



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
CRIMINAL CASE NO. 7 OF 2014
REPUBLIC
VERSUS
SALIM CHARO MASHA
JUDGEMENT

The accused person is 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 the accused on 17.9.2012 at Mtsangamani Village, Fundisa Location, Magarini District within Kilifi County murdered Mwandugu Kahindi Kalongo.

Six witnesses testified for the prosecution. PW1 MWALIMU MWANDUGU is the deceased's son. On the 12.9.2012 he was with the deceased at home. The deceased sent him to go to the accused and take a bicycle, a dog and money. It was a Saturday. The deceased also told him to ask the accused to go to his home on Sunday so that they could travel together the following morning. He saw the accused on the date the deceased was killed at Charo Mweni's place. Charo Mweni is their neighbor. PW1 told his father that he had seen the accused and the deceased told him that it was okay as the accused who was going to go to their home and sleep. The deceased slept outside as he was taking care of his goats that were being stolen.

PW1 further testified that at about midnight, he heard the deceased screaming. PW1 was sleeping in the house with his wife (PW2). They came out of their house with a torch. They saw the accused running away holding an axe. They also saw Juma and Benzi. The deceased had been cut on the head and asked for water. PW1 went to report to the village elder. The deceased died before he could be taken to hospital. He had a small torch which he used to identify the accused.

PW2 MARY NGOWA is the wife of PW1. On 12.9.2012, a Saturday, she was at home with PW1 and the deceased. The deceased decided to sleep outside as he was taking care of his goats that were being stolen. The deceased was also to travel with the accused to Vibao Viwili Area the following day. The accused lives in Marafa. She saw the accused that day at a neighbour's place. The accused was supposed to sleep at the deceased's home. At about midnight they heard the deceased screaming. She had a small torch while PW1 used light from his phone. She flashed the torch and saw the accused, Benzi Charo and Juma Charo running away. The accused was wearing a black short trouser and a white shirt. Juma had a short trouser without a shirt. Her husband went to call neighbours. The deceased was talking saying that he had been assaulted but did not give names. PW1 was ahead of her when they came out of their house to check on the deceased.

PW3 MWENI KALONGO MASHA is the area village elder. On 15.9.2012 he met the deceased who told him that he was to transfer his goats to Vibao Viwili at his younger brother's place as they were being stolen. He assisted him to prepare the place where the goats were to be taken. The deceased had arranged with the accused to transfer the goats. The accused went to the deceased's place but the deceased had gone for burial. The accused then went to Charo Mweni's house. At about 1.00 am he got the information that the deceased had been assaulted. He went to the scene and tried to take the deceased to hospital but he died before they managed to get a vehicle. PW4 JACKSON KADENGE MWENI testified that he got information that the deceased had been assaulted. He called the assistant chief and the two went to the scene together. The deceased had been cut on the head. They tried to look for a vehicle to take the deceased to hospital but he died. PW4 was aware that the deceased had given the accused Kshs.27,000/=. Kshs.20,000/= was a debt that was to be recovered through deductions for work done by the accused for the deceased. The accused was like the deceased's employee and the two had good relationship.

PW5 DR. ERICK YEGON was based at the Malindi District hospital. He produced the post mortem report prepared by Dr. Mohamed who had since left Government employment. According to the report the deceased had a deep cut wound on the temporal part of the head. The cause of death was cardiopulmonary arrest. PW6 INSPECTOR JOAKIM GICHURU was stationed at the Marereni police station. The report was made at the station about the death. He went to the scene and saw the deceased had a deep cut near the neck. He investigated the matter and PW1 and PW2 told him that they had seen the accused and two other people that night. The accused was seen holding an axe. He charged the accused with offence.

In his sworn defence the accused denied committing the offence. He testified that the deceased went to his home on a Tuesday and slept there. He left the following day on Wednesday at about 3.00 pm and they parted ways at the stage. The deceased had gone to inform him that they were to go to Vibao Viwili to prepare some land. The deceased had also bought him a bicycle. The deceased wanted him to give the bicycle to his son Mwalimu (PW1). The accused was keeping two dogs for the deceased and the dogs were to be taken to the farm. The deceased could not cycle the bicycle as his knees were not in good health. The deceased went home and later called him informing him that PW1 was going to collect the bicycle and the dogs. PW1 went to his place with two people. One was Said Charo Mweni. They had two bicycle. They reached his place at about 7.00 am and went to their other homestead nearby. They went back to his house at about 3.00 pm. They quarreled as PW1 wanted to take the bicycle without the dogs. They started walking along the road and he met his brother in law Mutawali Chengo who is a watchman. While talking to his brother in law PW1 and his colleagues grabbed the bicycle from him and they took off. He stayed at his home that evening. The following day was a Sunday and he got information from Karisa Kazungu Nzai that the deceased had been killed. He started crying as the deceased was like his father. Even people referred to him as Salim Mwandugu. The deceased used to take presents to his children. He was informed that the burial was going to be on a Wednesday. He went for the burial at Fundisa.

