REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL CASE NO. 17 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

KATSANGA KAZUNGU KATANA .....1ST ACCUSED

KATANA KAZUNGU KATANA .....2ND ACCUSED

Coram: Hon. Justice R. Nyakundi

Ms. Sombo for State

Mr. Mbura Advocate for Accused persons

JUDGMENT

The accused persons **Katsunga Kazungu Katana** and **Katana Kazungu** were jointly charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code for causing the death of the deceased **Dama Tsui Kapombe** on 17.8.2015 at Mwangatini village, Pumwani Sub Location. Each of the accused being represented by Learned Counsel **Mr. Mbura** pleaded not guilty to the charge. At the trial, initially led by prosecution counsel **Mr. Fedha** and later taken over by **Ms. Sombo**, the state summoned nine witnesses seeking conviction and appropriate sentence for the accused persons.

The prosecution case:

According to the testimonies of **PW1 – Tsofa Furaha Charo** and **Ali Anderson Charo** on the 17.8.2015 they were at home with the deceased on or about 2 pm during day time. At the time one **Katana Mtawahi** entered their compound asking for water to drink which was readily served by **(PW2).** Shortly, it was the evidence of **(PW1)** and **(PW2)** that the first accused **Katsunga Kazungu Katana** together with the 2nd accused Katana also joined **Katana Mtawahi.** That time the first and second accused got hold of the deceased by taking her outside the homestead. Further, in PW1 and PW2 testimony, it did not take long before one **Katana Mtawahi** would enter the house to pick an iron bar which became the weapon used to inflict fatal injuries against the deceased.

In **(PW1's)** recollection of the events, the 1st accused initiated the beatings with the iron bar hitting the head and right arm in the presence of the second accused and **Katana Mtawahi**. Thereafter, **(PW1)** left the scene for **Mary Wanjiku's** house **(PW3)** to inform her of the incident. According to **(PW3)** on receipt of the information together with other neighbours and relatives visited the scene only to confirm the death of the deceased had occurred as a result of the assault. In cross-examination by the defence counsel, **(PW1)** evidence was to the effect that the two accused persons and another one not before Court took the deceased away from her house to the scene of the murder approximately twenty metres from the homestead. On that same day and time **(PW1)** told the Court that they were armed with an iron bar earlier on collected from the house of the deceased.

In so far as **(PW2)** response to the issues raised on cross-examination she confirmed seeing the two accused persons at the home of the deceased on 17.8.2015. It is on that fateful day they picked an iron bar and dragged the deceased from the compound to another location to commit the crime.

In so far as the evidence of **(PW3) Mary Wanjiku** and **(PW4) Charo Kaingu Tinga** disclosed they were away during the incident in which the deceased was beaten to death. They were however to visit the scene and able to witness the multiple injuries inflicted upon the deceased whose motionless body lay on the ground.

PW5 – Dr. Angore Gilbert in support of the prosecution case testified on behalf of **Dr. Aziz** who was the primary pathologist in carrying out the post-mortem examination over the deceased body. Upon the essential facts and positive findings **(PW5)** told the Court that the deceased had been found to have suffered multiple injuries to the scalp, eye, and right shoulder. The cause of death was stated to have been cerebral haemorhage secondary to severe head injury. He produced the post-mortem report as exhibit 2. Through a record oversight the state did call **(PW7) Dr. Swaleh** to testify on an issue already covered by **Dr. Angore (PW5).** It appears that the prosecution counsel was not privy that at the outset of the oral, circumstances demonstrating causation had been presented to Court by **(PW5).** In accommodating **(PW8)** on the same set of facts was a waste of judicial time.

PW6 – Jacob Chikola attached to the chief's office as part of the community policing testified that following the death of the deceased a report was received from **Kazungu Katana**, the father of the suspects. According to (PW6) there was an imminent threat to their lives from the community thus the need for the harm to be prevented. As a result **(PW6)** gave evidence that in consultation with the Assistant Chief they visited the house where the suspects were hiding. The two were therefore arrested and tied with ropes until the police officers were called in to take charge of the situation.

