of her sister, Kadzo about 200 metres away. The sister was in the house and she confirmed the Accused was her brother. He went into the house with the sister and PC Khaemba and gave them a shirt and trousers which was blood stained. Although PC Khaemba could recall that Kadzo www.kenyalawreports.or.ke 14 and Katsozi used to visit the Accused and PW3 in custody, he denied that on the day of the recovery of the items they were there and insisted that he found them at their respective homes. He also stated that the clothes recovered were in a black paper bag hung on a wall and not on a line. The panga was in the open under the bed not in a mattress. There is further evidence by the investigating officer that he took the blood stained shirt to the Government Chemist who confirmed that the blood group was that of the Accused and there was none of the deceased. The report is Exhibit 5(a) and 5(b). The shirt was torn up and was not produced as an exhibit. The panga was produced as **Exhibit 6**. It had no blood stains.

PC Khaemba also testified that as soon as he arrested the Accused, he noticed that he had a small injury on his right hand finger tips. It was a fresh wound. He prepared a P3 form and took him before Dr. Mwangemi PW11 on 22.11.99. That was about 11 days after the incident and about 7 days after the Accused was placed in custody on 15.11.99. Dr. Mwangemi found a small infected cut wound on the right index finger and some bruises on the middle right finger. There was no other injury. He placed the age of the injuries at 11 days. When he asked the accused how he suffered the injury the Accused said he

got it in while he was in police custody. The report was produced as **Exhibit 7**.

Three days later PC Khaemba took the Accused before Dr. Mwangombe PW6, the Psychiatrist who confirmed that he was fit to plead. Dr. Mwangombe did not check whether the Accused had any physical injuries and would have noticed any obvious ones. No complaints were made to him about physical injuries and he only dealt with mental assessment. His report is **Exhibits 3**.

Finally the retracted statements:-

I considered the evidence tendered in trial within trial in respect of the statement under Inquiry. Only one witness testified for the prosecution and he related how the Accused was taken before him and he followed the Judges rules and did not threaten or beat up the Accused. It was the Accused's assertion that he was beaten at the police station and blindfolded. A gun was cocked and he was threatened with death. That is when he told the police what they wanted to hear for fear of being maimed and he thumbprinted the statement. The veracity of the statement aside, therefore the recording of it was admissible. So was the brief charge and cautionary statement recorded before IP Marambi. The evidence on record in the trial within trial did not establish the physical mishandling of the Accused by the recording officer. He said he was only given a hard look. The Accused admitted he signed the statement although there was no truth about it.

The statement by IP Kitetu PW10 was recorded on 20.11.99 at 12.30 p.m. The Accused had been in the cells for 5 days before he was taken to IP Kitetu. He stated in the translated version:

"I am SHIDA NGUMBAO KAGOMBO a Giriama male adult married with two children. I stay at Kazimbiji Village, Ganda Location of Malindi District. I am a small scale farmer whereby I plant maize, potatoes, onion, green peas and so forth. I do very well remember on the 11 th day of November, 1999 I woke up in the morning and after taking my breakfast I went to the shamba which is a distance from my home. I worked in the shamba till sometimes late in the afternoon when I went back to the house. I made a decision to go and look for JAMES MAGANGA KARISA with the intention of wanting to cut him with a panga. The reason of doing so was that he bewitched my own mother who is now a deceased. I therefore armed myself with a panga and went out to check on him in his house. I did not find him. As I was now walking on the path heading to the shopping center I noticed somebody who was walking towards me from the shops and I came to realize that he was JAMES MAGANGA KARISA. I quietly took cover in the bushes on the road side to allow him pass. So as he approached and passed near the place I was hiding, I emerged from behind him and with my panga I slashed him on the neck once. He started running away but I followed him and cut him many times till he fell down. I left him down there and I walked away with my panga to the house. I took the panga to my brother KENGA NGUMBAO KAGOMBO house since I do not have a house of my own. I kept it there but I did not say anything to do with it. After that I came back to the house to sleep. At that time the deceased, had been found and was rushed to the hospital. I joined the people who were taking him to hospital but before reaching the hospital he had already died. I did not reach hospital but I went back on the way.

On 12th day November, 1999 in the morning, I accompanied my other brother to the Malindi hospital mortuary and we took the body for burial. Later on the day after the funeral I left home for Majengo Magarini Area to alert the uncles of the deceased James Maganga Karisa and other relatives of his about the death. I arrived there and found Mr. Katungwa Mwangangi whom I informed and straight away he accompanied me back to Kazimbiji. On arrival back home I found a letter for me from the Area Chief that I should report to the Police Malindi station. It was late at night therefore I decided to go there on the following day early in the morning. On 13 th day of November at 8.00 a.m. I was at Malindi Police Station. My other brothers had been picked by the police the previous day as I was away from home. When I introduced myself at the police station I was straight away arrested and put in cells till today. That is all what to state."

Nine days later on 29.11.99 at 7 a.m., the Accused was taken before IP Marambi PW9 to record the

charge and cautionary statement before being taken to Court on the same day. The Accused is said to have responded to the charge:

“I followed him along the road and then I cut him with a pan ga because he had bewitched my mother.”

