



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MALINDI**  
**CRIMINAL CASE NO. 8 OF 2012**

**REPUBLIC**

**VERSUS**

- 1. NGUMBAO KARISA NDUNDA**
- 2. CHARO KAINGU CHARO alias TELE**

**JUDGEMENT**

The two accused persons are charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code, Chapter 63 Law of Kenya. The particulars of the offence are that the two accused, on the night of 27<sup>th</sup> and 28<sup>th</sup> April, 2010 at Kachoroni junction, Magogoni Sublocation, Sokoke Location in Ganze District within Kilifi County jointly murdered Karisa Mwarumba.

The prosecution called six witnesses in support of its case. PW1 SHIKARI KARISA MWARUME is the deceased's son. On 25<sup>th</sup> April, 2010 he arrived home at about 8.30 pm. He found the first accused making noise saying he is a lion. The first accused then left. PW1 found his mother at home and she told PW1 that the 1<sup>st</sup> accused had alledged that PW1's parents were practicing witchcraft. The deceased was informed when he went home. It was agreed that they go to a local witch doctor who could point out a witch. The following day 26<sup>th</sup> April, 2010 the accused and PW1's parents went to a witch doctor. The witch doctor held that the deceased and his wife were not witches.

It is PW11's evidence that the 1<sup>st</sup> accused was not satisfied. They went to another witch doctor but the results were the same. They went to a 3<sup>rd</sup> witch doctor but it was late and were told to return the following day. On 27<sup>th</sup> April, 2010 they once again went to the witch doctor. While returning, the deceased decided to buy alcohol. The deceased sat with the accused and started drinking. PW1 and his mother left. PW1 went home at 8.30 pm but his parents were not at home. His father didn't go to home that night. The following day he asked the first accused about the deceased. The 1<sup>st</sup> accused told him that they had parted ways. PW1 further testified that the deceased was later found having been killed. PW1 could not identify the body at the scene. He identified it at the mortuary. According to him nobody could identify the body at the scene.

PW2 JAMES BAYA was the assistant chief, Magogoni sublocation, Sokoke Location. He is a brother in law to the deceased and a brother to PW4. PW2 was informed that a dead body had been found by the road. He went to the scene but could not identify the body. It is his evidence that nobody could identify the body. Police went to the scene and turned the body around. The face was swollen and totally

distorted. He also saw the two accused at the scene.

PW3 DR. HASHIM SULEIMAN was based at the Kilifi District Hospital. He produced the post mortem report on the deceased that was prepared by Dr. Ibrahim on 30<sup>th</sup> April, 2010. The deceased had multiple skull fractures, fractures of the mandible and ribs, massive bleeding on the head and chest. The doctor opined that the cause of death was bleeding in the head due to the head injuries.

PW4 KAMBIZI KAZUNGU is the deceased's wife, mother to PW1 and sister to PW2. On 26<sup>th</sup> April, 2010 she was at home when one Chome went there at 6.00 pm. Chome alleged that PW4 and the deceased were witches. Later Ngumbao, the 1<sup>st</sup> accused went there and alleged that the deceased had bewitched his son. The deceased went home and found Ngumbao still there. Ngumbao told the deceased that he had bewitched his son. It was agreed that they go to a witch doctor. The following day they went to the witch doctor and the deceased was cleared of the witchcraft allegations. This was in Bamba. Ngumbao suggested that they go to another medicine man. They found him but he was sick. They went home. The following day they went back to the medicine man but he was still ailing. They went home. On their way back PW4 decided to visit her parents. The deceased was with Chome and the two accused. PW4 went home in the evening but the deceased did not return. The 1<sup>st</sup> accused went to her home to find out if the deceased had returned. The 1<sup>st</sup> accused told her that he had ported ways with the deceased on their way home. PW4 and the 1<sup>st</sup> accused decided to search for the deceased. They went to the medicine man but he was not there. They went with the 2<sup>nd</sup> accused. The deceased's body was found the following day. It is her evidence that one of the accused is the deceased's brother while the other one is her in law. The accused had no serious dispute with the deceased. They could go and drink alcohol together.

PW5 JOSEPHINE JOSEPH sells alcohol. On 27<sup>th</sup> April, 2010 she was at club selling alcohol. The deceased and the two accused went there. They took nine bottle of alcohol jointly. They started drinking from 11.00 am up to 3.00 pm. They were drinking palm wine. Before they left, they asked for a jerrycan and put three bottles of palm wine. They then left at about 3.00 pm. there were only those three customers that time.

