



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CRIMINAL CASE NO. 43 OF 2015**

**REPUBLIC .....PROSECUTOR**

**VERSUS**

**NGONYO THOMAS KALINGO alias KENGA**

**DENNIS KATANA KADZITU**

**JOSEPH PONDA KADZEHA**

**FREDRICK RUWA KALUME..... ACCUSED**

**JUDGMENT**

1. The accused persons NGONYO THOMAS KALINGO Alias KENGA, DENNIS KATANA KADZITU, JOSEPH PONDA KADZEHA and FREDRICK RUWA KALUME are jointly charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code

The particulars are that;

**“ On the 26<sup>th</sup> day of November, 2015 at Gandini village Kayafungo location, Kaloleni sub county within Kilifi County, the accused persons jointly with others not before court murdered THOMAS KALINGO KADZEHA.**

2. The accused persons were arraigned in court on 15.12.2015 whereby they were informed of the charge against them but were not required to plead until such time as they would have been examined by a psychiatrist and assigned counsel by the Deputy Registrar of the court. They were then remanded in custody.

3. On 9<sup>th</sup> February, 2016, the psychiatrist reports of all the accused persons were availed and each was confirmed to have been examined by the psychiatrist and found fit to plead. The accused persons were also assigned M/s N Chala, advocate to represent them.

4. The accused persons pleaded not guilty to the charge and the case proceeded for trial, which commenced on 17<sup>th</sup> November, 2016. The prosecution called nine (9) witnesses while each of the accused persons opted to give sworn statements in defence and called no witness.

5. The summary of the prosecution's witnesses' evidence was that in October, 2015, ISAAC JUMA, a son to the deceased THOMAS KALINGO KADZEHA was ailing and had a mental problem. That he died even after being treated in several hospitals. After his death, there were allegations that his father, the deceased was the one responsible for his death.

6. According to the prosecution's witnesses, after the burial of the said ISAAC JUMA, the chief decided that the family meets to deliberate over the issues of the deceased being suspected to be a wizard who had caused his son's death, so that they would live in peace. The family agreed and they held a meeting where the deceased decided that he be taken for an oath taking exercise to establish the truth of the allegations against him. And although some of his sons like Pw2 were against this, it was decided that they proceed for oathing.

7. It was further evidence that the deceased was taken for the oathing exercise at Ngonzini village in Kinango to be administered by a witch doctor by the name SALIM MWABENDO MAGUTA (herein referred to as Pw7) He was accompanied by JUMA CHARO (Pw4 herein), DENIS KATANA (2<sup>nd</sup> accused person herein). FRANCIS RANDU YERI (Pw1 herein) KENGA and FRANCIS SHINDO. They had been given a letter of introduction by the village elder, FREDRICK MUNA, who is the 4<sup>th</sup> accused person herein.

8. It was said that the deceased was "caught by the oath" and this confirmed he was a wizard and responsible for the death and sickness in his home. That he confess that he had brought "Jinis" (spirits) in his home to protect his family. The chief was called and informed of what had

happened.

9. After the oath, these people returned with the deceased to their home at Kayafungo in Kilifi with a letter from the witch doctor indicating what had transpired and how the deceased had confessed to being a wizard.

10. When they got to the deceased's home, they found many people who included the deceased's mother and sister. As these people alighted from the car, people started screaming while others started streaming into the home to see what was happening. These people demanded that the deceased come out of the vehicle and he obliged. He was given a chair and he sat. These people then kept saying that the deceased was bad, they beat and threw stones at him until he died. These people then left.

11. The police from Kaloleni, who included I P JACOB OKONG'O visited the deceased's home upon receiving a report of murder at Gandini village in Mbalamweni sub-location. They found the deceased lying dead at the main door of his house with his head facing outside and in a pool of blood. They also stated that he had several serious injuries on the head. IP JACOB OKONGO testified as Pw6 and said that he collected a blood stained log from the scene together with the deceased's body which he escorted to Coast General hospital mortuary for preservation and post mortem examination.

12. Pw9, PC OBAYI MUNG'ANIA, the investigating officer produced the pestle which was suspected to have been among the weapons used to assault the deceased as exhibit P1 and the post mortem examination report as Exhibit P4. The letter dated 25.11.2015 from the village elder authorizing the oath-taking was produced as exhibit P2 and the one from the witch doctor, Pw6 dated 26.11.2015 as exhibit P2.

13. According to Pw9, after recording witnesses statements and conducting investigations, he arrested the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> accused persons for being part of the people who escorted the deceased for the oath-taking exercise from which his death emanated.

14. After the close of the prosecution's case, the accused persons were placed on defence and each opted to give sworn statement in defence. They called no witness.

