



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL CASE (Murder) NO. 2 OF 2012

REPUBLIC.....PROSECUTOR

-VERSUS-

SIDI GONA KOMBE.....1ST ACCUSED

BENJAMIN KOMBE TUVA.....2ND ACCUSED

JAMES CHARO KARISA.....3RD ACCUSED

YUSUFU KARISA KITSAO.....4TH ACCUSED

KARISA CHARO KARISA.....5TH ACCUSED

J U D G M E N T

1. The five accused were jointly charged with two counts of Murder contrary to section 203 as read with section 204 of the Penal Code. In that, on 22nd December, 2011 at Lango Baya village Kilifi County they jointly with others not before court murdered Charo Kitsao Gona and Riziki Mbogo. They pleaded not guilty and were represented by Mr. Shujaa.

2. The deceased herein Riziki Mbogo (Riziki) and Charo Kitsao Gona (Kitsao) who were father and son respectively resided at Mkondoni in the material period. They were peasant farmers. An allegation was made by the 1st accused, also a resident in the village that the two deceased had “rain charms” which interfered with rain.

3. On 22nd December, 2011, the 1st accused in the company of the 2nd to 5th Accused confronted the two deceased in their respective homes (they lived in one general homestead). They accused them of keeping rain charms and practicing witchcraft. A search at the farm of Riziki Mbogo did not yield any charms. Nevertheless, the group proceeded to the home of his son Charo Kitsao Gona. The two men were ordered by the five accused and others with them to accompany them to Lango Baya ostensibly to have the matter dealt with by the District Officer (D.O).

4. On the way there however several stops were made, to gather more “witches”. Upon reaching Lango Baya at a place called Makalatsi the 5th Accused made phone calls to announce that the “rain witches” had been caught. He invited people to come and kill them. Presently the crowd was joined by others who began to sing dirges and before long the mob set upon the two deceased and bludgeoned them to death, using stones and other crude weapons. By the time local police arrived at the scene, the mob had dispersed. The bodies were removed to the mortuary. Eventually, the five accused were arrested and

charged.

5. Upon being placed on their defence, the accused elected to make unsworn statements and did not call witnesses. Sidi Gona the first accused stated that several males collected her from her home at Mkondoni ostensibly to go to the D.O.'s office without revealing the purpose. She accompanied them up to Lango Baya where she witnessed the murder of the two men. The second accused said he met with a mob on his way home at Lango Baya who said they were headed to the D.O.'s office and could not establish what was going on. He went home and later learned of the murder of the two men.

6. The third accused was going about his business when he heard commotions at the homestead of the two victims, both said to be suspected witches. A large group marched the two towards the D.O.'s office Lango Baya. He walked along with them until Kombeni, his destination. He parted with them to do his own chores and eventually went home, only to learn on the next day that the two men had been murdered.

7. The fourth accused stated that he is a goat trader at Bondoni Lango Baya. He went to the local dispensary on 22nd December, 2011 to do business with a doctor there. A mob singing dirges came to the compound. Riziki allegedly Mbogo complained that the group was taking him to the home of Charo Kitsao but had delayed there before proceeding. Eventually, the mob went for Kitsao. Riziki and Kitsao were asking that the local vigilante be called or they be released. Kitsao was fearful. The accused went home for lunch but at 6.00pm he learned the two men were killed at Lango Baya.

8. The fifth accused said he lived at Bondoni and worked as a tout. He was at the stage when he saw the mob holding Riziki. They claimed he was a witch. They demanded a visit to Kitsao's. Both men were questioned. He was called away but on his way home he saw the same mob headed to D.O.'s office. He remained at his home attending his chores. At 6.00pm he learned that the two men were killed.

9. There is no dispute that a group of villagers forcefully removed the two deceased men from their homes on the material morning, on grounds that they were suspected to practice witchcraft. That the two men were forced to accompany the mob allegedly to the D.O.'s Office but at Lango Baya they were murdered. The first accused witnessed the forced removal and eventually murder of the deceased while his four co-accused admittedly witnessed but denied involvement in the initial part of the transaction. All denied involvement in the assault and murder of the deceased occurring later at Makalatsi, Lango Baya. The court must determine whether the five accused jointly with others participated in the murder of the deceased persons.

10. Undoubtedly, this unhappy episode began with rumours in the village that the two men had charms on their farms which were interfering with rain. PW1 and PW3 are wives of the late Riziki and witnessed the incident of his forced removal from his farm. PW1 in her evidence identified the 1st, 3rd 4th and 5th Accused as being in the group that first confronted Riziki who was working in his shamba. According to PW1 the 1st Accused stated that the deceased had charms to stop the rain and the group demanded he accompany them to the D.O.'s office at Lango Baya.