PW6 Chief Inspector RONALD KIMANZI was attached to the Kilifi police station. He investigated the case. On 27<sup>th</sup> April, 2010 a report was made at the station about the death. Some police officers were sent to collect the body. The Assistant Chief of the area took the two accused to the police station. There was information that the deceased was suspected to be a witch. The accused went with the deceased to a witch doctor and on their way back, went to drink palm wine. The two accused were with the deceased and left the drinking den together. It is his further evidence that when the deceased's body was found, the accused went to the scene but could not identify the body although the deceased had the same clothes. They feared looking at the body.

In his sworn defence, the 1<sup>st</sup> accused, NGUMBAO KARISA NDUNDA testified that the deceased was his cousin while the 2<sup>nd</sup> accused is his brother in law. On 27<sup>th</sup> April, 2010 the deceased went to his home at 6.00 am. He told him that Chome Karisa, the deceased's brother, and his wife had disagreed. The deceased told him that he was to go to an oath giver (medicine man) with Chome and PW4, Kambizi. The accused advised the deceased to go to the village elder. They left for the medicine man's place at Bamba and on their way decided to pass through the 2<sup>nd</sup> accused's home who is their in law and inform him. They found the 2<sup>nd</sup> accused at his shop. The 2<sup>nd</sup> accused advised the deceased to see the village elder first. They all left for Bamba, PW4 called her brother, PW2 who gave out money for transport. The medicine man knew PW4 and enquired from her what was the problem. PW4 told the medicine man that she had disagreed with Chome and wanted to find out who among them was a witch. The medicine man did his work and cleared both PW4 and Chome.

It is the accused's evidence that they decided to go home. On their way back they passed through a drinking den. They drank upto about 3.00 pm. PW4 and PW1 had already left. The deceased then gave him two bottles of mnazi. They had drunk from 11.00 am upto 3.00 pm. The 2<sup>nd</sup> accused left first. The

1<sup>st</sup> accused left at 4.00 pm. The deceased told him that he was going to the Chief's place. Upon reaching home, the accused gave his wife the two bottle of palm wine to take to the deceased's place. She found the deceased and his wife were not there. The following day he heard that someone had been killed. He went to the scene but was not able to identify the body. It had rained. The following day he was summoned to the Chief's office. He was arrested and taken to the police station where he stayed for two weeks and was later released on bond. He was later told that the matter was over. On 6<sup>th</sup> November, 2012 the Chief and the deceased children went to his house with police officers and arrested him. He was then charged with the offence.

The 2<sup>nd</sup> accused CHARO KAINGU CHARO also testified under oath. He stated that the deceased was a brother to the accused's wife. He confirmed that they went to the medicine man together with the deceased as per the evidence of the 1<sup>st</sup> accused. They took palm wine form 11.00 am. At 3.00 pm he left for his business. The deceased was to pass through the Chief's place to pick his wife. He worked at his shop upto 8.00 pm when he closed. The following day he saw people running towards the scene stating that someone had been killed. He went to the scene but could not identify the body. The deceased's clothes were muddy. On 29<sup>th</sup> April, 2010 he was summoned to PW2's office at 9.00 am. He went to Kilifi police station the following day. The 1<sup>st</sup> accused had already been arrested. He was arrested and stayed at the station for two weeks. They were then both released. They were arrested on 6<sup>th</sup> November, 2012 and charged with the offence.

DW3, KAREMBO KARISA NDUNDA is the wife of the 2<sup>nd</sup> accused. On the night before the deceased died, her husband went home at about 4.00 pm. They sold items at their shop and slept at 8.30 pm. The following day she learnt about the deceased's death. DW4 FURAHA CHARO is the 1<sup>st</sup> accused's wife. On the material day, the deceased went to their home in the morning. In the evening her husband went home at about 5.00 pm with palm wine. He told her to take it to the deceased's home. DW4 went to the deceased's home but there was no one. She returned again at 9.00 pm but found no one. They slept. The following day they heard about the deceased's death.

DW5 PETER KITSAO GARAMA saw the deceased and the two accused taking palm wine at the drinking den. He saw the 2<sup>nd</sup> accused leaving at about 3.00 pm. The deceased asked for two bottles of mnazi and it was poured in a jerrycan by the 1<sup>st</sup> accused. The 1<sup>st</sup> accused left with the jerrycan at about 4.00 pm. Five months later he heard that the deceased had been killed.