15. The 1<sup>st</sup> accused person, NG'ONG'O THOMAS KALINGO testified that the deceased was his father he narrated what transpired from the death of his brother until his father's death. From his evidence, it clearly came out that the chief of their area, who also happened to be their brother in law, (having married their sister) instigated the whole exercise saying it was a Giriama custom. He also said that after the father had been "caught" by the oath, he (deceased) called the chief to tell him about it. And although he wanted his father to stay with him in Mombasa, the chief insisted that he goes back home to bless his children. That it is when they reached their home that their father was killed while he (DW1) had gone to buy ginger and vegetables. He heard of his father's death over the news on radio while at the shopping Centre. He was told that his father had been attacked and killed by a group of boda boda riders.

16. The 2<sup>nd</sup> accused person, DENIS KATANA also testified to confirm that he was 'son' to the deceased and had escorted him for oathing on 25.11.2015. He also said that after the deceased had allegedly been "caught" by the oath he asked him to call the chief, who is his son in law and inform him that he had been 'caught' by the oath. Dw 2 said that after taking the deceased home, he left before the deceased's children arrived. He said that he did not know what transpired and led to the death of the deceased.

17. The 3<sup>rd</sup> Accused person, JOSEPH PONDA KADZEHA, a brother to the deceased told court that some time in November, the deceased called to tell him that he had returned from oathing and he went to his home. There he found many people who were inquiring if the deceased had been "caught" by the oath. That he saw people attack and beat his brother to death and could not let him defend his brother.

18. The 4<sup>th</sup> accused person, FREDRICK RUWA KALAMA, the village elder of Gandini village was called to a meeting by the deceased where it was decided by those in attendance that he goes for oath-taking. That he wrote a letter of introduction to the witch doctor who was to conduct the oathing exercise. And on 26.1.2013, DW4 said that he received information that the deceased had returned from oathing but had been attacked and murdered.

19. After listening to the defence statements by each accused person's the issue to be determined by his court at this stage is whether the prosecution has proved their case against the accused persons beyond reasonable doubt as required by law.

20. It is trite that in a criminal case, the legal onus is always on the prosecution to prove the guilt of an accused person, and the standard of proof is beyond reasonable doubt. This burden of proof always lies upon the prosecution and it never shifts to an accused person. An accused person is only obliged, and if so wishes to give an explanation or raise a defence to the charge. If he does this, then he discharges his burden of proof and his explanation or defence must be accepted.

21. It is also trite that to sustain a charge of murder, the prosecution has the burden of proving the ingredients of section 203 of the Penal code, which are that;

(a) the death of the deceased and cause of the death;

(b) the accused committed the unlawful act or omission which caused the deceased's death;

(c) that the accused had malice aforethought

22. On the first ingredient, the evidence adduced by the prosecution and defence clearly confirms the death of the deceased and that he died

as a result of severe traumatic head injury and severe hemorrhage shock secondary to assault, after being attacked by a crowd of people who hit him with stones and a pestle. The prosecution has therefore prove the first ingredient for the offence of murder in this case.

23. The second ingredient is about whether the prosecution has proved beyond reasonable doubt that the accused persons jointly with others not before court caused the death of the deceased through their unlawful act or omission.

24. By being charged jointly, it implies that the accused persons had a common intention to murder the deceased and they acted together to accomplish the act. This too requires to be proved beyond reasonable doubt.

25. The accused persons were charged with the offence of murdering the deceased. And the decision to charge them was made by Pw9, PC Obayi Mung'ania, the investigating officer in this case. According to Pw9, a meeting was held following the death of one of the deceased's son by the name Isaac Kalingo, where it was decided that the deceased goes for oathing to determine whether he was a wizard.

26. Pw9 said that the 1<sup>st</sup> accused person, Ngonyo Thomas Kalingo and 2<sup>nd</sup> accused person, Dennis Katana Kadzitu, who are sons of the deceased, are the ones who went to collect the letter for the deceased to be taken for oathing from the chief but he refused to give them and instructed them to go to the police station. The two then decided to go to the village elder, Fredrick Ruwa, who is the 4<sup>th</sup> accused person, who wrote for them the said introductory letter.

27. Pw9 also said that the deceased was not willing to go for oath taking and so he went to hide at his brother in-law's place at Shanzu. But the 1<sup>st</sup> and 2<sup>nd</sup> accused person on the advice of Joseph Ponda, a brother to the deceased and 3<sup>rd</sup> accused person herein, followed him there. That it is the 1<sup>st</sup> and 2<sup>nd</sup> accused person who pressured the deceased to go for the oath-taking exercise.

