



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBOSA

CRIMINAL CASE NO 73 OF 2012

REPUBLIC.....PROSECUTION

VERSUS

KARISA KATANA POLA

KAHINDI KATANA POLA

MWALIMU KATANA POLA.....ACCUSED

KENGA KATANA POLA

JUDGMENT

1. The accused persons are jointly charged with the offence of murder contrary to section 203 as read with section 204 of the penal code.

The particulars of the offence are that;

“On the 18th October, 2012 at 8.30 am at Makwala village, Makwala sub location, Bamba location, Ganze District within Kilifi county, the accused persons jointly with others not before court unlawfully murdered KAZUNGU NDORO.”

2. The accused persons were first arraigned in court on 17th December 2012 whereby they were informed of the charge against them but were not expected to plead.

They were remanded in custody to await examination by a psychiatrist to establish their mental capacity and for the Deputy Registrar to assign them counsel.

3. And on 5th February, 2013, the accused persons took plea and each pleaded NOT GUILTY to the offence of murder. The accused persons were all represented by Mr Mwarandu advocate.

4. The hearing of the case commenced on 8th May, 2013 whereby the prosecution conducted evidence of eleven (11) witnesses in support of their case while each accused person opted to give unsworn statements in their defence and called no witnesses.

5. It is the prosecution's evidence that there was a land dispute at Makwala between two clans, namely Amwakithi clan and Akize cha Mwawale clan.

6. According to Pw6, the Assistant chief of Makwala sub-location, HENRY NGALA CHARO, that the dispute had been heard by the lands officers, which proceedings he had participated in and a decision made to the effect that the clan of Akize cha Mwawale were the rightful owners of the land

7. The issue of the said land dispute was being pursued by the deceased, KAZUNGU NDORO for the Wakiza clan while one JAFFA MALANGA was the leader for the Mwakithi clan and father of the accused persons in this case.

8. With regard to 18th October, 2012, Pw2 GABRIEL KAHINDI BIHONDA and he deceased, KAZUNGU NDORO had gone to check on what was happening on the disputed land where they interrogated a neighbour by the name CHANGAWA MAKAMABA and he told them that he had seen a group of Wakithi people cultivating the said shamba .

9. Pw2 and the deceased then decided to go and report the matter and on their way, met a group of people who were armed with bows, arrows and pangas, which made them decide to run.

10. It was evidenced that the group of people chased after the deceased who ran to the home of KITSAO KILUNGA (herein referred to as Pw9). Pw2 ran to his home and called the police.

11. That these people, among them the accused persons, started demolishing the house where the deceased had ran into so as to reach the deceased. The deceased was shot and he came out of the house. He however could not run fast and was cut with pangas until he died.

12. The attackers left after killing the deceased. Some of the people who witnessed the incident screamed and people came to the scene. The police were called but they did not arrive in good time. They arrived later, collected the bows and arrows from the scene and took the body to the mortuary at Kilifi Sub County Hospital.

13. A post mortem examination was conducted on the deceased's body on 19.10.2012 by Pw10, DR. AWADH TARAB TAHIL and he told court that he observed

(a) deep cut wounds on the back of the deceased's head which extended to the rib cage;

(b) deep cut wounds on the head extending to the brain matter;

(c) deep cut wounds on the forehead

He formed an opinion that the cause of deceased's death was severe hemorrhage due to deep cut wounds and trauma to the head. He said he filled and signed the post mortem report which he produced as exhibit P4.

14. Pw11, No 231672, chief Inspector JOSEPHAT SHAIRI, who was then attached to Bamba police station said he received a call from the Assistant chief of Mwakala area that there was a group of people who had gone to a disputed piece of land and there were two groups. He proceeded to the scene where he found the deceased's dead body with several wounds. He collected a bow, three arrows and two pieces of sticks which were blood stained from the scene. He later caused the arrest of the accused persons and called the witnesses, who were known to them to identify them.

15. The accused persons were placed on their defence and each opted to give unsworn statements in defence. They called no witness.

16. The 1st accused person, KARISA KATANA POLA told court that he is accused of killing KAZUNGU NDORO who is said to have been killed in December 2012. He explained that there was a land dispute between a clan known Akiza. And he remembered that on 18.10.2012, he went to his shamba in the morning and planted maize. That after about an hour, he saw a group of people who were armed with pangas, bow, arrows and clubs come there. He stated that there were about 30 people who were digging a water basin near his shamba so that when he shouted for help, these people came to his rescue and they escaped from the shamba. That two days later, they heard that deceased had died. And on 14.12.2012, the assistant Chief came to their home with four police officers. They were arrested and taken to Bamba police station without knowing why. He said he did not know who killed the deceased.

