



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CRIMINAL CASE NO. 5 OF 2016**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**KATANA CHENGO KARISA.....ACCUSED**

**JUDGEMENT**

1. The accused person, Katana Chengo Karisa is charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. It is said that on 25<sup>th</sup> March, 2016 at Rima Ra Pera Village, Dagani Sub-Location, Mitangani Location in Kanze District, Kilifi County the accused person murdered Kahaso Ngumbao Kenga.
2. The prosecution called six witnesses in support of its case. PW1 Kahindi Kanze Katana testified that on the material day at about 9.00 p.m. he was at home when the accused went and knocked his door and told him he wanted to tell him something. Upon opening the door he found the accused armed with a panga. The accused informed him that he had done some work and he wanted him to assist him. When PW1 hesitated, the accused threatened to deal with him and the witness followed the accused to the house of mzee Ngumbao. On reaching there the accused commanded him to enter the house. The accused who had a torch directed the torch light on a bed where the wife of Ngumbao had been killed. The accused instructed him to assist him to remove the body. They removed the body and took it to the house of Kalume which was on the lower part of the homestead. Upon accomplishing the task, the accused directed him to go and sleep. PW1 feared for his life and went and hide in the forest. When he came back in the morning he found police officers at the homestead who later removed the body of the deceased to the mortuary.
3. PW2 Jackson Safari Kithi told the court that on the material night he saw the accused with a panga. The accused stated that he had killed the deceased with the panga he was carrying.
4. PW3 Dama Katana Kira testified that on 25<sup>th</sup> March, 2016 at about 10.30 p.m. she was in her house when the accused went and showed her a blood stained panga. He told her that the blood belonged to Kahaso Ngumbao Kenga, the deceased whom he had finished because she had bewitched him. He asked her for a book so that he could record that had killed the deceased.
5. After the accused left PW3 went to a neighbor who is an administration police officer and together they went to the house of the deceased. They saw cuts on the left hand, left breast, chin and neck of the body of the deceased.
6. As they were emerging from the house, they heard the accused tell Riziki Ngumbao that if she wanted to see her mother Kahaso she should keep quiet otherwise he would deal with her. The accused entered the house with Riziki and he showed the body to her. The accused told the witness to leave since she had seen the body. It was PW3's evidence that when she came back at 5.00a.m. she found the body outside the house. The accused who was at the scene had severe injuries.
7. PW4 Riziki Ngumbao was selling mnazi on 25<sup>th</sup> March, 2016 when between 9.00 p.m. and 10.00 p.m. the accused person went there and took some of her customers outside. She heard him tell them that he had finished with Kahaso Ngumbao by cutting her with a panga as she was a witch. PW4 closed her business and decided to go and check. On arrival she confirmed that the deceased had indeed been killed. She saw cuts on the hand, breast and neck. The accused who had accompanied her and some of her customers had a torch and a blood stained panga. The accused said he would not leave until the police arrived. When the other relatives of the deceased arrived, they enquired from her who had killed the deceased. She told them it was the accused who was sleeping next to the body. The accused was tied up and beaten.
8. PW5 Police Constable Peter Odhiambo was one of the police officers who visited the scene. He testified that they collected the body of the deceased and a panga from the scene. They also took the accused person to hospital where he was admitted for treatment. Upon his discharge he was charged with the murder of the deceased. He produced the panga as an exhibit.
9. Dr. Zeinat Zahran testified as PW6 and produced a post- mortem report that was prepared by Dr. Hashim Suleiman as an exhibit.

10. In his defence the accused denied committing the offence with which he is charged. He stated that on the material night he received a call from his unnamed sister informing him that somebody had been killed at home. He proceeded home in order to find out who had been killed. On enquiring from those present he was told to stop pretending that he did not know who had been killed. The people started beating him until he lost consciousness. He came to at the hospital three days later. He was later brought to court and charged for killing the deceased.

11. The question is whether the prosecution has established that the offence of murder was committed and that it is the accused who committed it.

