



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL CASE NO. 50 OF 2012

REPUBLIC PROSECUTOR

VERSUS

1. NDORO CHAKA MWAMZUKA 1ST ACUSED
2. NYONDO CHAKA MWAMZUKA 2ND ACUSED
3. JUMAA MGANDI MBOVU 3RD ACUSED
4. ATHUMAN CHAKA MBEGA 4TH ACUSED

JUDGMENT

The four (4) Accused persons above mentioned are charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code.

The particulars are that:-

“On the the night of 18th and 19th day of August, 2012 at about 02:00 hours at Nihutu Village – Kasemeni Kwale County they jointly murdered MWEMBE MWAMZUKA MWANDULYA”.

The prosecution in this case called seven Witnesses in support of their case. The Defence called Six (6) Witnesses inclusive of the four (4) Accused persons.

The uncontested facts of this case are that the Deceased and the Accused persons are relatives.

On the 17th day of August, 2012 a funeral ceremony was being held in respect of the wife of the Deceased. There was a disagreement between the Deceased and the 1st and 2nd Accused with the Deceased ordering the two to leave his homestead. Later the same night the Deceased was killed.

The prosecution's star Witness is PW 2 one Kadzo Changa Yanga. She testified to the effect that the Deceased who was married to her sister visited her at night and requested for a place to sleep overnight. She albeit grudgingly allowed him to sleep on the floor. During that night she saw men armed with torches and pangas enter into the house. She was blindfolded by two men. It is her contention that she identified the first and second Accused persons from their voices. They proceeded to cut and wound the Deceased and went away.

She decided to run into the bushes to hide. The following morning she went back to her house and took her goats to the pastures, later she went and reported the matter to the area Chief and police.

The statement recorded to the police by PW 2 was marked for identification and was later produced as an exhibit by the Defence.

The reason for the production of this statement was because it contained evidence to the effect that on the fateful night she had seen four (4) attackers whom she identified take away the Deceased while still alive and that he was killed elsewhere and the body returned to her house while she was away hiding. During Re-examination she told the Court that it's the police officers who told her that the Deceased was killed elsewhere and the body brought back to the house.

The investigating officer (PW 5) did testify to have found the body of the Deceased lying on a bed in house of Kadzo (PW2). It had three (3) deep cuts on the head. There was a panga placed next to the body but there were no blood stains prompting the finding by police that the Deceased was killed elsewhere and the body taken to PW 2 house.

These two versions as to whether the Deceased was killed whilst in the house of PW 2 or outside in the bushes and returned to her house are indeed contradictory. They go to the root of the case as regards evidence of identification.

Apart from PW 2 no other prosecution Witness has testified to have seen the Accused persons kill the Deceased. She is for all intents and purposes a single Witness.

In the Court of Appeal case of Maitanyi –Vs- Republic 1986 KLR page 198 it was held,

“Although it is trite law that a fact may be proved by the testimony of a single Witness, this does not lessen the need for testing with the greatest care, the evidence of a single Witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult

- 2. When testing the evidence of a single Witness a careful inquiry ought to be made into the nature of the light available conditions and whether the Witness was able to make a true impression and description.***
- 3. The Court must warn itself of the dangers of a single identifying Witness. It is not enough for the Court to warn itself after making the decision, it must do so when the evidence is being considered and before the decision is made”.***

In the present case, the incident is said to have taken place at night. No source of light is given. The Witness was blindfolded and hence unable to see the attackers. Her evidence is that she identified the 1st and 2nd Accused from their voices. She did not tell the Court the exact words she heard the Accused persons utter so as to enable her recognize their voices.

This renders the voice recognition doubtful and of no evidential value.

This is compounded by the fact that there is material contradiction as to whether the Deceased was killed while in the house of PW 2 and in her presence or whether he was taken away from the house and taken elsewhere and murdered and returned to the same house he had been whisked away from.

The evidence before the Court is not only contradictory but also confusing. PW 2 also concedes that she was confused at the time. This case has not been proved beyond reasonable doubt.

The Accused persons are found not guilty of the offence of murder contrary to section 203 as read with section 204 of the Criminal Procedure Code and are accordingly acquitted. They are set at liberty unless otherwise lawfully held.

Judgment delivered dated and signed in open Court this **6th** day of **February, 2015**.

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M. MUYA

JUDGE

6TH FEBRUARY, 2015

In the presence of:-

Mr. Muchele holding brief Kenga for Accused

Mr. Jami for the State