(PW8), Henry Sang who testified as the government analyst in relation with the contents in the analyst report stated in detail as follows: That at the chemist **Sgt Anwayi (PW7),** forwarded an exhibit memo accompanying blood sample in bottles marked A of **Katsunga Kazungu** and B of **Katana Kazungu**, a blood sample of the deceased marked C and a metal bar in a khaki envelope paper marked D.

At the trial PW8 presented evidence that the profile generated from the blood stains on the metal bar matched those generated from the blood sample marked C of **Dama Tsui,** the deceased. The analyst report was produced in Court as exhibit 5.

From the evidence of **(PW7) Inspector Awayi** (formerly a Sergeant attached to DCIO office Malindi in 2015, on investigating of the crime of murder against the deceased he reasonably found that the accused persons had a role in her demise.

In sum (PW7) provided other circumstantial evidence on record that demonstrated that the deceased was initially beaten with an iron bar by the accused persons before succumbing to death. According to (PW7) upon correlating all the evidence, it was reasonable to arrest and charge the accused persons with this offence. In respect of the crime of murder (PW7) produced the consents signed by the accused to have blood samples extracted for purposes of DNA analysts by the government analyst, the exhibit memo forwarding the samples to the analyst and the alleged iron bar as the murder weapon.

The defence

The first accused testified on his own behalf and took the position that on the material day the offence was committed, he was involved in the funeral arrangements of one **Riziki,** who passed on at Malindi Hospital. The accused further stated that he was later to be joined by the second accused and a number of other relatives in an attempt to transport the body home for burial. The accused told the Court that both he and the second accused happened to be in Malindi where the tragic incident on the death of **Dama Tsui** was reported to them. He only came to learn of his connection when the local Chief effected an arrest as suspect of that murder.

The second accused on his part also denied the offence. According to the accused by this time and date of its alleged the offence was committed he had left home at 6.00 a.m. to go and tap wine. It is at that location he received the sad news on the death of Riziki initially admitted at Malindi Hospital.

Thereafter, he made arrangements to travel to Malindi Mortuary where he joined the 1st accused and other people making arrangements to escort the body home for burial. That is when they also received a telephone call from their uncle **Charo** that **Dama**, their grandmother is also dead.

According, to the accused on their way home rumours did the rounds implicating them for the offence that took place while in Malindi. He denied any such involvement.

In support of the defence narratology, **DW3 – Cleophas Katana** told the Court that on 17.8.2015 he did travel from Kupalelea Teachers College to Malindi Hospital Mortuary where he met the accused persons in company of other people. The witness testified that in one accord they set out to raise funds to assist them transport the body of **Riziki** to her home for the final rites. The next thing he remembered was the information going round the village that the accused persons are the ones who killed **Dama Tsui.** He therefore could not understand how they could have done it in view of their presence at Malindi when the incident is alleged to have taken place.

DW4 – Kazungu Katana testified as the father to the accused persons to the effect that during the burial arrangements for **Riziki** he happened to be with both of them at Malindi Mortuary. It was also his evidence that within that period **PW3 – Mary Wanjiku** told them that the deceased **Dama Tsui** has been fatally injured. Nevertheless, **(DW4)** told the Court they travelled home in the same vehicle with the accused persons and it was only after the burial of **Riziki,** rumours emerged that they had killed the deceased in the instant case.

Analysis and Determination

The one single issue from the circumstances of this trial is whether the prosecution has discharged the burden of proof of beyond reasonable doubt to secure conviction in their favour for the offence of murder contrary to Section 203 of the Penal Code against the accused persons.