17. The 2nd accused person, KAHINDI KATANA POLA gave similar evidence to that of DW1, the same case with the 3rd accused person, Dw3 and 4th accused persons.

18. Mr Mwarandu, counsel for the accused persons filed written submission in which he stated that the prosecution had demonstrated a clear case of mob justice in this case and that the investigations were shoddy since it had failed to follow possible leads to get at the true offenders. He cited two authorities being;

1. HIGH COURT CR CASE NO 88 OF 2003 -REPUBLIC VRS PHILLIP MWANGI CHEGE

2. HIGH COURT CRIMINAL CASE NO 26 OF 1993 – REPUBLIC VRS ALFAYO OTIENO OGUNGA.

19. While the defence in their submissions outlined the issues for this court to determine, in analyzing the evidence adduced by both sides in this case, I find that the main issue for determination by this court is whether there is sufficient evidence against the accused persons to warrant them being convicted for the offence of murdering the deceased in this case.

20. Section 203 of the penal code defines the offence of murder as

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

From this definition, three (3) critical ingredients required to be proved arise. These are:

(a) the fact of death of the deceased.

(b) the cause of death of the deceased

(c) that the accused persons committed the unlawful act that led to the death of the deceased.

(d) that at the time of the unlawful act or omission was committed the accused person had malice aforethought

21. The definition of murder is also well captured in the Latin maxim;

“ Actus non facit reum, nisi mens sit rea” which means “ The act itself does not constitute guilt unless done with a guilty mind”.

The second ingredient of this definition constitutes the “ actus reus” or action of the offence of murder while the third ingredient constitutes the “mens rea” as the guilty mind required to prove the offence of murder.

According to the law, these ingredients must be proved beyond reasonable doubt in order to sustain a charge of murder.

22. For the fact of the deceased’s death, it is not in doubt that the deceased met his death on 18th October, 2012 at Makwalla village. All the prosecution’s witnesses and the accused persons in their evidence to court stated that the deceased died on the alleged date. The identity of the deceased was provided by all these witnesses who were either related to him or were neighbours. The body of the deceased was identified to the doctor who performed post mortem examination, Dr AWADH JAFAB TAHIL (Pw10 herein) by two of his sons, HENRY NGALA CHARO AND EDWARD FUNDO NDORO.

23. On the question of the cause of the deceased’s death, there was no contention that he was shot with an arrow and cut severally with a panga. Pw1, Pw 2, pw3, Pw4, P5, Pw6, Pw7, Pw8, Pw9 and Pw11 testified that the deceased died as a result of being shot with arrows and cut with pangas.

24. Pw10, the doctor who performed the post mortem examination on the deceased’s body confirmed that he observed that the deceased had deep cut wounds on his back, rib cage, head, forehead and concluded that he died as a result of severe hemorrhage due to the said deep wounds and trauma to the head. He produced a post mortem form as exhibit P4 to confirm these findings.

25. Although the accused person in their defence confirm that they heard of the deceased’s death, they did not testify as to the cause of his death and neither did they challenge the evidence that he was shot with arrows and cut with pangas until he died. The cause of deceased’s death has hence been proved beyond reasonable doubt.

26. Having proved that the deceased died, and died as a result of being shot with arrows and cut by pangas, there is need to find if the prosecution has proved that the accused persons caused his death. And if it is so proved, if they did it with malice aforethought.

27. The accused persons have been charged with the offence of the murder of KAZUNGU NDORO, the deceased herein. To prove this, the prosecution presented eleven (11) witnesses who testified in support of their claim.

28. Pw1, KADENGE NGOLO NDOLO, Pw3, CHIEF KITSAO KILUNGA, Pw4, CHANGAWA CHARO KADOFI, Pw5 CHANGAWA MKAWA NYOKA, Pw8, KASIWA NDORO, and Pw9, KITSAO KILUNGA NYOKA testified that they saw the accused person, who they identified by their names in a group of about ten or twelve (12) people, chasing the deceased who ran into the house of KITSAO KILUNGA (Pw3 herein) . They all said that the accused persons were armed with bows, arrows and pangas. That the accused persons started demolishing Pw3’s house so as to get to the deceased. They shot at the deceased and he came out of the house. They then proceeded to cut him with pangas until he died. They all testified that the incident took place in broad day light, between 9.00 -10.00 am.