It is the accused's evidence that the deceased had a dispute with his neighbours who alledged that he was a witch. He gave him the names of Benzi, Mweni Charo and Said. He also told him that even his own children were alleging that he was a witch. People also used to warn him to avoid the deceased as he was a witch. He stayed at the deceased's place after the burial until morning. He denied that he went to the deceased's place on the day he was killed. He was not indebted to the deceased and he had no disagreement with him. He used to work for the deceased and they were together at the forest at Vibao Viwili where they were only two of them. If he wanted to kill the deceased, why couldn't he have killed him when they were working together in the forest. The deceased's children were not happy with his relationship with their father. He recorded his statement with police on 20.3.2014.

DW2 KARISA KAZUNGU NZAI is a brother in law to the accused. On 17.9.2012 he heard about the deceased's death. He later informed the accused who was not aware about the death. This was on 19.9.2012. DW3 KATANA CHARO MWENI is the accused's cousin. He heard about the deceased's death on Sunday 19.9.2012. The deceased was his uncle. He called the accused on phone and informed him.

The evidence on record does prove that the deceased was killed on the night of 17.9.2012 while sleeping outside his house. The issue for determination is whether it is the accused who killed the deceased. The prosecution's direct evidence is that of PW1 and PW2. The two witnesses were asleep in the house while the deceased was sleeping outside. PW1 and PW2 heard the deceased screaming. The evidence of PW2 is that her husband was ahead of her when they came out of the house. According to PW2, PW1 was using light from his phone. PW1 testified that his wife had no torch. They saw the accused and two others running away. PW2's position is that she was the one who had the torch while her husband was using light from his phone. The two witnesses seem to be in agreement that it is PW1 who came out of the house first. The incident occurred at midnight. The issue is whether PW1 and PW2 clearly identified the accused that night. The source of light was a small torch. It is the evidence of PW1 that it was a torch costing Kshs.30/= which does not use a battery. PW1 and PW2 woke up from their sleep as a result of the screams from the deceased. The deceased was assaulted while sleeping outside. It is evident that PW1 and PW2 could not have awoken at the same time the deceased was being assaulted. It is PW1 who woke up first. Even if they were sleeping just near the deceased's bed, I do find that it is doubtful for PW1 and PW2 to have woken up, walk out of the house, see three people running away and identify them. PW2 stated that the accused looked behind as he was running away. The evidence on identification is quite doubtful. It is equally doubtful that PW1 and PW2 would observe the type and colour of the clothes the killers were wearing. The picture painted by the two witnesses is that the killers stayed around even after realizing that family members were coming out of the house to check on the deceased. That is quite doubtful.

In the case of **MUTISO V REPUBLIC, [1993] KLR 344**, a two Judge High Court bench of J. Oguk and Mbogholi held a follow on identification evidence: -

1. Where the only evidence against defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favorable and free from possibility of error before it can safely make it a basis of a conviction.

Apart from that, there is the defence evidence. The sworn defence evidence is not farfetched. It is in line with the prosecution evidence. The accused admit that he was to go to Vibao Viwili with the deceased. PW1 talked of the bicycle and the accused admit that indeed he was asked by the deceased to give the bicycle to PW1. The evidence of PW1 who is the deceased's son is that he did not see the accused and the deceased quarreling at any given time. That evidence is corroborated by that of PW4 who testified that the accused was like the deceased's employee. The accused's evidence is that the deceased was like his father. There was no motive for the accused to have killed the deceased. The contention that the deceased had loaned the accused Kshs.20,000/= cannot be the cause of the killing. The deceased and the accused were in very good relationship. I see no reason as to why the accused would have killed the deceased. The two were working together and it is confirmed that they were to transfer the deceased's goats to Vibao Viwili.

Given the evidence on record, I do find that the prosecution evidence does not prove the case beyond reasonable doubt. The defence evidence raises doubt on the prosecution case. I find that the accused is not guilty of the offence of murder as charged. He shall be set at liberty unless otherwise lawfully held.

Dated and delivered in Malindi this 16th day of February, 2017.

S.J. CHITEMBWE

JUDGE