In this trial therefore its incumbent for me to examine in detail the elements of the offence of murder on the basis of Section 203 of our code. Murder has been defined to be an offence where any person who with malice aforethought causes the death of another person by an unlawful act or omission and therefore calling for a death penalty as prescribed under Section 204. The key ingredient that distinguishes murder from that of manslaughter has everything to do with malice aforethought defined under Section 206 of the Penal Code thus:

"Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances

(a). An intention to cause the death of or to do grievous harm to any person, whether such person is the person actually killed or not.

(b). Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous harm is caused or not, or by a wish that it may not be caused.

(c). Intention to commit a felony.

(d). Intention to facilitate the escape from custody of a person who has committed a felony.

This broad principle is more exacting when the evidence adduced establishes beyond reasonable doubt that the offender to the crime initiated the unlawful act intended to cause the death or do grievous harm to his or her victim, or had knowledge, that his or her unlawful act or omission which resulted in death, would probably cause death or grievous harm. Taking the meaning further malice aforethought brings into focus the element of transferred malice and knowledge."

In that sense the person killed need not necessary been the person the offender intended or set out to kill. The said malice aforethought may be premeditated or in an appropriate case be formed at the spur of the moment.

For this sake of this element it may also be inferred from the facts and circumstances of the case by examining the various unlawful acts and intent of the offender in committing the act which causes death or to do grievous harm. Canonical though these words are under Section 206 of the Penal Code, they require no much interpretation. In almost every respect the Court has to see the difference in principle between murder and manslaughter offences. In the locus classical case of **Rex v Tubere s/o Ochen {1945} 12 EACA 63 the Eastern Court of Appeal** emphasized that malice aforethought has been deemed to be established and manifested primarily in considering

"the weapon used. The manner in which it is used, the part or parts of the body seized to inflict harm, the gravity or multiple injuries inflicted and the conduct of the perpetrator before, during or after committing the crime."

In general, therefore, the Courts in its statutory context must in making of the preliminary investigations on whether malice aforethought is favourable satisfy itself existence of primafacie evidence which passes the test outlined under Section 206 of the Penal Code.

As adumbrated in the succeeding precedents of **Ernest Asami Bwire Abanga alias Onyango v R CACRA No. 32 of 1990 Morris Aluoch v R CACRA No. 47 of 1996, Karani & 3 others v R {1991} KLR 622, R v Ndalamia & 2 others {2003} KLR 638 Olenja v R {1973} EA 546** The Courts have to consider that by virtue of Section 206 of the Penal Code of death is caused by an unlawful act or omission by use of a dangerous weapon or one which though not basically not of that definition but used in a manner to inflict serious personal injuries, in furtherance of an intention to cause death or to do grievous harm malice aforethought is deemed to be manifested.

A further reason for the ingredient lies in the thrust of the gravity of the injuries and parts of the body target by the accused person as precisely captured in the above decisions. In the instant case **PW1 – Tsofa Furaha Charo** and **PW2 – Ali Anderson** testified before this Court and stated that on or about 17.8.2015 at 2.00 p.m. The accused persons entered the homestead of the deceased, thereafter dragged her out to the scene of the murder. In doing so (PW1) and (PW2) went further to describe the unlawful acts done with malice aforethought to cause death or to do grievous harm to the deceased. In their description, a metal bar used to inflict harm was picked from the deceased house and at the scene, observed in closer view the first accused persons violently with the iron bar attacked the deceased to the head and right arm.

According to the witnesses as the deceased was being attacked by the 1st accused, it turned out that the second accused was one of those directly involved in the assault of the deceased. It cannot be ignored as stated in the evidence of (PW1) and (PW2) that the accused persons prior to the deadly assault went for the deceased at her home which events were clearly observed by these eye-witnesses. The nature of injuries inflicted against the deceased as tabulated by **Dr. Angore Gilbert (PW5)** and **Dr. Swaleh** fit in the definition of grievous harm under Section 4 of the Penal Code which means any harm which amounts to a dangerous harm, or harm which can seriously injure health or which is likely so to injure health, whether permanent or temporary disorder to the body of the victim. In line with the holding in the cases of **Ernest Asami Bwire (supra), Morris Aluoch (supra)** and **Karani v R (supra).**

Dr. Angore and Swaleh (PW5) AND (PW7) who produced the postmortem report on behalf of **Dr. Abdul Aziz** on the examination done on 26.8.2015 on the body of the deceased testified that the victim had been found to have suffered multiple cut wounds on frontal aspect of the skull and on the right arm. According to **(PW5)** and **(PW7)** the injuries suffered made the deceased susceptible to cerebral haemorhage due to severe head injury.

