



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL CASE NO. 20 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

KAZUNGU KARISA KAPISHI.....1ST ACCUSED

MESHA KAHINDI KADENGE.....2ND ACCUSED

JUDGEMENT

1. Kazungu Karisa Kapishi, the 1st accused and Mesha Kahindi Kadenge, the 2nd accused are charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the charge disclose that on 21st July, 2015 at Mwangatini Village, Pumwani Sub-Location in Magarini Sub-County within Kilifi County the accused persons jointly murdered Kahonzi Jeffa.

2. The prosecution's case is that on 21st July, 2015 PW1 Karisa Kapishi Saro left his mother, the deceased Kahonzi Jeffa with the two accused persons and others in the farm and proceeded to a funeral nearby. While at the burial word reached him that his mother had been killed in the farm. He went back home and confirmed that the information was indeed true. The body was collected by the police and taken to the mortuary.

3. It is the prosecution's case that PW6 Kapishi Saro saw the deceased being killed by the accused persons. They threatened to kill him if he reported them.

4. Each accused person denied participating in the killing of the deceased.

5. As stated by Section 203 of the Penal Code, the offence of murder is committed when a **“person who of malice aforethought causes death of another person by an unlawful act or omission”**. In order to secure a conviction in regard to a charge of murder the prosecution is therefore required to establish malice aforethought on the part of the killer. The prosecution is also required to establish that the cause of death is attributable to the action or omission of the accused person.

6. The evidence that linked the death of the deceased to the accused persons was that of PW6. The witness told the court that on 21st July, 2015 he was resting at home when Kazungu, the 1st accused who was with Masha, the 2nd accused went and told him they should go to the farm to get **“madafu”**. They proceeded to the farm where they found his grandmother, the deceased with his uncle PW1 Karisa Kapishi. The 1st accused told him to go and wash himself with the 2nd accused. They did as instructed and came back and sat under a mango tree. After his uncle left, the 1st accused came and took a panga stating that he was going to kill his grandmother. He warned the witness against revealing the information. The witness stated that the two accused persons took the panga from the deceased and the 1st accused cut her. They then warned him that they would kill him and his uncle if he uttered a word about what he had seen to any soul. The witness ran home but did not find anybody but somehow people started screaming and proceeded to the farm.

7. According to PW6, the 1st accused approached him again the next day and warned him that he would kill him together with his uncle if he talked about the incident.

8. PW6's testimony was that after the burial of the deceased, PW2 Kadhua Safari Kapishi went and told him that one of his uncles by the name Hussein Ngona wanted to see him. Hussein Ngona testified as PW4 under the name Chagana Ngona Tembo and told the court that he was also known as Hussein Ngona. PW6 told the court that he went and told PW4 what had happened. It was then that he also talked to PW1 about what had happened. He was taken to Marereni Police Station where he recorded a statement.

9. The witness told the court that he did not come to court to testify as the wife of the 1st accused had threatened him telling him that he was responsible for the arrest of her husband. The witness was explaining why he had to be brought to court to testify under a warrant of arrest.