Before this court the Accused gave sworn testimony and did not call witnesses.

He was working at his shamba at Malindi 3 kilometres away from home the whole day on 11.11.99 upto 6.45 p.m. when he returned home at Kasumbiji. On his way home he found a group of people. He went there and found his relatives, some bending some standing. He then saw the deceased on the ground and was told that he had been cut up by gangsters. He joined in to help take him to hospital but he died. Police found him there. He also accompanied the rest of the family to collect the body from Malindi for burial. Then on the second day he was sent to Magarini which is far from Malindi, to inform the deceased’s uncle about the death. On his return on the third day he received a letter from the Assistant Chief asking him to go to Malindi Police Station. He did so.

On arrival one police officer confronted him saying they were looking for him as he was the deceased’s killer. He denied it. There were 7 other people – relatives and neighbours – who had also been placed in custody. The following day he was taken to an officer for questioning and was blindfolded. He was harassed and asked to explain how he killed the deceased. He denied knowing anything about it and was returned to the cells. All other suspects were released on the fourth day when he was taken out again and beaten up to admit the offence. Some papers were placed before him. He was hit on the hands and the head and neck. Kadzo and Katsozi came to the police station and Pc Khaemba called them to his office. He told them that the Accused was the killer but there was no panga. The two ladies said they can produce a panga from home. So the two of them, the Accused, and Pc Khaemba took a police car and went home. He is not the one who volunteered to go and show the items. The Accused then went in Kenga’s house and picked up a panga from under the bed and gave it to Pc Khaemba. They went to Kadzo’s house and he picked up his clothes from the line they were not hidden. None of the items had blood stains.

He was not in the group beating “Mkokoto” before the deceased’s death. He did not attend his mother’s funeral where bad things are alleged to have been said against the deceased.

The Accused in cross-examination clarified his evidence on the panga that:

“Police told me to go and get the panga. I went to Kenga’s house because I knew I would get a panga. I led them there. I did not go to Kadzo’s because we did not go there. I have not used the panga before. The panga was under the bed. I never lived there”.

He said he looked for the panga before picking it up as it was not his house. And on the clothes:-

“Police asked me to produce the clothes I was wearing during the day. I took them and told them the clothes were there on the line. I was told to show them the clothes I was wearing when the killing occurred. I did not agree but they forced me and I showed them my clothes”

Learned Counsel for the Accused Mr. Munyao submitted that there was no single witness who saw the Accused committing the crime. He took issue with the conflicting evidence of both Kadzo and Katsozi as against that of Pc Khaemba on the recovery of the Accused’s clothes and panga. The impression created by PC Khaemba, he submitted, was that it was the Accused who volunteered to go and show the police where the two items were and on arrival there they found Kadzo and Katsozi in their respective houses. The two women however said they were at the police station and it was the police who took them together with the Accused to pick up the clothes and panga. That contradiction, in Mr. Munyao’s view, was material and vitiates the probative value of the recovery of the two items.

Mr. Munyao further submitted that the only evidence relied on was the confessional statement of the

Accused which was retracted and therefore required independent other evidence if it is to be relied on. Such other evidence is however lacking. The confession relates to the killer weapon, the panga, but there was no evidence to link the Accused with the panga or the panga with the crime. It belonged to PW3 Kenga and was seen in the house by PW2 Katsozi on the day of the Murder. It had no blood stains. The police, he submitted were manufacturing evidence on the panga when they asked Kenga about it and where it was in the house. The other item of evidence, the clothes, were also not linked to the offence. The suspected blood stains did not belong to the deceased but to the Accused as confirmed by the Government Chemist. The recovered items had therefore nothing to do with the offence and are not corroborative of the confessionary statement.

As for allegations of witchcraft, Mr. Munyao submitted that it was other people who, one week before the deceased's death, threatened him during a funeral and in beating "Mkokoto" drums. The Accused had no part in those threats. Those who made the threats were arrested but were released without explanation.

The conduct of the Accused in assisting the deceased, going to report to other relatives and reporting to the police voluntarily on his return, shows his innocence. The prosecution did not discharge their burden of proof and the Accused should thus be acquitted..

For the State, Learned Counsel Ms. Mwaniki relied on the evidence on record and called for conviction of the Accused.

The two Assessors left in the trial after the disappearance of one Kenneth Nyagaka Arori, were unanimous that the prosecution did not prove its case beyond reasonable doubt.

The first Assessor Florence Achieng found no direct evidence to connect the accused with the offence and believed his evidence that he spent the day working in his shamba only to find the offence having been committed. The witnesses who gave evidence on circumstantial evidence particularly PW1, PW2 and PW7 were conflicting in their testimony and it was therefore unreliable. The items recovered were not shown to have relevance to the crime. In her view the wrong person was arrested for the crime.

The Second Assessor Richard Ochieng Adede similarly found no credible independent evidence to support the confessionary statements produced. The items put forward as circumstantial evidence that is the clothes and the Panga, were discounted as such evidence because there were no blood stains of the deceased on the clothes and the panga was not the Accused's. It was instead said to have been in the prosecution witness' house the whole day and was not borrowed. There is also contradicting evidence on the recovery of the items.