Murder as defined in Section 203 of the Penal Code is connected by an unlawful act or omission with malice aforethought. The actus reus required for the offence is that unlawful act or omission which causes the death of another. In the instant case the accused persons obtained an iron bar, they went further to forcibly drag the deceased from her house, thereafter by use of that weapon in their possession directed it against her head in multiple strands, which a reasonable man would foresee as likely to cause death or grievous harm.

There is therefore ample evidence from **(PW1)** and **(PW2)** testimonies that the beating of the deceased was specific to exclude any possibility of the deceased survival. Further, **(PW8) Henry Sang**, the government analyst evidence showed the extent of the DNA profile to prove a causal link between the blood stained iron bar and the deceased injuries to confirm what **(PW1)** and **(PW2)** told the Court on the nature of the weapon used by the accused persons to commit the dangerous act.

As indicated above there are no extenuating or mitigating circumstances, or elements of provocation under Section 208 of the Penal Code or defence of self in Section 21 of the same code or any other factors as a whole to rule out malice aforethought. The prosecution has shown both directly and circumstantially that the accused persons had an intention to kill or cause the death of the deceased.

On the facts of the case and defence offered by the accused persons I hold that it did not negative my findings on the presence of malice aforethought in the commission of the offence on the 17.8.2015.

Further, for clarity purposes the evidence set out in the presentation made by **(PW1)** and **(PW2)** imports the elements of joint offenders and common intention dealt with in Section 21 of the Penal Code. Under Section 21 a person can be held jointly or severally liable for the offence when the evidence shows that in execution of that unlawful purpose of murder each of them had a hand which rendered them criminally liable. This is more illustrated in the case of **Rex v Mikaeri Kyeyane & Others {1941} EACA 84** said:

> ***"Where a mob sets upon a suspected thief and beat him to death, every person forming the mob, would be deemed to have formed a common intention with the rest to kill the thief, and would be liable for murder. It was stated that it is not necessary that there should have been any concerted agreement between the arrested persons prior to the attack on the so called thief."***

In the case of **Zuberi s/o Rashid v R {1957} EA 455**,

> ***"it was pointed out by the Court that the failure to try to prevent the commission of the offence or to apprehend the offenders will also make a person a principal offender in the commission of the offence."***

It suffices to show that the secondary act took place in furtherance of the agreed common criminal enterprise. It will be noted that in the instant case from the testimony of **(PW1)** and **(PW2)** the deceased was in her house on 17.8.2015. The accused persons entered the compound and subsequently forcibly held the deceased and armed themselves with an iron bar. The fact of holding the hands was to prevent her from any thought of escape. As alleged by **(PW1)** and **(PW2)** about twenty metres away from the homestead, accused persons hit the deceased severally with the iron bar on her head and right arm. It was established by **Dr. Abdul Aziz** in a post-mortem report produced in evidence by **(PW2) Dr. Angore** and **Dr. Swaleh** that the strikes and attacks to the head caused cerebral haemorhage resulting in the death. on the basis of the evidence adduced in Court by **(PW1)** and **(PW2)** the accused person did nothing to take measures necessary to ameliorate the danger that they had created of even escorting the deceased to a nearby hospital or call for medical assistance. Closely a kin to the joint enterprise and common intention is the level of association, their discussion, and acts done before, during and after the commission of the offence immediately after inflicting the final blow upon the deceased. In addition to the sufficiency of eye-witness testimony as to how the incident took place is also the circumstantial evidence of **(PW3), (PW4), (PW5), (PW6), (PW7)** and **(PW8)** respectively.