11. During cross-examination she said that the 5th Accused was the first to speak by stating that the group was there "to collect mzee because he has a charm for preventing rain", and that Sidi (1st Accused) confirmed by stating that "Mzee Riziki has a charm to stop rain." PW1 stated for the first time during cross examination that a search was conducted at the shamba as the 1st Accused indicated that the charms were there.

12. In her evidence PW3 mentioned that the 2nd Accused came with the other accused persons, and narrated how a search was conducted for the charms in the shamba but nothing found. In cross examination she too stated that the 1st Accused spoke and insisted on the alleged presence of charms on the farm. She also said that the 2nd Accused also spoke during the said incident but maintained that in the initial stage, only five people had come. Although all the accused persons deny the roles assigned to them by these witnesses in their testimony, the 1st, 3rd, 4th and 5th Accused confirmed their presence in

the initial stage where Riziki and Kitsao were collected from their homes.

13. Both PW1 and PW3 testified that after taking Riziki from his shamba, the group went for Kitsao, according to PW1, on the suggestion of the 5th Accused, while 3rd Accused proposed they go to the D.O's. All the five Accused were people well known to the witnesses PW1 and PW3, being fellow villagers. The incident occurred during the day. The 1st, 3rd, 4th and 5th Accused admit they were at the scene or vicinity of the scene albeit allegedly on their own business and not involved in removing the deceased from their homes. As for the 2nd Accused, he did not suggest to the witnesses that he first joined the group at Lango Baya.

14. Regarding the accused's respective roles at the shamba of Riziki, there may be variation in the witness accounts who spoke first, and what they said. But it is clear from the evidence of PW1 and PW3 that the group of five including the 1st to 5th Accused approached Riziki and accused him of being a witch. They claimed there were charms in his shamba which were preventing rain. They conducted a search before proceeding to the house of the 2nd deceased. That in my view is the gist of the evidence of PW1 and PW3 and the trigger to the entire unfortunate incident.

15. The five accused were not, at that stage mere witnesses but from the evidence, full participants in hurling accusations that Riziki was a witch and had charms in his shamba which prevented rain, conducting a search for the alleged charms and eventually forcing Riziki out of his shamba to accompany them supposedly to the D.O.'s office.

16. The second incident was at the home of Kitsao where Riziki was taken by the five persons. Present in that home was the deceased and his family. Witnesses to the incident were his daughter (PW2) his wife (PW4) and son (PW6). Although these witnesses were more detailed in their evidence concerning this second incident, other witnesses namely PW1 and PW3 who accompanied Riziki from his shamba confirmed that indeed the same group that took Riziki headed for Kitsao's home. This fact is also confirmed in the defences of the 1st, 3rd, 4th and 5th Accused. As to what occurred at Kitsao's home, PW2 stated that all the accused who are known to her as neighbours stormed the home whereupon the 2nd Accused announced that the group was there "because of rain".

17. When Kitsao asked who had reported there was rain on his farm the 2nd Accused said the 1st Accused had. After an exchange Kitsao was ordered to join the group to go to the D.O's office. This is the evidence of PW4 too except she said that the 2nd Accused told Kitsao that he was a witch and that the information had come from 1st Accused. As for PW 6 he said that the second Accused stated that they had been sent by the D.O. to collect Riziki and Kitsao for practicing witchcraft that prevented rain, and that 1st Accused had the information. It seems that the 1st Accused did not directly enter the homestead and stood at a nearby dispensary as her colleagues went inside Kitsao's home.

18. Following verbal exchanges between the group and Gona's family including PW6, PW6 fetched the 1st Accused to confirm what had been said. She allegedly said that she had seen witchcraft paraphernalia, namely potsherds and suspected that Kitsao practiced witchcraft. During cross examination PW 6 said that when the 1st Accused finally entered the home compound, on his insistence she said: "Go ahead and have me jailed." This witness, PW6 also mentioned one Kahindi Philip as one of those who came with the five accused to Kitsao's home. From his evidence, PW6 verbally engaged with his father's accusers demanding justification for their accusations. The defence latched on the fact that he is the only one who mentioned Kahindi Philip as another suspect and that he stated that the 1st Accused did not initially enter the home. The defence submitted that this statement was contradictory of evidence by PW1,2,3 and 4.

