



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL CASE NO. 19 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

KAHINDI CHARO KATANA.....1ST ACCUSED

KENGA SAMSON TAABU alias ZAIMBOGI.....2ND ACCUSED

DICKSON BARAKA MISTANZE IHA.....3RD ACCUSED

AS CONSOLIDATED WITH

CRIMINAL CASE NO. 23 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

DICKSON BARAKA MISTANZE IHA.....ACCUSED

JUDGEMENT

1. On 12th October, 2015 Kahindi Charo Katana, the 1st accused person (A1) and Kenga Samson Taabu alias Zaimbogi, the 2nd accused person (A2) were charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. Their case was later consolidated with that of Dickson Baraka Mistanze, the 3rd accused person (A3) who was arrested later and charged in Malindi H.C. Criminal Case No. 23 of 2015.

2. The consolidated information read to the accused persons on 8th March, 2016 informed them that on 8th August, 2015 at Bore Taula Village, Magarini Location in Kilifi County they jointly with others not before court murdered Kahindi Nduka Ngasho.

3. The prosecution called six witnesses in support of their case. The only eye witness was PW1 Kahindi Kibandi Thoya. His testimony was that on 8th August, 2015 at about 3.00 p.m. he was cutting trees in the forest when three people passed heading towards the home of the deceased Kahindi Nduka Ngasho. Shortly thereafter he heard screams from the home of the deceased. He proceeded there. On arrival he found the three accused persons assaulting the deceased using stones and rungs. He stated that Baraka (A3) was the first to attack the deceased. As the deceased screamed that Baraka was killing him, A1 and A2 urged A3 to finish off the deceased.

4. PW1 went to report the matter to the Nyumba Kumi elder but did not find him at home. He informed the wife of the elder about the assault and went to report the incident to PW2 Karema Simeon Kangu. When he went back to the scene with PW2 they found the deceased had been killed. The body had been taken to the house and there were stones at the scene.

5. PW1 further testified that he had alerted Kavumbi Nduka Ngasho, a sister to the deceased, about the assault on the deceased but she had told him to mind his own business. His evidence was that Kavumbi's homestead is next to that of the deceased.

6. PW1's testimony was that he knew the accused persons very well. They were related to the deceased who was his uncle.

7. When cross-examined by counsel for A1 and A2, he stated that he found Kavumbi preparing to cook pumpkins and on enquiring why she

was not asking the accused persons not to assault the deceased she told him to mind his own business. PW1 also disclosed that the three accused persons were with a fourth person who was a young boy. He stated that prior to the incident the deceased had been directed to ensure that the deceased's younger brother who was unwell recovered from his illness. He stated that when he came back with PW2 the accused persons had left. His evidence was that he feared the accused persons would assault him and that is why he did not rescue the deceased.

8. Responding to questions put to him by counsel for A3, the witness stated that he did not talk to the accused persons as they passed him in forest. His evidence was that when he heard the screams he went and hid near the deceased's home so as to observe what was happening.

9. PW2 Karema Simeon Kangu and PW3 Duka Victor Katana arrived at the scene after the deceased had been killed. They saw stones and sticks at the scene. They also saw injuries on the head of the deceased. The accused persons were nowhere to be seen. PW1 gave them the names of the killers of the deceased.

10. PW4 Ziro Ndaa Ziro the village elder also visited the scene and confirmed the deceased had indeed been killed. He relayed the report to his seniors.

11. PW5 Corporal Patrick Theuri identified himself as the investigating officer. His evidence did not, however, disclose that he carried out any investigation.

12. Dr. Joab Gayo testified as PW6 and produced a post-mortem report prepared by Dr. Gohil Hetal as an exhibit in this case. The post mortem performed on the body of the deceased disclosed the cause of death as cardiorespiratory arrest secondary to penetrating cut wound. When PW6 was cross-examined by counsel for A1 and A2 he stated that the cuts on the deceased's body were caused by a sharp object.

13. A1, A2 and A3 testified as DW1, DW2 and DW3 respectively. Their defence was that on the material day they were going to play football when they heard screams from the homestead of the deceased. They went and found he had fallen down. He asked them to prop him up and they did so. After about five minutes PW1 arrived and asked them what had happened and they told him they had just responded to screams from the homestead. PW1 went and called the brother of the deceased. Other people came and PW1 told them not to leave.