29. Pw2, GABRIELL KAHINDI BIHUNDA, Pw6, HENRY NGALA CHARO, an Assistant chief , Pw7, REHEMA KITSAO and Pw11, No. 231672, CHIEF INSPECTOR JO SEPHAT SHAIRI are those who did not witness the incident happen but confirm that they found the deceased dead, having been killed by people who were said to have been armed with bows, arrows and pangas. Pw2 saw the deceased’s body having several cuts on the hands and head and had also been shot. Pw6, saw the deceased’s body lying beside the house with cut injuries all over it. He also saw a bow and three arrows at the scene which he identified to court (Exhibit P1 and P2) . Pw7 is the owner of the house where the deceased had run for refuge and she said it was damaged with holes having been poked into the wall and door removed. She also found the deceased body with three arrows and a blood stained club. Pw 11 told court that when he visited the scene, he found the deceased’s dead body with several wounds . He collected the bow, three arrows and two pieces of sticks which were blood stained.

30. Out of eleven (11) witnesses, seven (7) of them testified to confirm having witnessed the attack on the deceased by the accused persons and a group of others. The other four (4) were informed of the incident that led to the deceased’s death.

31. The seven (7) witnesses were each able to point out and identify the accused persons before court as having been among the group of people who fatally attacked the deceased. From their evidence in court they were sure of who they were identifying because the attackers, who included the accused persons, were people who were well known to them as they lived in close vicinity of each other and had been warring over a piece of land.

For instance, Pw1 said;

“ I saw the 4 accused persons, Karisa Pola , Kahindi , Mwalimu and Kenga .I knew them before. They are neighbours . They were chasing a man I did not know.

Pw 3 said ;

“ I saw the 4 accused persons running chasing the deceased. They were in group of others.

Pw 4 said ;

“ The accused persons are neighbors.

In cross examination, he said;

“ I gave the names of eight people, I do not know why police did not arrest others.

32. Also, from the evidence of the said prosecution’s witnesses, the incident occurred in broad day light, time being between 9.00-10.00am and visibility was good. And from the way these witnesses described the attack on the deceased, it is clear the same took a considerable amount of time to the extent that they were able to recognize, identify and name the deceased’s assailants and what each accused did.

According to Pw1

“They managed to demolish the house and found the deceased. He was shot with an arrow, he came out running and got hold of the 1st accused. The 3rd accused shot the deceased on the chest. He got hold of 1st accused’s bows and arrows. The 3rd accused cut the deceased on the hand. The deceased was cut with a panga on the back by another suspect who is not before courtthe 2nd accused cut he deceased on the ribs . Karisa cut him on the face. He got hold of a piece of wood and hit the deceased till he died”

Pw3 on the other hand said;

“He came out of the house and they cut him with pangas till he died. Karisa is the one who finished the job of killing the deceased with clubs.”

Pw 4 told court that;

“ He was being cut by a group of people including Mwalimu, Katana, Kenga, Karisa, Kahindi, Katana.....Karisa did aim arrows at the deceased. Mwalimu did cut the deceased with a panga. The others also cut the deceased.....”

Pw 5 stated that;

“.....I did see Karisa Katana, Mwalimu Katana and Kenga Katana.....I did see Karisa shoot the deceased with an arrow on the heckwhen the deceased came out of the house he was cut by Mwalimu on the back with a panga and he fell down.....”

Pw 8 said that;

“ I heard screams . I went to the scene and saw the deceased had been killed I saw Karisa Mwalimu, Kahindi and Kenga and others. They were armed with bows and arrows. Karisa was armed with bows . Mwalimu Kahindi and Kenga we armed with pangas. I saw them walking way from the scene.

Pw 9 also said that;

“ I saw a group of men following him. I saw Karisa, Mwalimu, Shida, Kazungu and others chasing the deceased . They were more than ten. They were armed with bows and arrows Karisa, Mwalimu was also armed with bows and arrows.....”

33. Clearly, this is not a case of visual identification but one of identification by recognition, which according to the decision in the case of ANJONONI AND 3 OTHERS , VRS REPUBLIC

“recognition of and assailant in more satisfactory, more assuring and more reliable than identification by a stranger because it depends upon the personal knowledge of the assailant in some form or other”.