19. The fact that the witnesses reported different versions of the words spoken by different accused persons at the scene is also a matter that stood out. These matters however do not amount to material contradiction in my considered view. It is not unusual for persons witnessing an incident, especially involving a fluid situation to report the incident differently as they saw it, and it would be

unreasonable to expect a uniform description. Whether the 1st Accused directly entered the home of Kitsao from Riziki's does not take away the fact that she eventually did go into the home and confirmed allegations of witchcraft against him.

20. Secondly, the name of a sixth suspect Kahindi Philip by PW6 does not detract from evidence regarding the presence of the accused herein and their respective roles. It is true that where evidence is riven by serious contradictions it should not be relied upon (**see Dinkenral Ramkri Shan Pandya – Versus- Republic (1957) EA 336.**)

21. However, the correct approach to contradictions and inconsistencies is as stated by the Court of Appeal in **Erick Onyango Ondeng –Versus- Republic (2014) e KLR:**

“As noted by the Uganda court of appeal in Twehangane Alfred –Versus- Uganda, Criminal Appeal No. 139 of 2001, (2003) UGCA 6 it is not every contradiction that warrants rejection of evidence. As the court put it: with regard to contradiction in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution case.”

22. It is my view, having watched PW1-4,6 testify, they were not untruthful witnesses and any contradictions arising from their testimony concerning the events are minor in nature. That the witness PW6 identified Kahindi Philip among the accused may not be surprising as the incident clearly attracted a fairly large crowd of people. Thus I am satisfied that the 5 accused were the persons who took away the two deceased from their homes on accusations of witchcraft, ostensibly to take them to the D.O's office. The question is: Did they take them to the D.O's Office? The answer to this question is found in the evidence of family members PW1, 2, 3, 4 and 6 who accompanied their deceased relatives in the alleged trip to the D.O.

23. The journey to Lango Baya where the D.O. was based was by foot. The initial scene visiting officer, Inspector of Police Kibowen (PW7) estimated the distance to the said place as 10km from the victims' homes. PW1, 2,3, 4 and 6 described the journey that ended with the stoning of the deceased at Lango Baya. It is their evidence that on the way to Lango Baya the group forced the victims and their families to stop at two places. The first stop was at a place called Kwa Kapira, where the victims were made to wait as the Accused allegedly went in search of other “rain witches”. Apparently none joined the two victims and after a while the groups resumed the journey.

24. PW2, the young daughter of Kitsao gave the clearest description of the events occurring on the trip. She said that the waiting at Kwa Kapira took about 2 hours. She said after the journey resumed the five accused ordered a second stop at a place called Makalatsi. She stated:-

“We were ordered to stop. Karisa (accused 5) made a phone call saying: “here are the witches. Come we kill them”. Many people started to come.....suddenly the crowd that came started to sing dirges then they pelted stones-starting with the five men- Komoro was the first. Then it was free for all. Stones were thrown.....”

25. During cross examination the witness said that the call made by 5th Accused attracted a large crowd of possibly 300 people singing dirges. She said she could not identify them as they were residents of Lango Baya. She maintained that the 2nd Accused threw the first stone.

26. PW 2's evidence is corroborated by that of PW1, PW3, 4 and 6. PW6 said that during what must have been the first stop, he heard Kahindi Philip and the 5th Accused making calls and urging people to come forth. He rushed to the Administration Police Camp to seek help but none was forthcoming. By the time he returned, he found the group had moved from the location of the first stop and further ahead discovered the bodies of the two victims who had been bludgeoned to death.

27. In her evidence in chief PW1 named the 4th and 5th Accused as persons who assaulted the deceased, but during cross examination, she conceded that she was at the periphery of a large crowd and could not see clearly. Further that she fled when missiles started flying. For her part PW2 said that the 2nd Accused threw stones. So too PW3. As for PW 4 she said that all the men assaulted the deceased with sticks and stones. In cross examination she maintained her accusation against the 4th accused.

28. From the description of the witnesses, a chaotic scene broke out at Makalatsi when a large crowd came out in response to calls made by the 5th Accused. PW1 captured the chaos in her evidence as follows:

“Then Karisa (Accused 5) called on the phone saying: “we have the witches who have charms. We will kill them.” I don’t know who he was speaking to. Time was about 6.00pm then. I had a small child and could not intervene as the crowd became big I could not tell who was throwing stones at deceased. Because there was a crowd I could not tell each person’s role. Rasta (4th Accused) hit deceased with a stick. Charo (5th Accused) used stones. They threw fists and kicks at the deceased.”

29. This was also PW1’s evidence in chief. Clearly she honestly admitted the difficulty she had in identifying the exact role of the attackers when chaos broke out. She later was to state under cross examination that she followed from the periphery and could not see Mzee Riziki from her further position, further stating:

“Many people threw stones from different directions. Yes I fled when stones started flying. No I did not see who stoned Riziki.”