Counsel for the accused submit that there is no eye witness wo saw the accused killing the deceased. When the body was recovered, no one could identify it. The accused's conduct was not that one of murderers. They assisted in looking for the deceased. The defence case indicate that the accused slept at their homes and did not go tout that night.

The main issue for determination is whether the prosecution has proved that it is the accused who killed the deceased. The standard of proof required is that of beyond reasonable doubt. The evidence eon record shows that the deceased was killed between 27<sup>th</sup> and 28<sup>th</sup> April, 2010. The charge sheet makes reference to the killing having occurred at night. Although counsel submitted that the Doctor who produced the postmortem was not familiar with the handwriting of the Doctor who performed the post mortem and therefore there is no medical evidence proving death. My finding is that death cannot simply be proved through production of post mortem reports or death certificate. Death is a reality. Wherever one dies and people bury him, that is enough proof of the death. The case is about the death of Karisa Mwarumba. His body was found on 28<sup>th</sup> April, 2010. The body was badly battered and even his ow son (PW1) and brother in law (PW2) could not identify him. The fact that the accused could not identify the deceased at the scene cannot be attributed to their guilt. According to PW1 and PW2, no one could have identified the body at the scene. I therefore find that indeed the late Karisa Mwarumba was killed between the 27<sup>th</sup> and 28<sup>th</sup> April, 2016. He is no longer alive. His body was taken to the Kilifi District hospital and a post mortem was conducted on 30<sup>th</sup> April, 2010.

The evidence against the accused is circumstantial. No one saw the accused killing the deceased. The

motive for the killing is alledged to be witchcraft. According to PW4, the 1<sup>st</sup> accused alledged that the deceased had bewitched his son. The name of the bewitched child is not given. According to the deceased's wife, the accused had no serous dispute with the deceased. They used to drink together.

The investigating officer was of the view that the accused were the last people to be seen with the deceased. The evidence shows that the deceased and accused went to Bamba in the morning of 27<sup>th</sup> April, 2010. They were with Chome, PW1 and PW4. They then went back to their village and visited a drinking den. PW5 was selling at the den. She saw the deceased and the accused at the den. They took palm wine together upto about 3.00 pm. It is established that either the three left together or the second accused left first. In their defences, the accused maintain that the 2<sup>nd</sup> accused left first at 3.00 pm while the 1<sup>st</sup> accused stayed with the deceased until about 4.00 pm. There is no evidence that from 4.00 pm upto the time the body was recovered, the accused were with the deceased. People could have seen the deceased and the accused walking together from 4.00 pm. No one saw the accused and the deceased together after they left the drinking den.

There is the defence evidence that the 1<sup>st</sup> accused's wife took the palm wine to the deceased's home in the evening but found no one. This is in line with the evidence of PW1 who went home at 8.30 pm on 27<sup>th</sup> April, 2010 but found on one at home. According to PW4, 1<sup>st</sup> accused told her that he had parted ways with the deceased. The accused and PW4 started searching for the deceased. It is the evidence of PW2 that there was a huge blood stained stone close to the deceased's body. The deceased's face was badly battered.

For a conviction to be based on circumstantial evidence, the inculpatory facts should point to the accused's guilt. It is true that the accused and the deceased were together at the drinking den. However, they left during the day. There is a possibility that the deceased went elsewhere after drinking palm wine with the accused. It is possible that he was killed at night while on his way home. The 1<sup>st</sup> accused sent his wife to take the jerrycan of mnazi to the deceased. The prosecution evidence proves that indeed the 1<sup>st</sup> accused left with the jerrycan of mnazi from the drinking den.

Given the evidence on record, I do find that the circumstantial evidence is not sufficient to conclude that indeed it is the accused who killed the deceased. The circumstances of the deceased's death can be explained by another sequence of events. The deceased could have visited another drinking den or gone to some other place and was killed later that evening. No one heard the deceased screaming. No blood was found in the accused's clothes to suspect that they killed the deceased. It is doubtful that it is the accused who killed the deceased. The 2<sup>nd</sup> accused never made any allegations that his brother in law was a witch. What would be the motive for the 2<sup>nd</sup> accused to kill his brother in law. There were no disputes between the deceased and the accused. They drank alcohol together that today.

In the end, I do find that the prosecution has not proved its case beyond reasonable doubt. The two accused persons shall be set at liberty unless otherwise lawfully held.

**Dated and delivered at Malindi this 30<sup>th</sup> day of January, 2017.**

**S.J. CHITEMBWE**

**JUDGE**