The motive for killing was said to be witchcraft but the Accused was not mentioned in the group that threatened the deceased with death. Those who threatened him were released by police.

Finally the small injury on the Accused's finger as stated by PW11 did not necessarily follow that it was suffered during the Murder. He expressed doubts on the probative value of that evidence.

They both called for the Acquittal of the Accused. I am grateful to both Assessors for their patience and attention throughout the trial lasting one year. Their opinions are not binding on me.

Nevertheless I concur with them that there are gaping holes in the prosecution evidence which only establish the suspicion that the Accused may have been the killer of the deceased. Clearly there was no direct evidence and it was incumbent therefore on the prosecution to establish a chain of Circumstantial evidence that left no doubt that the Accused, and none other committed the offence or at the very least corroborate the retracted statements put forward in evidence. The starting point is not the confessionary statements and then some other evidence that may be supportive of it. The law as I understand it is that unless there is other independent material evidence established first to support a retracted or repudiated a confessionary statement, then the court is not entitled to lay any reliance on of such statement to found a conviction.

A chain is only as strong as its weakest link and the chain of circumstantial evidence put forward here was the recovery of the clothes the deceased wore on the evening of the Murder which were expected to be at least stained with the blood of the deceased. There would have been no other reason for seeking the production of those clothes or taking them for examination by the Government Chemist. But the Government Chemist ruled out the few blood stains on the shirt of the Accused which were the Accused's own. The other item was the panga which was also expected to have blood stains otherwise the investigating officer would not have enquired of PW3 Kenga whether there was one in the house and whether it was blood stained. There was no evidence that it was. On the contrary there was evidence from the prosecution itself that it did not have blood stains. The panga did not belong to the Accused but to two of the prosecution witnesses, PW3 Kenga and his wife PW2, who never complained anywhere that it was unlawfully or at all taken from its usual place in their house, that is under the bed. There was no evidence that there was free access into the house by any person including the Accused or the house was never locked.

On the contrary it was the prosecution's own evidence through Katsozi PW2 that the panga was in the house on 11.11.99 and she saw it. When the police visited the home to recover the panga she was asked by PW7 PC Khaemba to open the house. It was therefore a secured house.

At all events the circumstances surrounding the recovery of those two items remain inconsistent and suspect. The evidence of the investigating officer PC Khaemba was tailored to show that it was the Accused who opted and volunteered to lead the police to the recovery of these items; an assertion denied by the Accused. That is how they first arrived at the two homes of Kadzo and Katsozi and found them there, then the Accused retrieved the hidden items. Both Kadzo and Katsozi however testified that the motivating force for the recovery of the items were the police who took them together with the Accused from the police station to their homes. The clothes were on a line on a wall in a house the Accused lawfully occupied and were not hidden in a paper bag kept in the Accused sister's house. It is Kadzo who put them in a paper bag and gave it to the police. At the home of Kadsozi it is Pc. Khaemba again who was directing matters.

He said:

"We found the sister -in-law of the Accused in the house. We requested her to open the house for him to take the weapon."

PC Khaemba had earlier asked and was told by Kenga PW3 about the panga in the house.

The inconsistency or contradictions in the evidence from PW1, PW2 and PW7 relating to recovery of the two items is material and vitiates the veracity of such evidence. That would be sufficient to disqualify the chain of circumstantial evidence intended to support the confessionary statement. But there was one more link sought to serve the purpose.

That is the evidence of PW11, Dr. Mwangemi, that he found a small cut wound on the right index finger and a bruise on the middle finger of the accused. The Doctor did not hazard an opinion on what caused those injuries. The age of the injuries was an estimation. The Accused himself did not say in his statement that he was injured during the Murder incident or at all. He only said he was working in his shamba throughout the day. He referred to the injuries when he alleged in the trial within trial that the police beat him up. It is not a matter that arose from the confessionary statement and therefore stands alone as evidential material which ought to have been related to the offence charged. It appears instead to have simply been put forward to raise suspicion against the Accused. But suspicion upon suspicion remains suspicion.

Much of the evidence on record points to the direction of the Accused's innocence. It is the prosecution's own evidence that the deceased was threatened with death by persons who were seen and found. A report was even made to the area Chief and arrests were made by the police. None of this involved the Accused. Those persons were however released by police and no explanation was made for it.

The deceased was the Accused's cousin. There is evidence that he participated in attempts to take him to hospital and attended his burial. There is prosecution evidence that he was sent to report the death to other relatives far from Malindi and he returned home. There is evidence that he found a letter asking him to go to the police and he willingly went there only to be told he was a killer. The conduct of the Accused casts reasonable doubts on his involvement in the crime.

I have said enough to justify the conclusion that the charge of murder is not proved beyond reasonable doubts as charged and the Accused is entitled to an acquittal. He will be set at liberty unless he is otherwise lawfully held.

Dated at Mombasa this 28th day of March, 2002.

P.N. WAKI

JUDGE