



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL CASE (MURDER) NO. 14 OF 2013

REPUBLIC.....PROSECUTOR

-VERSUS-

JULIUS CHANGAWA KATANA.....ACCUSED

J U D G M E N T

1. The accused, **Julius Changawa Katana** was charged with Murder Contrary to Section 203 as read with Section 204 of the Penal Code. The particulars in the Information state that on 3rd April, 2013 at Kambicha Village, Kilifi County he murdered **Philip Mutua Kimau**. The accused denied the charge. He was represented by Mr. Shujaa at the trial.

2. The prosecution called seven witnesses. The prosecution case was that **Philip Mutua Kimau** (the deceased) lived alone at Kambicha on a shamba he had purchased. He did some farming there and traded in charcoal and firewood with his wife **Phylis Mutua** (PW3) who lived at the trading centre at Merereni, visiting him over the weekends. Among their neighbours at Kambicha were a couple **Dama Kaungu** and **Kaungu Chonda** (PW1 & 2), **Julius Karisa Kashutu** (PW4) and **Sikari Mohammed Masha** (PW5). At the material period there existed an unresolved land dispute between the deceased and the accused.

3. On 2/4/2013 the deceased visited PW3 at her shop and returned to Kambicha in the evening. He was seen by several persons including PW1 and PW2. However on the next day at the home and later on the deceased was missing. Instead the accused was seen by neighbours early the next day performing several tasks such as taking out the deceased's goats to pasture. When PW3 came home that afternoon the accused followed her claiming that he had seen deceased the previous night. After a fruitless search PW3 spent the night at the shamba. The search resumed in the next day. That is when trails of covered blood were spotted near the deceased's kitchen where his dinner of ugali and tea sat untouched. PW3 went to report to police.

4. While she was away the accused was seen by PW1 entering the deceased's home. When questioned he claimed that the deceased had hired him to clear some bushes. He had a smoldering stick and said he was going to burn the rubbish. When cautioned to wait for police he retorted that he needed payment. Soon he set the gathered tree branches and rubbish alight.

5. Unfortunately police did not accompany PW3 back home. When PW3 returned and commenced the search, the body of the deceased was found under the burning rubbish. It had deep head injuries. The police came and collected the body. The accused was subsequently handed over to police by members of the public. He was later charged.

6. In his unsworn defence statement, the accused said the he was a farmer and resident of Kambicha. He said he went to his shamba at 6.00am on 3/4/2013 returning home at 6.00pm. He wanted to see the deceased but did not find him at his home as he learned he had gone to Marereni. Later he heard Mutua's voice as he walked by his home. He followed and caught up with Mutua.

7. The deceased was with another man and had goods loaded on a donkey. He discussed with Mutua concerning a breeding goat and agreed to meet the next day, because he also had firewood to sell to the deceased. He went there at 6.00am but his knock did not elicit a response. He met with PW1 and inquired from her if she had seen the deceased. He returned to the home of the deceased at 9.00am and took the goats out to pasture before going back to his farm. He went back at noon to check on the deceased and moved the goats to a shaded area.

8. When PW3 arrived he went over to greet her before returning to his tasks. The accused went home in the evening and returned to the home of the deceased on 4/4/2013. He learned that blood spots had been seen at the kitchen. PW3 went to report to police and returned to mount a fresh search. The accused assisted in the search but another group searching a different part of the shamba found the body. He denied that he had any dispute with the deceased.

9. There is no dispute that the accused was in the company of the deceased at the latter's home on the night of 2nd April 2013 (which refers to as 3rd April). He admits visiting the home again early on the next day, and later on several occasions, in the course of which he took out the deceased's goats out to pasture.

He was at the home with PW1 when PW3 went to report to police and remained there until the body was found.

10. The body of the deceased was not examined until ten days after recovery. It was decomposing and maggots had set in. The post mortem form records the following injuries:

- a. Displaced fracture of the mandible at baseline.
- b. Deep transverse cut at front parietal region, with penetrating skull fracture.
- c. Deep cut right parietal region with displaced bone fragment.
- d. Displaced fracture at right maxilla involving right zygomatic arch.
- e. Deep transverse cut on occipital region with skull fracture.
- f. Compound fracture left radius and ulna with forearm angulated.

11. Death was due to severe head injury secondary to assault by sharp weapon. These injuries are clear evidence that whoever inflicted them upon the deceased intended to cause him grievous harm or to kill him. The court must determine whether the accused is the person who assaulted the deceased, killing him on the night of 2nd April 2013.

12. As the defence rightly submitted, the prosecution case against the accused is based on circumstantial evidence there being no eye witness to the murder. It is also true therefore that the exact time and date of the murder is not known. What comes out from the prosecution evidence and the accused's testimony however is that the deceased was last seen alive on the night of the 2nd April 2013, was missing from the early hours of 3rd April 2013 and was not seen alive again. Instead his badly assaulted body was found under a pile of rubbish in his shamba after a search.

13. In addition to the accused's admission to have been at the home of the deceased on the material night, and severally on the next day, there are other pieces of evidence that tend to link the accused with the

murder of the deceased. Firstly, the evidence by the elder, PW4 and the deceased's wife PW3. These two witnesses testified that relations between the accused and the deceased were strained arising from a land dispute.