30. It is evident from the testimony of the witnesses that the stoning incident involved many people. The multiplicity and nature of injuries on the deceased as for instance many broken ribs testify to this fact. The defence submitted with regard to the large crowd that no common intention was proved between the accused and the crowd. It is clear from the evidence of eye witnesses that the five accused started the transaction. Contrary to the assertions by the 1st Accused, she was a willing participant from the start of the transaction when the deceased were removed from their homes. She accompanied the group all the way to Makalatsi, the scene of the murder. The 2nd Accused admitted meeting the mob at Lango Baya while the 3rd Accused said he accompanied the group to Kombeni where he parted with them to attend to personal matters. As for the 4th and 5th Accused they admit at least being at the scene when the two deceased were forcefully taken away.

31. The prosecution evidence provides proof that the five accused were present from the start to the end of the transaction. Even when calls were made by the 5th Accused for people to come forth and kill the witches all the accused remained there. So that whether or not the accused were seen physically assaulting the deceased they were responsible for the assault as joint offenders. They initiated the transaction by taking the law in their hands and storming the homes of the deceased with accusations of witchcraft. They took the two deceased forcefully on a trip characterized by long delays caused by stops ordered by the accused. These actions negate suggestions that the accused had any intention to hand over the deceased to the law enforcement agencies. In particular the calls by the 5th Accused in respect of which no accused disassociated himself amply demonstrate the intention of the accused.

32. Coming from a region where accusations of witchcraft are tantamount to a death sentence, the accused knew that their actions would incite the public to inflict grievous harm or even to kill the deceased. In my considered view, the accused are liable for the death in the same way as those who physically assaulted the deceased. Section 21 of the Penal Code states:

“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable

consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”

33. In the case of **REX –Versus- Tabulayenka s/o Kirya & 3 others (1943) 10 EACA 51** the Court of Appeal for Eastern Africa stated:

“To constitute a common intention to prosecute an unlawful purpose.....it is not necessary that there should have been any concerted agreement between the accused prior to the attack on the so called thief. Their common intention may be inferred from their presence, their action and the omission of any of them to disassociate himself from the assault.”

34. This position was reiterated by the successor of the Court of appeal for Eastern Africa, the Court of Appeal, **Njoroge –Versus- Republic (1983) KLR 197** where it stated that:

“If several persons combine for an unlawful purpose and one of them in the prosecution of it kill a man, it is murder against all who are present whether they actually aided or abetted or not provided that the death was caused by the act of someone of the party in the course of his endeavours to effect the common assault of the assembly.....Their common intent may be inferred from their presence, their action and the omissions of either of them to disassociate himself from the assault.”

In this case the five accused combined for the unlawful purpose of searching for rain charms at the home of the 1st victim and also capturing the second victim on accusations of witchcraft.

35. Although they declared an intention to take the victims to the D.O., their actions showed no any such intentions. They delayed the trip by making stops during which the 5th Accused in particular called people on the phone to come forth. Finally, his call at Makalatsi attracted the mob that killed the deceased persons at about 6.00pm. At no time did any of the accused disassociate themselves from the words spoken by the 5th Accused or the actions of the mob that responded to his call.

36. The murder of the deceased was, in terms of Section 21 of the Penal Code a probable consequence of the accused’s joint purpose, which was evidently to bust and punish suspected witches. The defences of the 2nd to 5th Accused as innocent by standers cannot hold and are totally displaced by the prosecution evidence. As for the 1st Accused, she was the origin of the witchcraft accusation which she maintained at the homes of the victims during their respective “arrests.” Her evidence that her co-accused forced her to join them is controverted by her conduct as disclosed by PW1, 2, 3,4 and 6-she was a willing participant who stayed from the beginning to the end of the transaction, namely the murder of the two men.

37. The postmortem forms completed in respect of the deceased describe multiple severe injuries. The bodies bore head gashes and multiple fractures of the ribs. Evidently, those who assaulted them intended to cause them grievous harm or to kill them. Indeed as the prosecution witnesses have narrated the 5th Accused had called out the attackers to “kill the witches.” Malice aforethought is self evident.

38. Considering the prosecution evidence in its entirety, I am satisfied that the prosecution has proved its case beyond any reasonable doubt and will convict all the five accused persons as charged in the two counts.

Written and signed this **29th day of January 2015** at Naivasha.

C.W. MEOLI

JUDGE

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

SAID J. CHITEMBWE

JUDGE