



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL CASE (MURDER) NO. 24 OF 2011

REPUBLIC.....PROSECUTOR

-VERSUS-

NGUMBAO KAHINDI KADSOMBA.....1ST ACCUSED

MKUTANO KAHINDI NGUMBAO.....2ND ACCUSED

J U D G M E N T

1. The two accused were charged with the Murder of **Ngumbao Kahindi Kadzomba** on 3rd May, 2011 at Baricho Sub-location of Marafa Division, Kilifi County. They pleaded not guilty. Mr. Omwancha represented them at the trial.
2. At the close of prosecution the case, the court ruled that the 2nd Accused had no case to answer and acquitted him under Section 306 (1) Criminal Procedure Code. This judgment is therefore in respect of the 1st Accused only.
3. The prosecution case was as follows. On 3rd May 2011, the deceased, his two wives **Mburuga Charo Marongo** (PW2) and one **Kaikwali** and a daughter **Simanya** left home for the shamba. At noon the deceased left the rest of his family at the shamba to return home. He did not get there as someone waylaid and attacked him on the way. He sustained a severe crush injury to the head and died.
4. His lifeless body was discovered by the wives as they walked home from the shamba at 4.00pm. The body was removed to the mortuary by police on the next day. The cause of death was cardio-respiratory arrest due to severe head injury. About 4 months later, a land dispute arose involving a brother of the deceased by the name **Charo** (also now deceased) and **Pisi Kenga Kitu** (PW3) the latter who was summoned before the Area Assistant Chief, **Thomas Wanje Mulala** (PW4). On that occasion, PW3 against whom **Charo** had made the complaint revealed to PW4 that he had witnessed the accused (older brother to **Charo** the complainant) attack and kill the deceased on the material date. The information was passed on to the police by PW4 and eventually the accused was arrested.
5. Upon being placed on his defence the accused gave an unsworn statement to the effect that the deceased was his brother. The accused stated that he returned home on the material date from a shamba in a different location. That having got back home at 1.30pm, he remained there until 5.00pm when children of the deceased came and reported the murder of their father. He rose to accompany them to the scene. At the scene, in the company of his brothers the late **Charo** and **Dickson** (**Dickson Mudzomba Mwayele**, PW5), the accused kept watch overnight.

6. Five months after the burial, PW3 disagreed with the family of the deceased (**Charo**) over the former's action of harvesting trees from the land owned by Charo (Deceased). The matter was reported to the Chief. PW3 allegedly refused to comply with the Chief's order to make compensation. The accused was subsequently summoned to the Chief's Office and questioned concerning the death of **Ngumbao Kahindi Kadzomba**. He denied involvement.
7. There is no dispute regarding the relationship between the deceased and the accused. They were brothers or cousin/brothers, at any rate, close relatives. They lived in the same village. The deceased's body was found on a footpath in the locality on the material date with a gash on the head. Beside the body was a "gongo" (large stick) and a stone which were apparently used to inflict the head injury.
8. The court must determine the identity of the person who attacked the deceased, with the obvious intention of maiming or killing him. The last person to see the deceased before the attack was his wife (PW2). She said he left her and her co-wife in the shamba and headed home at about noon. It seems that the said witness and her co-wife were also the first people to discover his body at 4.00pm.
9. The distance between the scene of murder and the shamba is unknown but during cross-examination PW2 said that the deceased had stated that he was going home for a meal. At the time the body was discovered, the deceased held onto his panga and a little bag. Perhaps he had gone home, had his meal and was going back to the shamba, or maybe he was attacked earlier than 4.00pm as the sole eye witness PW3 asserts. The exact timing does not matter as clearly the attack occurred in the afternoon of the material date.
10. The sole eye-witness PW3 stated that he left his shamba at 4.00pm and on the way home entered a bush to relieve himself. While there he heard the voices of two persons approaching on the foot path close by. He recognized the voices of the accused and the deceased who were in conversation. He stated that when the duo came into view, he identified them. At the same time the accused struck the deceased on the head with the "gongo". Apparently, the deceased fell down and was hit once more with a stone. PW3 testified that when he went close he noted that deceased was bleeding profusely. He ran off from the scene to his home. Apparently the attacker had left soon after the attack
11. When PW3 eventually gathered himself sufficiently he approached PW5 an older brother of the 1st accused who told him to be quiet. Similarly other brothers **Charo** and **Kazungu** rebuffed him saying he was "on his own" if he did not hush up. When he testified, PW5 I was clearly reluctant to confirm the relationship existing between the accused and the deceased, claiming that he (PW5) had migrated from his ancestral home. He however confirmed that an infant child of the acquitted accused, another close relative had recently died. PW5 denied that PW3 reported to him the incident of 3/5/2011.
12. Unfortunately, Charo, the other brother to whom the matter was also allegedly reported is now deceased. Several factors stand in favour of the evidence of PW3 despite his failure to make an immediate report to authorities. First, the attack occurred in daytime and the witness was well known to the actors. Second, PW3 was not a member of the Kadzomba family. Finally, he acquitted himself well during cross-examination. He freely admitted that he decided to report to PW4 concerning the event of 3/5/2011 after the deceased brother of the accused had him summoned to the Chief.
13. Perhaps this delay was borne out of the need for self-preservation but watching the witness testify and handle questions during cross-examination, he did not strike me as a dishonest man. He answered questions with ease. If indeed there was any need to make false allegations against any member of the accused's family, that should have been against Charo with whom the witness had a dispute, not the accused herein. Allegations made by the accused in his defence that PW3 refused to pay compensation when summoned by the Chief before revelations against the accused