28. Further, Pw9 said that after the oath taking exercise where the deceased allegedly confessed to being a wizard, the oath giver advised those who had accompanied him to ensure his security but the 1<sup>st</sup> and 2<sup>nd</sup> accused persons threatened and insulted the deceased. That they went ahead and raised an alarm back home that the deceased had been "caught" by the oath so that when they arrived, people were already gathering there. That they alighted from the vehicle and went to discuss with the crowd for a few minutes as the 3<sup>rd</sup> accused person gave him a seat. That shortly thereafter the deceased was stoned and a hit to death with stones and pestle.

29. On being cross examined, Pw 9 said that he established that the accused persons took the deceased for oath-taking and then left him at a dangerous ground with a charged crowd instead of managing the said crowd. However, he stated that the 4<sup>th</sup> accused person did not go for the oathing ceremony and that he was in court because of writing the letter for taking the deceased for oathing.

30. Pw1 on the other hand stated that he witnessed the deceased being stoned to death but did not state that any of the accused persons took part in the said attack. He only said that they did nothing to stop the same. He also told court that on their way to the deceased's home from oath taking ceremony they did not discuss much in the vehicle except for how they could counter the effect of the oathing

31. When he was cross examined, he confirmed that the deceased went for the oath on his own volition. He said he did not see any of the accused persons stone or hit the deceased and that in fact the 4<sup>th</sup> accused person was not at the home at the time of the incident. He further said that the 3<sup>rd</sup> accused person removed a chair for the deceased, who was his brother to sit on and he appeared sympathetic to him. As for the 2<sup>nd</sup> accused person, Pw1 said he read the letter from the medicine-man to the crowd so as to stop them from harming his father. Clearly, the evidence of Pw1 counters the evidence of Pw9 gave as having informed him to charge the accused persons with the offence of murder of the deceased.

32. Pw2 said he did not witness the deceased being stoned to death and only heard he had been stoned by bodabada cyclists and riders. He also said that when the issue of the oath-taking came up, the deceased was ready to go for it.

33. Pw3 told court that his brother Ngonyo had been against the whole exercise of oathing but when he (Dw3) declined to accompany their father he agreed to do so. He also did not witness the attack, and eventually the death of the deceased. Pw4 equally did not witness the incidence and Pw5 only witnessed the post mortem examination on the deceased's body.

34. Pw6 was the oath-giver and only testified on what transpired during the oathing exercise and how the letter he received indicated that these was a problem between the deceased and his son, the 1<sup>st</sup> accused who was alleging that his father was a wizard. P7 was the police officer who visited the scene of crime, conducted preliminary investigations and collected the deceased's body for onward transmission to the mortuary.

35. Pw8, was wife of the deceased and mother to 1<sup>st</sup> accused person and she testified that she witnessed the deceased's death. She denied that any of the accused persons took part in stoning the deceased to death. She said he was killed by the many people who had come to their home after her husband and others had returned from the oath taking ceremony.

36. An analysis of the evidence of all these witnesses clearly confirms that the deceased went for a oath taking ceremony by Pw6 in the company of his sons 1<sup>st</sup> and 2<sup>nd</sup> accused persons, and brother, the 3<sup>rd</sup> accused person and others not before court. The letter requesting for the oath to be taken was written by Pw 4. However, I find no evidence which directly confirms that the said accused persons took part in the murder of the deceased. None of the witness has told the court in which manner any of the accused persons did or said anything that would result into the deceased being killed. And even as Pw1 said that they did nothing to stop the attack, he too was present at the scene and did nothing. Their evidence as prosecution's witnesses was that the crowd was too big that it was overwhelming to them. In fact, there is no evidence to confirm that the accused persons conspired to murder or have the deceased murdered.

37. The accused persons in their evidence in defence denied any involvement in the deceased's death and narrated what transpired in

confirmation of the evidence of the prosecution's witnesses.

38. In view of the evidence that has been adduced in this case, I find the same insufficient to warrant this court to find the accused person's guilty of causing the death of the deceased

39. As for the third ingredient, that of malice aforethought, it is this court's finding that it would easily be said that the motive behind the murder of the deceased would have been the claim of his being a wizard. However, having found that none of the accused persons have been shown to have caused his death, then the same cannot be discussed at this stage.

40. Consequently, I find the prosecution has failed to prove their case against the accused persons beyond reasonable doubt and find each one of them NOT GUILTY of the offence of murder contrary to section 203 of the Penal code.

41. I proceed to acquit the accused persons under section 215 of the Criminal Procedure Code.

**Delivered, dated and signed this 4th day of July, 2019.**

**D.O. CHEPKWONY**

**JUDGE**