34. In their unsworn statement of defence, the accused persons do not deny the incident happened and that the deceased was killed. They deny having been part of those who caused the death of the deceased. They all said that they were working on their farm when they saw a group of people who were digging a water basin and another group who were armed with bows, pangas, arrows and rungu come there. That they were rescued by the people who were digging the basin and they went home. That they only heard that the deceased had been killed after two days.

35. In evaluating the defence case, I find that the accused persons were at the shamba, there was a group of people who were digging a water basin, then another group which was armed with pangas, arrows and bows came there and then there was a confrontation. I also find that they confirmed that the deceased was killed. They did not tell this court who was involved in the confrontation, why they had to run and

were rescued and who killed the deceased and why? In my own view, I find the prosecution evidence overwhelming to the extent that it effectively dislodged the defence of the accused persons.

The prosecution has proved beyond reasonable doubt that the accused persons were in the group of people who attacked and killed the deceased.

36. Having found so, the last issue for determination is whether the accused persons can be held criminally culpable for the death of the deceased. Under section 206 of the penal code, it must be proved that the accused had the criminal intent to kill and actually planned to kill the deceased, so as to prove the existence of the "means mea" or the mental element of the offence of murder.

37. From the evidence of the prosecution's witness there had been a long standing dispute over a piece of land at Makwalla between two clans known as the Wakithi, which the accused persons belonged to and Wakisa, which the deceased belonged to. They said that the matter had been deliberated on by the authorities and the court knew about it. According to Pw6, the assistant chief of Makwalla sub location, the deceased was the one who was following the issues for his clan while one Jaffer Malanga, father to the accused persons, was the leader of their clan, Wakithi. This evidence was not disputed by the defence.

38. It was also not disputed that on the fateful day, the deceased the company of Pw2, went to the said land to check on what was going on after being asked to do so by Pw6 when they met the group of armed people who started chasing them. From this evidence, it is clear that these people were after attacking the deceased who they pursued up to the house where he went to seek refuge and even managed to flash him out by poking holes into the door and walls of the said houses using arrows and they then cut him all over the body with pangas until he died, a clear indication that they were determined to get rid of him by all means.

39. Clearly, the accused persons and others who were in the group but were not arrested, had a dispute with the deceased's clan members over what they considered to be their land and were aggrieved by this. They were all armed with dangerous and offensive weapons and they set upon the deceased who was unarmed, and unprovoked, attacked him. In their minds, the accused person and others in the group knew that their actions would either lead to grievously harming the deceased or killing him. And they fatally cut and shot him in the attack.

In the case of DRACAKU S/O AFIA VRS R (1963) E.A 363, it was stated that;

"there was no evidence that any agreement formed by the appellants prior to the attack made by each, it is not necessary if an intention to act in concert can be inferred from their actions, such as "where a number of persons took part in beating a thief"

40. Given my analysis of the prosecution's evidence in this case, I find the same tangible and cogent. The prosecution met the standard of prove required in a criminal trial by law.

I hence enter a verdict of "GUILTY" and convict each accused person of the offence of murder.

It is ordered.

Dated and delivered this 5th day of May, 2018.

HON. LADY JUSTICE D. O. CHEPKWONY

5.6.2018

Before Hon D O Chepkwony

C/clerk- Beja

M/s Ocholla, counsel for the state

M/s Chala, counsel for the accused present

Accused persons – All present

Court – I have considered the accused persons records and mitigation statements by their counsel.

And despite their mitigation that they have families to take care of and their claim of sorrowful circumstances under which the offence was committed, I find that the accused persons ought to have thought of the repercussions or consequences of their actions. I find they were not provoked by the deceased or any one at the scene. And even though there was a land dispute between the clans, the dispute was being processed by the relevant authorities. They would not have taken the law in their hands. It is true the death sentence has been declared unconstitutional by the Supreme Court but legislature to that effect has not been put in place. The death sentence still remains the mandatory sentence provided for in our statute.

However, in exercise of this court's powers and the relationship between the two clans, I sentence each accused person to life

imprisonment.

Right of appeal 14 days.

M/S Ocholla- We apply to be supplied with typed proceedings.

Court – The parties to be supplied with typed proceedings.

HON LADY JUSTICE D. O. CHEPKWONY

5.6.2018