were not canvassed with PW3 or PW4 when they testified.

14. The fact that the witness delayed in making a report to anyone in authority can be reasonably explained as resulting from an almost irrational sense of fear as the witness stated. It did not help that close members of the family of the accused and deceased such as PW5 told him to be quiet. The deceased was aged about 70 years and was murdered within weeks of death of an infant member of a family.
15. In a region where traditional beliefs, especially witchcraft are strongly entrenched, the conduct of PW5 and his close relatives might well be based on the fact that there was some suspicion in the family that the deceased had something to do with the infant's death. Hence none of them were concerned that their brother had murdered a close relative.
16. In my view the circumstances of this case point to a motive rooted in traditional beliefs, there being no evidence at all that the deceased and the accused had any prior disagreements. The defence cross-examination of PW3 centred upon the delay in making his report and not that he had flouted the Chief's order to pay compensation before raising the murder allegations. All in all, there does not appear to be any plausible reason for PW3 to swear false testimony against the accused in particular, in as much as his delay in reporting was unwise.

17. In **Mali Mali Ole Moiyare v Republic [2014] eKLR** the Court of Appeal stated:-

“It is a well settled principle that the evidence of visual identification in criminal cases can cause miscarriage of justice if not carefully tested. A court must always satisfy itself that in all circumstances it is safe to act on such identification, particularly where the conditions favouring a correct identification are difficult.”
See also *John Njoroge Mwangi –vs- Republic – Criminal Appeal No. 55 of 2007*.

18. In Moiyare's case the evidence on what transpired was given by only one witness and there was no other independent eye witness account. The appellant's contention was that the learned judges of the High Court erred in relying on the evidence of a single witness. The Court reiterated that there is no particular number of witnesses who are required for proof of any fact unless the law so requires. See **Section 143** of the *Evidence Act*.

19. The Court proceeded to cite the well-known case of *Abdallah Bin Wendoh and another -vs- Regina, (1953) 20 EACA 166*, as follows:

“Subject to certain well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but his rule 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. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on testimony of a single witness, can safely be accepted as free from possibility of error.” Emphasis added.

20. And the case of *Kariuki Njiru and 7 others-vs- Republic-Criminal Appeal No. 6 of 2001*, where the Court had earlier stated:-

“The law on identification is well settled, and this court has from time to time said that the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error. The surrounding circumstances must be considered (see *R.Vs. Turnbull (1976) 63 Civil Appeal R. 132*). Among the factors the Court is required to consider is whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity or at all.

In this case the offence occurred in a secluded place in day time within close proximity to the spot where PW3 was crouching. The witness reported the matter to the accused's brother, PW5 albeit belatedly.

21. In a sense, the described conduct of the accused's brother PW5 when informed of the incident by PW3 is consistent with his reticent attitude before this court when he testified. In his evidence, PW5 struck a perfunctory pose and was unwilling to be drawn into questions regarding the relationship existing between the accused and the deceased even while admitting the death of an infant in the family. Although his testimony indicates that he was resident in the village where the deceased resided at the material date, he was at pains to distance himself from the extended family by claiming that he had moved from the ancestral home.

22. The accused's defence that he was at his home at the time of the murder cannot be believed in light of PW3's evidence. There was no possibility of mistaken identity as the witness and accused were admittedly well known to each other. Therefore, this was a case of recognition. In **Anjononi Versus Republic (1980) KLR 57** the court described evidence of recognition as being:-

“more satisfactory, more assuring and more reliable than identification of a stranger because, it depends upon the personal knowledge of the assailant”.

23. I have considered the prosecution evidence and do accept the evidence of PW3 linking the accused to the murder of the deceased. The accused's defence cannot stand. I find that the prosecution has proved its case beyond reasonable doubt that the accused person waylaid and violently attacked the deceased causing him fatal injuries. I will convict him as charged.

Written and signed at Naivasha this 11th December, 2014.

C. W. MEOLI

JUDGE

Delivered and signed at Malindi this 3rd day of March, 2015

SAID J. CHITEMBWE

JUDGE