12. Section 203 of the Penal Code creates the offence of murder in the following words:

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

13. Section 206 of the same Code defines malice aforethought. It states:

**“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances**

**a. an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;**

**b. knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may be caused;**

**c. an intent to commit a felony;**

**d. an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”**

14. In order to obtain a conviction for a charge of murder, the prosecution must establish that the deceased died as a result of an unlawful act or omission by the accused. There is also need to establish that the accused had malice aforethought. In the case at hand, there is no dispute that the deceased died of cut wounds. The doctor who performed post-mortem on the body of the deceased concluded that the cause of death was severe head injury and massive haemorrhage secondary to assault.

15. The accused's defence is that he did not commit the offence. He stated that he was called by his sister who told him that somebody had been killed. He therefore denies encountering the deceased prior to her death.

16. In written submissions dated 29<sup>th</sup> May, 2018 and filed on 30<sup>th</sup> May, 2018, counsel for the accused asserted that the prosecution relies on circumstantial evidence which is weak and cannot lead to a conviction. He contends that the evidence of PW1, PW2 and PW3 was contradictory as to the place the body of the deceased was found. Counsel submits that no photographs were produced and there was no evidence adduced to link the panga produced as an exhibit with the accused.

17. Referring to the evidence of the prosecution witnesses, counsel pointed out that the accused was either insane or intoxicated and had no capacity to form the intention to commit the offence. Counsel contends that the accused was never taken to a psychiatrist to confirm that he was indeed fit to stand trial.

18. Let me start with the defence of insanity or intoxication. Counsel for the accused admitted that neither the defence of insanity nor the defence of intoxication was raised by the defence.

19. The defence of insanity at the time of the commission of an offence requires an accused to show that he was suffering from a defect of reason caused by a disease of the mind rendering him not to know what he was doing, and if he did know what he was doing then he did not know that the act was wrong – see Section 12 of the Penal Code. Otherwise, as per Section 11 of the same Code, every person is presumed to be of sound mind until the contrary is proved.

20. The accused did not put forward any evidence to show that he had a mental disease at the time he committed the offence. The proceedings of 26<sup>th</sup> April, 2016 shows that he had been taken for medical examination. PW5's unchallenged testimony was that he had taken the accused to Coast General Hospital for mental assessment and filed the report with the court. The evidence on record therefore shows that the accused was of sound mind immediately after the alleged offence.

21. During cross-examination PW3 stated that the accused appeared drunk and she knew that he used to take alcohol.

22. Section 13(2) of the Penal Code provides the circumstances under which intoxication shall be available as a defence. It states that:

**“Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and –**

**a. the state of intoxication was caused without his consent by the malicious or negligent act of another person; or**

**b. the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.”**

23. The accused never testified that he was inebriated. He did not say that he took alcohol without his consent. There was no evidence that even if he was drunk he was so intoxicated to the point of insanity. The defence of intoxication is thus not available to him.

24. Nobody saw the accused kill the deceased. The defence case is that the circumstantial evidence put forward by the prosecution is so weak that the same cannot lead to a conviction.

25. In **Daniel Muthomi M’arimi v Republic [2013] eKLR**, the Court of Appeal adopted with approval its decision in **Abanga alias Onyango v Rep. C.R.A. No. 32 of 1990 (UR)** wherein the test to be applied before circumstantial evidence can be used to convict was laid down as follows:

**“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:**

**i. the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;**

**ii. those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;**

**iii. the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”**

26. The evidence adduced by the prosecution shows that the accused walked around brandishing a blood stained panga as he invited people to go and see his handiwork. Those who resisted like PW1 and PW4 were threatened with dire consequences. The accused is the one who led the prosecution witnesses to where the body of the deceased was. He told them that he had killed the deceased because she had bewitched him. He specifically told PW4 that he could not secure a job because of the deceased’s charms.

27. Some of the prosecution witnesses were relatives of the accused. Accused was also related to the deceased. None of the witnesses had any differences with the accused prior to the incident.

28. The evidence adduced overwhelmingly pointed to the accused as the person who killed the deceased. The claim by the accused that he only went to the scene after being alerted by his sister cannot be believed. He did not name the sister and neither did he call her as a witness.

29. From the evidence on record, the offence of murder is established. I therefore find that the prosecution has proved the charge against the accused beyond reasonable doubt. I find the accused guilty of the charge of murder contrary to section 203 as read with section 204 of the Penal Code and I convict him accordingly.

**Dated, signed and delivered at Malindi this 19<sup>th</sup> day of July, 2018.**

**W. KORIR**

**JUDGE OF THE HIGH COURT**