



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MALINDI**

**CRIMINAL CASE (MURDER) NO. 21 OF 2011**

**REPUBLIC.....PROSECUTOR**

**-VERSUS-**

**BAHATI RAMA KAZUNGU.....1<sup>ST</sup> ACCUSED**

**KADENGE JAMANDA KOMBE.....2<sup>ND</sup> ACCUSED**

**J U D G M E N T**

1. The two accused are charged with the Murder Contrary to Section 203 as read with Section 204 of the Penal Code. The Information states that on 17<sup>th</sup> July, 2011 at 8.00am at Mirini Village, Digiria Location, Vitengeni they jointly murdered Rodgers Nzai Mwakumbo. The accused denied the charge. They were represented by Mr. Lughanje.
2. The prosecution case was as follows. The two accused were residents of Mirihini and worked as winetappers. The deceased also resided at Mirihini Village with his wife and extended family. His wife's name was Kadzo. Some six months or so prior to the material, day the first accused had been involved an illicit love affair with Kadzo. As is the tradition he was ordered to pay the traditional fine known as "Malu" amounting to Kshs 5,000/=, which was later raised to Kshs 6,000/= after he defaulted.
3. Mongoose meat is a delicacy among the residents where the deceased lived. It would appear that it was a common practice for residents to set traps in nearby thickets or forests to catch the animal. The deceased was no exception. He and his grandchild Bernard Nzai (PW1) had set mongoose traps in the thickets close to their home. On 17<sup>th</sup> July, 2011 PW1 went out early at 7.00am to check on his traps. The deceased too had done the same. While PW1 was in the thicket he noted that his dog was agitated. It was barking and running around. PW1 decided to follow it. Presently he had shouts of "ua! ua!" (kill! kill!) not far from where he was. Suddenly he was confronted by the two accused who were armed with an axe and panga, respectively. The first accused ordered him to leave the scene immediately.
4. Frightened, the witness ran back home. He reported the incident to his mother Mwenda Roba (PW2). She in turn decided to report to the area assistant chief, Francis Hare Mwakubo (PW3). PW3 proceeded to the scene of PW1's encounter with the two men. PW1 on nearing the scene was afraid of going closer, pointing it out instead to PW3 and his companions. On reaching the spot PW3 found the body of deceased lying on its back, near a mongoose trap. In his hand was a dead mongoose. He had severe head injuries. Police were notified. They visited the scene and

collected the body. Eventually the accused persons were arrested and charged.

5. Both accused elected to make unsworn statements when placed on their defence. Their defence statements were in many respects similar. They stated that they were together on the material morning, headed to their place of work when they came upon a very big snake in the forest. They confronted it and it disappeared into the forest. Just then they saw PW1 and warned him to run for dear life. Thereafter they proceeded on their business.
6. When they returned to the village in the evening, they heard news of the murder of the deceased. Before long a group of villagers accosted and arrested them and thereafter handing them over to the police. They denied involvement in the murder of the deceased.
7. There is no dispute that the deceased was murdered in a thicket close to his home on the morning of 17/7/2011. That the two accused persons met the grandson of the deceased (PW1) in the vicinity of the thicket and asked him to leave the scene immediately. The witness, the deceased and the accused all resided in the same locality and knew each other. The court must determine whether the accused persons inflicted upon the deceased the injuries which led to his death.
8. Regarding the attack itself, there is no direct eye witness account. The prosecution's star witness was PW1 the deceased's grandson. His presence in the thicket on the material date and time is not in dispute. He said that as he was checking on his mongoose trap, the dog accompanying him became agitated and was barking as it ran around. He also heard shouts of "ua! ua!" (kill! kill!) and soon was accosted by the two accused who told him to leave the scene immediately.
9. The two men had crude weapons, namely an axe for the first accused and a panga for the second accused. Frightened, the witness ran home and reported the incident to his mother (PW2) and chief (PW3). So frightened was PW1 that on returning to the scene with PW3 and others he did not dare go close. During cross-examination of PW1, the accused persons never suggested to him that in fact they warned him to leave because they had spotted a huge snake at the scene.
10. If indeed that was the case, there was no reason for the witness not to report to the chief that the warning of the accused was in connection with a snake. But then if the witness had not seen any snake or he had merely been given friendly advice to avoid the snake he would hardly be expected to make a report to the chief about it. From the evidence of PW2 and PW3, the witness appeared shaken and reported, not that he had been warned by the accused concerning the snake, rather that they had chased him away from the bush.
11. The accused did not canvass the "big snake" defence with PW2 and PW3 either. If indeed they were only good Samaritans to PW1, that is not something they would have failed to canvass during the trial.