14. The deceased had purchased the shamba on which he farmed from a neighbour. Thereafter the accused claimed that portion as his property. The dispute was escalated to the elders, including PW4 but had not been resolved at the time of the murder. According to PW3, the deceased had offered to compensate the accused by paying Kshs 20,000/=. However after a while the accused allegedly said he wanted neither shamba nor money.

15. In his defence, the accused denied that he had any dispute with the deceased person. As an elder and pastor, PW4 was not a party to the dispute nor was he shown to have any personal interest in the matter. There can be no plausible reason for the witness to make false accusations against the accused person in my view. The details given by the deceased's wife with regarding the dispute do not seem made up for the purpose of fixing the accused.

She presented herself as a believable and detailed witness to the events she described. Neither PW3 nor PW4 were shaken during cross-examination. I accept the evidence of PW3 and 4 that there existed a land dispute between the deceased and the accused.

16. And though it is not necessary to establish motive in order to prove an offence, motive in the circumstances of this case provides corroboration to the circumstantial incriminating evidence and also an explanation for the apparent ubiquitousness of the accused at the deceased home on the material date. (**See Choge V R. [1985] KLR 1**). One of those visits was described by PW2 who passed by the deceased's home on his way to work in the morning of 3/4/2013 at 6.00am.

17. This is what PW2 described:

“On the next day (3/4/2013) I was to go to do some task (Red Cross) on behalf of my brother. I passed through the house of Mutua (deceased). It was 6.00am but the accused was at the home. He was at the external kitchen throwing sand and twigs near there. I asked where Mutua was. Accused said he had left to do some work. I went away and returned at 12.30pm. On arrival I did not see Mutua. My wife cooked lunch and called our neighbour the accused to have lunch with us as we often do”.

18. The witness admitted in cross-examination that though the accused's behaviour appeared unusual – he seemed to be covering something on the ground – he did not ask him what he was doing there. It seems from the testimony of the witness and his wife PW1 that they were barely suspicious about the accused's conduct until that moment because PW1 that morning had also seen the accused take out the deceased's goats even as he inquired from her if she had seen Mutua or “his footsteps”. PW2 confirmed under cross-examination that the accused told him at 6.00am that Mutua had “gone to work”. This is almost the same statement he made to PW1 as he was taking out Mutua's goats. The accused allegedly explained to PW1 that he was helping tether the goats because he “had heard Mutua say he had many night duties”.

19. However, the accused was not an employee of Mutua. Neither could his statements regarding Mutua's whereabouts be true. On all accounts, Mutua was already dead. Because, on the very next day the first evidence emerged in the form of blood stains at the spot where PW2 had earlier seen the accused throw sand, obviously in a bid to cover the blood.

20. According to PW3 there was ready food that was uneaten at the kitchen. This evidence clearly shows that the deceased was murdered near the kitchen and at his home. Further confirmation is the finding of the body at the shamba under burning rubbish. The accused was seen by PW1 and questioned about carrying out the “work” after the blood trails had been found. He said he needed payment and proceeded to burn the rubbish.

21. In his evidence the accused made no reference to this incident. All the witnesses confirmed that the

body of Mutua was found under a heap of burning rubbish and was partly burnt. It may well be that due to the decomposed state of the body, the burns did not register during the post mortem examination. Be that as it may, when the accused told PW2 that the deceased had gone to work as he busied himself throwing sand and wiping seats outside the external kitchen he knew the deceased was dead. His action of throwing sand and wiping items close to the kitchen speaks volume about his guilty knowledge, as does the lie he told PW2 that Mutua had gone off to work. The burning of the bush on top of the body was a further effort to destroy the incriminating evidence and is confirmation of involvement in the murder.

22. In a sense, all the action of the accused at the home of the deceased during the material period including tethering of the goats point to his guilty knowledge. The accused, it seems had what he thought was a fool proof plan to fob off any curious villagers in order to obtain an opportunity to destroy the body of the deceased, while pretending to be a concerned neighbour.

23. I have applied the principles in **R. -Vs- Kipkering Arap Koskei (1949) 16EACA, 135** where the Court stated:-

“.....In order to justify on circumstantial evidence the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and in capable of explanation upon any other reasonable hypothesis than that of his guilt, and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused.”

And further in **Simoni Musoke –Vs- Uganda (1958) EA 715**, the court quoted **Teper -Vs- R (2) (1952) AC 480** where Privy Council stated:

“It is also necessary before drawing the inference of the accused’s guilt from circumstantial evidence to be sure that there are no co-existing circumstances which could weaken or destroy the inference.”

24. To my mind the accused had the opportunity, by being admittedly at the scene of murder on the night of 2/4/2013. And while it is true that there was a third man accompanying the deceased on the material night, it is the accused’s subsequent conduct that sets him apart. His conduct on the next day as described by witnesses whose evidence I found credible leaves no doubt that he was involved in the murder of the deceased. All the proven inculpatory facts point to his guilt and are incompatible with his innocence. His denials cannot be true and I dismiss his defence.

25. I find that on the evidence tendered the accused is guilty of the offence charged. I do convict him accordingly.

Written and signed at Naivasha this 2nd February, 2015.

C. W. MEOLI

JUDGE

Delivered and signed at Malindi this 4th day of March, 2015

SAID J. CHITEMBWE

JUDGE