Ultimately the wheel turns full circle when the prosecution evidence places the accused persons at the scene of the crime. A classic case in this group on identification is **R v Turnbull & others {1976} 3 ALL ER 549 (See also the cases of Simiyu & Another v R {2003} 1KLR 192, Warunga v R {1989} KLR 424.** Applying the principles in the cited authorities it is not disputed that (PW1) and (PW2) claimed to have seen the accused persons at the scene of the murder. In this case, according to (PW1) and (PW2) accused persons on making entry to the home of the deceased during daylight on 17.8.2015 they did so not as strangers but had close kinship relationship with the deceased.

The witnesses were able to see and recognize the assailants clearly from the time they entered into the compound thereafter walked away with the deceased. The uncontroverted evidence given by **(PW1)** and **(PW2)** shows that on arrival, at the locus in quo they observed accused persons attacking the deceased with the iron bar.

I am of the view that the killing of the deceased took place during daylight. There was no possibility of a mistaken identity. Further, the fact that the accused were no strangers to **(PW1)** and **(PW2)** which embolds the position that their identification evidence was free from error or mistake. I am satisfied that the witnesses had as much opportunity of identifying these accused persons in compliance with the guidelines set out in **R v Turnbull case (supra).**

Likewise, I am alive of the long narrative on alibi defence given by the accused persons denying the offence and their absence from the scene of the crime. I am fully cognizant of the meaning of the phrase *Alibi*, a latin verb which means elsewhere or at another place and if the evidence for an accused that he was not present at a place at the time an offence was committed is accepted by the Court, he is said to have established *an alibi* **(See Z. C. Anyongu, evidential perspectives on the defence of alibi in Nigeria Enugu Oke Chukwa (Publishers 2006).**

> ***"The defence of alibi postulates that the accused was somewhere other than the locus criminis at the time the offence was committed."***

In the case of **R v Sukha Singh s/o Wazer Singh & others {1939} 6 EACA 145** the Court held as follows:

> ***"If a person is accused of anything and his defence is an alibi, he should bring forward the alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuiness proceedings will be stopped."***

As regard the issue on alibi defence of the accused persons the Court in **Kiarie v R {1984} KLR** held:

> ***"An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in Law thereby assume any burden of proving that answer and its sufficient if an alibi introduces into the mind of a Court that is not***

unreasonable."

The evidence upon which the accused persons founded their defence was on the premise that they were in Malindi Hospital Mortuary following the death of Riziki. In the assessment of the evidence by respective witnesses DW3 and DW4 it cannot be said that the accused persons could be at the scene of the crime and at the same time be physically at Malindi – Mortuary.

I have given careful consideration to the whole evidence adduced before me by the prosecution and the defence. I am not inclined to believe the alibi defence of the accused person and their witnesses that they were not at the scene of the incident where the deceased was beaten to death. I prefer the evidence of (PW1) and (PW2) whose identification evidence was strong than that of the accused and their witnesses the demeanour. This was a choreographed defence aimed at controverting the prosecution case.

In my view, the alibi defence was of poor account and susceptible to fabrication as it did not account for the accused persons whereabouts at the time (PW1) and (PW2) stated they saw them at the scene of the crime. The cogent and credible evidence by the prosecution fully discharged the burden of proof of beyond reasonable doubt.

I think the whole evidence on this matter by the accused was aimed to provide a narrative so as to create a doubt in the mind of the Court that the deceased was killed by some other persons who are yet to be apprehended by the police. Contrary to the assertion evidence given by eye-witness (PW1) and (PW2) on identification displaced any such doubts that the accused were never at the scene of the crime. In particular there is a danger in this part of the country where witnesses sometimes will too readily come to the aid of their kinsman when it comes to the stage of exonerating him from culpability on matters of witchcraft behind the murder of the suspected witch or wizard.