Equally if they confronted the snake which ran deeper into the forest, and perhaps, in the process shouted the words "ua! ua!" (kill! kill!) they should have raised this during cross-examination as the reasons for the shouts described by PW1. They did not. Clearly as residents of Mirihini, the accused knew the relationship between the deceased and PW1.

12. Admittedly, the meeting with PW1 happened just about 7.00am. When he got home, he reported to his mother who first consulted a son of the deceased before reporting to chief (PW3) at 8.00am. When the chief got to the scene, he found the deceased still clutching at his catch (dead mongoose). It took PW3 5 minutes to get there. The time lapse was therefore quite short and from the evidence of the prosecution witnesses and the defence, there were no other persons at the scene save the accused, deceased and PW1 in the material moments. From PW1's description, the shouts of "ua! ua!" (kill! kill!) preceded the appearance of the two accused. They were armed with an axe and panga. The scene of the meeting was 10 metres from the clearing where, according to PW3 the deceased's body lay.

13). It would seem therefore that the presence of PW2 and his dog in the vicinity surprised the two accused hence their command that he immediately leaves. That soon after the body of the deceased which bore injuries consistent with an attack with the type of weapons the two men bore was found appears to rebut the accused's plea that their asking PW2 to leave, was an act of kindness.

14. The prosecution case largely depends on circumstantial evidence. In the case of **Kipkering arap Koskei –Vs- Republic (1949) 16EACA, 135** the court stated concerning such evidence:

**“.....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 again in **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.”**

15. The evidence tendered by the prosecution in the case places the two accused at the scene of murder, in circumstances that inexplicably point to their involvement therein. Their possession of weapons and chasing away PW2 lends strong corroboration to the circumstantial evidence. Moreover, with regard to the 1<sup>st</sup> accused, there is believable evidence that he owed “malu” to the deceased as a result of his illicit relationship with Kadzo the deceased's wife. He had reason not unusual in this part of the country, to desire the elimination of the deceased in order to escape the debt.

16. Although motive is not essential to proving the charges laid against the accused (See **Section 9 (3) Penal Code**), it is an important element in this case which rests upon circumstantial evidence. This is what the Court of Appeal stated in **Libambula –V- R (2003) KRL 683:-**

**“We may pose, what is the relevance of motive here? Motive is that which makes a man do a particular act in a particular way. A motive exists for every voluntary act and is often proved by the conduct of a person. See Section 8 of Evidence Act Cap 80 Laws of Kenya.**

**Motive becomes an important element in the chain of presumptive proof and where the case rests on purely circumstantial evidence. Motive of course, may be drawn from the facts, though proof if it is not essential to prove a crime.”**

17. The accused's defence is strongly displaced by prosecution evidence which consistently and inexplicably points to their culpability in the murder of the deceased. The injuries sustained by the deceased were so severe that he succumbed instantly. This is clear evidence of malice aforethought. I am satisfied that the prosecution has proved the case against the accused beyond reasonable doubt and will convict them.

Written and signed at Naivasha this 24<sup>th</sup> day of November, 2014.

C. W. Meoli

JUDGE

Delivered and signed at Malindi this 3<sup>rd</sup> day of March, 2015

**SAID J. CHITEMBWE**

**JUDGE**