



**Republic v Katana aka Juma Kazungu (Criminal Case 9 of 2017)  
[2023] KEHC 21142 (KLR) (22 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 21142 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CRIMINAL CASE 9 OF 2017**

**SM GITHINJI, J  
JUNE 22, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**BAYA KAZUNGU KATANA AKA JUMA KAZUNGU ..... ACCUSED**

**JUDGMENT**

- 1 The accused herein, one Baya Kazungu Katana alias Juma Kazungu is facing three counts of murder contrary to section 204 of the *Penal Code*, Chapter 63 Laws of Kenya.
- 2 The particulars of these offences are that on June 6, 2017 at Dera Village within Kilifi county in count 1, he murdered Kahindi Islam, in count 2 he murdered Kamali Mlewa and in count 3 murdered Pola Thethe.
- 3 The prosecution called 5 witnesses. The evidence by Pw-1 is to the effect that on June 5, 2017 her son known as Hamisi Riziki went to the water pond to fetch water and clean his motor bike. He drowned in the water. The body was recovered and police took it to the mortuary.
- 4 The following day, on June 6, 2017 at about 8.00am she was in the house with her husband known as Jackson Masha and other people. A crowd of people went to their house. They asked for the house owner and Jackson Masha moved outside. The crowd was holding Kamali Mlewa who cried for help from Jackson Masha. However, Jackson Masha was pushed back into the house by those in the crowd, and the house locked from outside. The door was opened after police officers had arrived and Kamali Mlewa already killed.
- 5 Pw-4 identified no one in the crowd as she was inside the house.
- 6 Pw-2 in her evidence stated that Kahindi Islam, the deceased in count number 1, is her father-in-law. The other deceased persons, Kamali Mlewa and Pala Thethe were her neighbours. The accused herein, is



also her neighbour at Dera Village. On June 6, 2019 at 6.00am Kahindi Islam visited her. He greeted her children and requested Pw-2 to assist him with maize seeds. Pw-2 informed him that she did not have but will purchase some from Kilifi and assist him. Kahindi Islam said he was going to the shops to buy maize flour and cigarettes. The shops were about 30 metres away from Pw-2's house and she could see him go. He went and purchased the maize flour. Some group of young men held him by the shoulder. There is a man who had drowned the previous day. The young men alleged that Kahindi Islam was a wizard. The accused herein was with them. They alleged they had gone to a seer who told them that he was a wizard. Kahindi Islam suggested they go to the said seer. They all left allegedly heading there. Pw 2 followed them behind. Along the way they started stoning Kahindi Islam. The young man said they had to hurry the killing. The accused drew out a knife and cut Kahindi Islam on the left side of the face. Kahindi Islam fell down dead. Some young men poured petrol on him and burnt the body. Pw-2 played safe and put out the fire. The assailants became unruly and Pw-2 escaped. They moved ahead. At the homestead of Pw-1, they found Kamali Mlewa being beaten. The accused herein was leading a huge group of youths in doing so. Pw-2 moved ahead as she heard there was another person being killed. They went to the home of Pala Thethe. He was being assaulted by the young men. The accused herein was present, leading the attackers. They killed Pala Thethe and left. The police visited the place and carried the bodies of the three deceased persons. Kahindi Islam is alleged to have had a land dispute with the accused person.

- 7 Pw-3 is the husband to Pw-1. His evidence is that on June 6, 2017 in the morning he had visitors at home mourning the death of his son Hamisi Dera. While in the house they heard noises outside. They were locked in the house. He did not go outside. They heard some cries outside. The door was opened after police arrived. He did not witness the murder.
- 8 Pw-4 investigated the murder of the three persons. They were murdered for allegedly being wizards. He visited the scene and drew three sketch plans. Photographs were also taken of the scene before they collected the bodies and took them to Kilifi Hospital Mortuary. On June 28, 2019 the accused was arrested. The three sketch plans and photographs were produced as exhibits.
- 9 Pw-5 produced the three postmortem reports in respect of the three victims. The body of Kahindi Islam had second degree burns. There were burns around the upper and lower limbs. The forehead had a fracture that exposed the brain, while buttocks had second degree burns. The cause of death was opined to be hemorrhage, asphyxia and 2<sup>nd</sup> degree burns of the body.
- 10 For Kamali Mlewa he had suffered 70% burns. There was 2<sup>nd</sup> degree burns of the lower abdomen. The whole neck was also involved. The cause of death was opined as extensive burns.
- 11 Pola Thethe body had depressed skull fracture. The skull was inside the brain. The cause of death was severe head injury.
- 12 The accused gave a brief unsworn testimony in his defence. He stated that he was working at Chumani as a palm wine harvester. On June 6, 2017 from 5.00am he was working in his farm. He worked upto 1.00Pm and was not aware of anything odd. On June 23, 2017 he was arrested by police at Chumani at about 8.30am. He was later charged with strange offences. From Chumani to Dera is far as one pays a fare of Kshs 100/=.
- 13 At this juncture, the court's obligation is to find out whether the prosecution have proved the offences against the accused person beyond reasonable doubt.