10. PW6 told the court that there was no grudge between the accused persons and the deceased and he did not know why the deceased had been killed.
11. Cross-examined by counsel for the accused persons, PW6 reiterated that there was no grudge between the deceased and the accused persons. He repeated that the 1st accused had gone to his home the following day and warned him of dire consequences if he uttered a word about the incident.
12. PW6 told the court that there was no grudge between the accused persons and the deceased and he did not know why the deceased had been killed.
13. PW6 stated that the panga that was used belonged to the deceased and she was using it in the farm. He further testified that PW2 told him that he had been seen with the deceased in the farm.
14. The question is whether the evidence of PW6 is credible. The deceased died on 21st July, 2015 and when PW6 testified on 28th December, 2016, he told the court that he was seventeen years old. My brother, Chitembwe J, observed that the **“witness appears to be over eighteen years”**. He was thus a competent witness.
15. Although a conviction can be based on the evidence of a single witness, the court must warn itself of the dangers that comes with entering a conviction based on the evidence of a sole witness. The question then is whether there was any evidence adduced to corroborate that of PW6.
16. PW5 Dr. Eddy Nzomo produced a post-mortem report in respect of a post-mortem performed on the body of the deceased by his colleague Dr. Salman Omar on 30th July, 2017. Among the injuries noted on the body of the deceased was a deep cut on the neck. This injury corroborates the testimony of PW6 that the accused persons **“cut her on the neck.”**
17. In his testimony PW1 testified that while at the farm, the accused persons arrived with PW6. He stated the 1st accused had borrowed his panga saying that they wanted to get **“madafu”**. The evidence of PW1 supports PW6’s testimony that he arrived in the farm in company of the accused persons.
18. PW3 Wanje Ziro Ngoa was in the farm with PW1 and the deceased but later left to sell palm wine he had just tapped. When he later came back he found the deceased had been killed. He noticed that she had a cut on the neck. Again, the evidence on the site of one of the wounds supports that of PW6. This witness also stated that as he was going to sell the palm wine he met the accused persons and PW6 going towards where PW1 and the deceased were. This evidence puts the accused persons in the environs of the murder.
19. That the deceased died as a result of the cut wounds was confirmed by PW5 who produced a post-mortem report showing that the cause of death was cardiopulmonary arrest secondary to severe head injury.
20. In his defence, DW1 told the court that on the material day he woke up and went to the home of his friend Katana Charo who gave him a motorbike to go out on boda boda business. In the process of doing so he took some customers to the village where his sister lived and he decided to visit her. He stayed there up to about 3.00 p.m. and when he arrived home he learned that the deceased had been killed. After the burial of the deceased he went back to his place of work.
21. The 1st accused stated that on 23rd August, 2015 PW1 telephoned him and asked him to attend a family meeting. While at the meeting police officers arrived and arrested him together with Ngoa Kenga, Wanje Safari, Pate Saro and John Kahindi. They were taken to Malindi Police Station and locked up. At the police station they found his uncle who is his co-accused in this case who informed them that he had been arrested the previous day. The third day after their arrest the investigating officer went and told them that whoever gave out KShs. 50,000 would secure his freedom. He and his co-accused had no money and they remained in custody until they were brought to court and charged.
22. The 1st accused testified that he had differences with PW1 who is his father over the fact that PW1 had refused to reaccept his mother who had left him and gotten children with another man. The 1st accused stated that his persistence in wanting to bring his mother home is what put him in trouble with PW1. He denied killing the deceased saying he loved her very much and she was the one who brought him up after his mother left.
23. On his part the 2nd accused who testified as DW2 told the court that he was at his place of work on the material day when he received information from his grandfather by the name Kenga Ngowa that his stepmother had been killed. He did not find anybody to take over his duties on that day and so he could not go home. The following day he travelled home and joined the family members in preparation for the burial. After the funeral he went back to work.
24. His testimony was that on 23rd August, 2015 he received a call from PW1 who requested him to go to Mtaa wa Mbaoni to collect his debt. Upon arrival he met PW1. As they were taking tea police officers arrived and arrested him. They took him to Malindi Police Station where he was later joined by his co-accused and four others. His testimony was that the four others were released after they gave money to the police. His case was that he did not participate in the killing of the deceased.
25. The accused persons have raised the defence of alibi. They say they were not at the scene of crime at the time the deceased was killed. The 1st accused said he was with his sister Cecilia and his brother-in-law Safari Kadenge. He did not avail any of them as a witness but that should not be held against him since as was stated by the Court of Appeal in **Victor Mwendwa Mulinge v republic [2014] eKLR; Criminal Appeal No. 357 of 2012** it **“is trite law that the burden of proving the falsity, if at all, of an accused’s defence of alibi lies on**

the prosecution.”

26. In the instant case, the accused persons only raised the defence of alibi when they gave their evidence. There is no hint that they raised the issue with the investigating officer. The record is also clear that their counsel did not raise the issue when cross-examining the prosecution witnesses. Indeed in **Victor Mwendwa Mulinge** (supra), the Court of Appeal stated that:

“The appellant was arrested on 16th May, 2003 and taken to Shauri Moyo Police Station where his statement was recorded. That statement was not produced before the trial court. Had that been done, the court would have been able to consider whether what the appellant had stated at the earliest opportunity regarding his whereabouts on the material day was in line with his defence of alibi before the court. In KARANJA V REPUBLIC (Supra), this Court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused’s guilt is established beyond all reasonable doubt, take into account the fact that he had put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought.”

27. Considering the evidence of PW1, PW3 and PW6 that the accused persons were at the scene of crime, the defence of alibi which came too late in the day is rendered unbelievable.

28. The claim by the 1st accused that he had differences with PW1 does not explain the testimony of PW6. Indeed PW2 and PW4 told the court that PW6 opened up to them and told them how the deceased was killed. It was PW2 and PW4 who first learned that the accused persons killed the deceased. The defence put forward by the accused persons cannot be believed.

29. Why was the deceased killed? PW1 stated that he did not know although he talked of the deceased having been assaulted by unknown persons about two months prior to the incident. When PW2 was cross-examined, he stated that PW6 told him that the accused persons had killed the deceased because she was a witch.

30. It is not clear why the deceased was killed but the evidence adduced in totality shows that the accused persons killed the deceased. The killing was premeditated. They hovered around the deceased as they waited for PW1 to leave. Once PW1 left they descended upon her without mercy. The accused persons had the intention to kill the deceased. Malice aforethought, as defined by Section 206 of the Penal Code, was thus proved.

31. It may appear that the 2nd accused played a passive role in the murder. That does not take him off the hook. He was with the 1st accused in the act. As was stated in **Njoroge v Republic [1983] KLR 197**:

“If several persons combine for an unlawful purpose and one of them in the prosecution of it kills a man, it is murder in all who are present whether they actually aided or abetted or not provided that the death was caused by the act of someone of the party in the course of his endeavors to effect the common assault of the assembly Their common intention may be inferred from their presence, their actions and the omission of either of them to disassociate himself from the assault.”

32. In the circumstances I am satisfied by the prosecution beyond reasonable doubt that the two accused persons with malice aforethought unlawfully caused the death of Kahonzi Jeffa. I find them guilty of the offence of murder as charged and I convict each one of them accordingly.

Dated, signed and delivered at Malindi this 14th day of February, 2019.

W. KORIR,

JUDGE OF THE HIGH COURT