In the well known and cited case of **Turnbull (supra)** the Court observed:

> ***"Recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone when he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."***

Plainly, in my opinion, the weighty and reliability of (PW1) and (PW2) evidence has not been impeached by the alibi defence to exclude accused persons from the scene of the crime.

In the result the prosecution has established beyond reasonable doubt that the accused persons were at the scene of the crime and the numerous statements in their defence and their witnesses was a conspiracy to support a non-existent alibi. There is nothing to show that evidence tendered by (PW1) and (PW2) was made in reference to duress, promise, coercion or malice on their part or other considerations relevant to the fairness and justice of the case.

The consequence is that I find the accused persons guilty of the charge of murder contrary to Section 203 of the Penal Code and enter conviction based on the critical prosecution evidence.

Sentence

During sentencing hearing the Senior Prosecution counsel **Mr. Alenga** rooted for a severe custodial sentence taking into account the aggravating factors and the motive of witchcraft behind the murder. On the other hand **Mr. Mbura** for the convicts presented their mitigation on their personal circumstances, age and being the being the bread winners of their respective families. Further, **Mr. Mbura** contended that each of the convict is a first offender with no previous records to warrant any heavy penalty. Learned counsel also brought to the attention of the Court that the convicts have been in remand custody close to five years. He prayed for a lenient sentence.

In this case the Court take judicial notice of the crucial principles in **Francis Karioko Muruatetu v R {2017} eKLR** in which the Supreme Court abolished the mandatory death sentence and brought about discretion in sentencing persons convicted of murder contrary to Section 204 of the Penal Code. In the opinion of the Court in passing sentence notwithstanding anything contained in Section 204 of the Penal Code on the death penalty remaining the maximum sentence an appropriate sentence should factor in the mitigation of the individual convict, circumstances of the case and any aggravating factors before the final order on sentence.

In respect to this case the counsels raised a number of issues in their mitigation as asserted elsewhere in this Ruling. The convicts expectations was for the Court to be gracious enough and entitle them a lenient custodial or non-custodial sentence. The evidence against the convicts showed that the offence of murder was executed in a planned intentional and unlawful manner to eliminate the deceased from the face of the earth. From the pathologist post-mortem report the deceased sustained multiple stab wounds to the head and the neck inflicted by the convicts. Its clear as the Doctor opined the cause of death of cerebral haemorhage was consistent with the nature of injuries inflicted at the time of the criminal act.

In determining the appropriate sentence, I have taken due regard to the circumstances of the counsels and the gravity of the offence. Arguably, there was a finding of a close causal link between the death of **Riziki** and that of the deceased who was blamed for possessing supernatural means of witchcraft behind her death. This was a discreet planned offence where lethal weapons were used to inflict a well calculated unlawful acts to cause the death of the deceased. Needless, to say that an impression was created that the convicts were acting on a belief that the deceased was a witch and reasonably contributed to the death of **Riziki**. It is beyond dispute that the constitution recognizes and protects every person right to life under Article 26. This is implicit in the constitution which accords and protects the inherent right to life that a person shall not be deprived of life intentionally except to the extent authorized by this constitution or other written Law.

In the present case, that right was infringed against the deceased to the extend not authorized by Law. It is noteworthy, that the offence of murder against the deceased was so gruesome and combined with other aggravating factors far outweigh the mitigating factors put forth by the counsels. On the basis of the foregoing, I take into account the provisions of Section 333 92) of the Criminal Procedure Code to discount

the period of 5 (five) years spent in remand custody and do sentence each convict to thirty-five (35) years imprisonment.

14 days right of appeal explained.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 13TH DAY OF OCTOBER 2020

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R. NYAKUNDI

JUDGE

In the presence of:

1. Mr. Alenga for the state
2. Mr. Mbura for the accused persons