



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL CASE NO. 1 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

KARABU CHARO KENGA.....1ST ACCUSED

ZAWADI MTAWALI KENGA.....2ND ACCUSED

HUSSEIN MULEWA KALAMA.....3RD ACCUSED

RULING

1. Of the three accused persons (Karabu Charo Kenga – A1, Zawadi Mtawali Kenga – A2 and Hussein Mulewa Kalama – A3) charged in this case, only Zawadi Mtawali Kenga remains standing before this court. The other two accused persons are said to be deceased. The accused persons were charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence being that on 10th December, 2013 at Mwangatini Village, Magarini Location within Kilifi County they jointly murdered Kadzo Mwambaga.

2. The prosecution called PW1 Kazungu Charo Kenga, PW2 Charo Mtawali Kenga, PW3 Daniel Kalulu Thoya, PW4 Kahindi Charo Kenga, PW5 Charo Kenga Karisa, PW6 Mtawali Kenga Karisa, PW7 Chief Inspector Justus Kiboi and PW8 Dr. Job Gayo in support of its case. At the close of the prosecution's case Ms Mwanja for A2 submitted that A2 has no case to answer. The State relied on the evidence adduced. This ruling addresses the submissions made at the conclusion of the prosecution case.

3. In summary, the defence's submission is that at the close of the prosecution case no witness had connected A2 with the death of the deceased. Counsel relied on the decision of the Court of Appeal in **Boniface Olunga v Republic [2014] eKLR; Criminal Appeal No. 574 of 2010** to show what is required before a conviction for murder can ensue.

4. The question to be answered at this stage is whether the prosecution has established a *prima facie* case to warrant A2 being placed on his defence. In **Boniface Olunga** (supra) the Court of Appeal outlined the ingredients of the offence of murder as follows:

“There are three essential elements to be proved for the offence of murder to be established which the prosecution must prove beyond reasonable doubt. The elements are:

a) the death of the deceased and the cause thereof

b) that the accused committed the unlawful act which caused the death of the deceased and

c) that the accused had the malice aforethought.”

5. In the case at hand the question is whether evidence has been adduced to connect the accused with the death of the deceased.

6. In his testimony, PW1 told the court that sometimes in November, 2013 A2 who is his cousin told him that he suspected that his sister Nyevu who was sick had been bewitched by the deceased and he was looking for money to take to a witchdoctor to treat his sister and find out about the issue. PW1 warned A2 about taking the step he was contemplating. After a short while he learned that the deceased had been killed.

7. PW2 never mentioned A2 in his evidence. He only talked of hosting Hussein Kenga Kalama on the night the deceased was killed. PW3

also never mentioned A2. His testimony was that the deceased was suspected to have bewitched one Karabu Charo Kenga. He denied being aware of any dispute between A2 and the deceased.

8. PW4's evidence related to how, in the company of his father, they discovered the body of the deceased. He also gave testimony to the effect that Karabu Charo Kenga admitted paying money to the killers of the deceased.

9. PW5 the husband of the deceased responded to his wife's screams. On reaching there he found her dying. He did not see the people who killed her.

10. PW6 stated that he gave a torch to PW5 after PW5 heard the deceased screaming. PW6 who is the father of A2 and the brother-in-law to the deceased stated that A2 had no grudge against the deceased. His evidence was that the child of Karabu had died and Karabu claimed that the deceased had bewitched the child.

11. PW7 took over investigations from Police Constable Geoffrey Eyago who had been transferred and could not be traced to come and testify during the trial. According to PW7 the investigating officer had established that A2 had contributed Kshs. 2,000 for the purpose of killing the deceased.

12. The evidence that can be said to connect A2 to the crime is fleeting at most. This is found in the evidence of PW1 who claimed that A2 indicated to him the desire to consult a witchdoctor over the sickness of his (A2's) sister. No mention was made about any plan to kill the deceased.

13. PW7 talked of the investigating officer establishing that A2 contributed Kshs. 2,000 towards the killing of the deceased. No evidence was adduced to support this revelation.

14. In short the defence counsel is correct that no evidence has been adduced to link A2 with the killing of the deceased. There is therefore nothing which A2 can be asked to explain so as to require his being placed on his defence. No *prima facie* case has been established against him. I therefore record a finding of not guilty against A2, Zawadi Mtwali Kenga, in accordance with Section 306(1) of the Criminal Procedure Code. He is acquitted and is thus a free man in so far as the charge before the court is concerned.

Dated, signed and delivered at Malindi this 20th day of July, 2018.

W. KORIR,

JUDGE OF THE HIGH COURT