- 14 The evidence of Pw-1, Pw-2 and Pw-3 shows that the deceased persons were killed by several persons in a group that alleged they were wizards. The first thing I have noted is that the particulars of the charge fails to acknowledge the fact as the charge does not read; -
- “together with others not before court”
- 15 The particulars portray that he killed the three persons alone. However, this error is not fatal and I will move on to consider the weight of the evidence.
- 16 Of the three prosecution witnesses, that is Pw-1, Pw-2 and Pw-3, only Pw-2 claims to had seen the accused lead a group of youths that killed the 3 accused persons. In the murder of Kahindi Islam she alleged that the youths stoned him and when they expressed they had to hurry up the killing, the accused removed a knife and cut him on the left side of the face. The deceased then fell down dead. I have examined the evidence against the postmortem filled in respect of the said Kahindi Islam, of which was produced as exhibit -3. On external appearance of the body the doctor noted that there were circumstantial burns on both lower limbs with skin changes. 2<sup>nd</sup> degree burns on the lateral aspect of the arm. 1<sup>st</sup> degree and 2<sup>nd</sup> degree burns on the whole back. Circumferential 2<sup>nd</sup> degree burns on the neck. Fracture of the forehead – frontal bone – deep exposing the brain with blood clots. 1<sup>st</sup> degree burns on both butts.
- 17 The cause of death was indicated as brain hemorrhage plus severe burns. Asphyxia and Hemorrhage.
- 18 Given the foregoing, the said doctor did not note of any cut wound on the body, leave alone one that would have killed Kahindi Islam. Given that the evidence of Pw-2 is not corroborated by any other evidence as to involvement of the accused in commission of the offence in count No 1, I do find the evidence doubtful and unreliable.
- 19 After the first incident Pw-2’s evidence portrays that she put out the fire set on Kahindi Islam. The youths however became unruly. She then alleges she moved ahead where the 2<sup>nd</sup> victim was being beaten and burned. She alleges the accused was there. She does not however state exactly what the accused did. She does not as well disclose vividly how the accused moved from the first incident to the 2<sup>nd</sup> one and whether it is the same group that was involved in all the three incidents, or three groups which killed the victims almost simultaneously. She said after the second incident they moved to the home of Pala Thethe who was being attacked by the same young men. These men were not otherwise described. It is not clear how she established it is the very same young men involved in the other two incidents. Their movement from one incident to the other is not clearly disclosed. Apart from saying the accused was leading the attackers it’s not disclosed what exactly he did as a leader.
- 20 The incidents allegedly took part in Dera Village, in Kilifi. If the assailants were from the same village some of them if not all would have been known to the witnesses, more so Pw-2 who allegedly witnessed the three incidents. Strangely she appears not to have known any other person apart from the accused. I also find it strange that incidents which took place during the day and where a group of suspects were involved, in a village, the police were not able to get any other eye witness.
- 21 Though Pw-1 had claimed Pw-3 her husband was ordered out of the house and moved outside before he was pushed inside, Pw-3 himself says he never got out of the house and saw no assailant(s) on the material day. Given the contradiction, the truth on the issue is unknown and Pw-3 was not able to disclose of any suspect.



- 22 In criminal cases the standard of proof is beyond reasonable doubt and where a reasonable doubt exists, the same should be resolved in favour of the accused person. That is, the accused takes the benefit of the doubt. See *Elizabeth Wathiegeni Gatimu v Republic*[2015]Eklr.
- 23 In this case there exists doubts as to the accused involvement in commission of the said offences in count 1, 2 and 3. Kahindi Islam who was a father-in-law to Pw-2, is alleged by Pw-2 to have had a land dispute with the accused person. While this could have been stated as motive for the murder, it can as well be the motive behind fixing of the accused by Pw-2.
- 24 I resolve the doubts in favour of the accused person and is acquitted of the three offences. He is free to go “home” unless otherwise lawfully held.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 22ND DAY OF JUNE, 2023**

.....

**S.M. GITHINJI**

**JUDGE**

**In the Presence of; -**

PARA 1.

Okuto for the Accused Person

PARA 2.

Ms Mutua for the State

**Malindi HCCR No. 9 of 2019 - Judgement Page 2**