14. A1 and A2 stated that they were separately arrested on 19th September, 2015 and accused of killing the deceased. A3 was arrested on 2nd December, 2015 and also charged with killing the deceased.

15. The manner in which to treat the evidence of a single witness was enunciated by the South African North Gauteng High Court – Pretoria in **Groenewald v S (A 807/11) [2013] ZAG PPHC 18 (4 February 2013)** thus:

“[11] The State’s case rested on the evidence of a single witness, being the complainant, a 17 year old male. In evaluating the evidence of a single witness, regard must be had to the probabilities and improbabilities of the evidence. In Olwale v S [2010] 1All SA 451 (SCA) at paragraph 14 the court held that ‘in evaluating the evidence against the appellant, one must look at the reliability and credibility of the witnesses, consider if any of them had a motive to falsely implicate the appellant, and further look at the probabilities of the State’s version’.... The evidence of a single witness has to be treated with caution. A court can accept the evidence of a single witness if it is satisfied that it is truthful beyond reasonable doubt.”

16. Although a conviction can be entered upon the evidence of a single witness, the trial court ought to warn itself of the risk of injustice that is likely to occur where the evidence of a single witness is used to reach a finding of guilt. The risk increases in a case like the one before me where the evidence of the single witness was recorded by another judge therefore denying me the opportunity of observing the demeanour of the witness. That is the precaution I will apply to this matter as I reach my determination.

17. A perusal of the evidence of PW1 shows clarity on the events of the material day. He was going about his business in the forest when he saw the accused persons and another walking along the road. Shortly thereafter he heard screams from the home of the deceased. On reaching there he found the accused persons assaulting the deceased.

18. The defence put forward by the accused persons is that they were going for a football match when they were attracted by an alarm raised by the deceased.

19. The defence case is unbelievable. The accused persons claimed the deceased was still talking when they reached where he was. The accused, however, did not state whether they asked the deceased who his attackers were and whether he named them. They have not offered any explanation about the boy who was said to have been with them. Their evidence was that they were not with anybody else.

20. The accused persons claimed that PW1 found them at the scene. PW1 was clear that when he came back with PW2 the accused persons had left the scene. This evidence was corroborated by PW2, PW3 and PW4. They all stated that they did not find anybody at the scene. PW1 immediately named the four people he had seen assault the deceased. It cannot therefore be said that his evidence was made up.

21. One may ask why Kavumbi Nduka Ngasho, the sister of the deceased who is alleged to have witnessed the assault was not called to testify. It is noted that she was said to have recorded a statement. It is apparent that her evidence would not have been of assistance to the court. PW1 stated that when he asked Kavumbi why she was not intervening in the matter, she told him to mind his business.

22. PW5 told the court that Kavumbi told him that she did not witness the attack on the deceased as she had been away in the farm. Her evidence would not have therefore made any difference in the matter. It cannot be said her evidence would have been prejudicial to the prosecution case as the statement she recorded with the police was to the effect that she did not witness the killing of the deceased.

23. There is the question of the nature of the injuries sustained by the deceased. PW6 stated that the injuries that killed the deceased were inflicted by a sharp object. PW1 stated that the deceased was attacked with stones and sticks. The weapons used to kill the deceased were not recovered. PW1 stated that he did not intervene because he feared for his life. He therefore did not reach the scene of crime at the time the crime was being committed. There is a possibility that apart from the sticks and stones the accused persons had a sharp object which they used to assault the deceased.

24. It is unfortunate that PW5 did not carry out serious investigations. However, there is clear evidence that the accused persons are the ones who attacked and killed the deceased. The evidence of PW1 is clear on this and I have no reason to doubt him. There is no evidence on record to show that he had any reason for telling lies against the accused persons.

25. The deceased was killed because it was suspected that he had bewitched his own brother. His killing by the accused persons was premeditated. I am thus satisfied that the offence of murder has been proved. Consequently, I find each accused person guilty as charged. Each accused person is convicted accordingly.

Dated, signed and delivered at Malindi this 19th day of July, 2018.

W. KORIR,

JUDGE OF THE HIGH COURT