



REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRIMINAL CASE NO. 28 OF 2010

REPUBLIC PROSECUTOR

VERSUS

KAMUTU KAZUNGUACCUSED

JUDGMENT

1. The accused, was charged with Murder contrary to Section 203 as read with Section 204 of the Penal Code, in that, on the 29th day of December, 2009 at Mtangani Location in Kilifi County within the Coast Province, he murdered Kazungu Magaro. He denied the charge and was represented by Mr. Lughanje.
2. The prosecution case was as follows.

The deceased Kazungu Magaro was the father of the accused, Kalume Kazungu (PW2) and Julius Kazungu (PW3) among others. He was a nephew to Kasimu Kiraga Nzai (PW1). The deceased lived at Dola, Bamba with his sons and engaged in making charcoal in the forest. The accused had a bad relationship with his father. On or about 29th December, 2009 the deceased went out to the forest to make charcoal but did not return home.
3. On the next day, his body was found in the forest bearing head cuts and several fractures. Police were called. They took away the body and a postmortem examination was conducted on 4th January, 2010. He was buried. On 15th September, 2010, the accused approached PW1 and told him that he is the one who had killed his father because he had bewitched him. The accused repeated this statement to his brother PW2 alone, and later in the presence of their eldest brother PW3. The matter was reported to the local chief and eventually to police. The accused was arrested and charged.
4. When placed on his defence, the accused elected to make an unsworn defence statement. To the effect that his father left home to make charcoal on 28th December, 2009 but never returned. Subsequently his body bearing several injuries was found in the bush. It was buried. He and his brothers recorded statements at Bamba Police Station. In September, 2010 he was arrested on suspicion of murdering his father. He denied the charges.
5. There is no dispute concerning the relationship between the deceased, the accused and his brothers (PW2 and PW3). Further that in or about 28th December, 2009 their father the deceased left home for the forest to make charcoal but was not seen alive again. His body which bore several injuries was found in the forest on the next day.

6. The court must determine whether the prosecution has proved the charge against the accused to the required standard. The only evidence tending to connect the accused with the murder of his deceased father was what the accused allegedly told PW1, PW2 and PW3 about one year later, in September, 2010. Their evidence is that the accused approached PW1 and PW2 separately and confessed that he had killed his father whom he suspected to have bewitched him. When PW2 heard what the deceased was saying, he called PW3, an elder brother. The accused repeated the same thing in the hearing of his two brothers.
7. During cross-examination, PW1 stated that in the course of his conversation, the accused told him that PW3 had previously told the accused that he suspected the accused over the murder of the father. The witness (PW1) however said the accused made the confession to him alone on 15th September, 2010. He also denied that the accused's brothers forced the accused to admit the offence stating that nobody would have known what happened had the accused not come forward.
8. PW2 also described the circumstances in which the accused confided in him. He said the accused came to his house and asked to speak to him. He stepped outside and heard his admissions. The witness informed the accused that he would summon his older brother to hear his statement. That when the said brother (PW3) also known as Ngumbao came, the accused repeated the admission and said he did so because his father had bewitched him. PW2 denied in cross-examination that PW3 had told him he suspected the accused to have murdered their father or that he (PW2) had been pestering the accused over the matter.
9. PW3 said in his evidence that the accused had a difficult relationship with his father because after he sat his Kenya Certificate of Primary Education (KCPE), the father did not take him to secondary school. That the accused quarreled often with his father. In cross-examination he said that he had asked the accused to record a statement with police after the murder in view of the bad relationship between them. The witness however, denied having forced or intimidated the accused into admission of the murder. On the relationship existing between the deceased and the accused, the evidence of PW3 is supported by that of PW1 and PW2. The two brothers stated that had the accused not made an admission to the murder, the most they harbored was suspicion arising from the soured relations between father and son.
10. The line taken by the defence in cross-examination suggested that the witnesses procured a confession from the accused through some unlawful means. However, as I understand it the confession in the strict sense envisaged by Section 26 of the Evidence Act is different. The Section states:

“A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible in a criminal proceeding if the making of the confession or admission appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him”

The inducement, threat or promise must issue from a person in authority and must be “in reference to the proceedings against” an accused person.

11. The nature of the confession covered in Section 25-29 of the Evidence Act is very different from the ‘confession’ in this case. The accused herein had not been arrested and no proceedings had been taken against him. Secondly, by no stretch of imagination can the elder and his two brothers (PW1, PW2 and PW3 respectively) be said to be persons in authority capable of inducing him through threat or promise to admit to an offence.
12. The facts in the case of Mary Wanjiku Gitonga vs R [2010] eKLR were very similar to those

before me. The appellant in that case had confided, one day after the murder of her husband, in her brother. The Court of Appeal rejected the argument that what the appellant told her brother was inadmissible as it amounted to a confession in terms of Section 25A of the Evidence Act. The court stated that such an interpretation amounted to an enlargement of Section 25A beyond reasonable limits.

13. The court considered the phrase **“person or persons in authority holding out any inducement, threat or promise having reference to the charge”**, before stating:

“The various amendments introduced in the Evidence Act were necessary because it was generally believed police officers, who would be persons in authority over an accused person, were either inducing them to make such confessions or admissions or were beating the confessions out of them. Titus as the brother of the appellant. He could not by any stretch of imagination, be called a person in authority over the appellant and who could induce, threaten or make a promise advantageous to the appellant to make the appellant think that he could stand to gain an advantage or avoid any evil of a temporal nature in connection to the death of her husband. Titus was merely listening to his sister and his evidence qualified as oral evidence which must be direct. It was ... the appellant herself who went to Titus ... and told Titus what had happened between her and the deceased. Titus, we have held, was not a person in authority over the appellant and the evidence of Titus could not be held to be inadmissible on that basis. The evidence could be disbelieved and rejected but it was admissible.”

14. Section 63(1) states that oral evidence must in all cases be direct evidence hence the inadmissibility of hearsay evidence. Section 63(2) states:

“For the purposes of subsection (1) of this section, “direct evidence” means—

- a. **with reference to a fact which could be seen, the evidence of a witness who says he saw it;**
- b. **with reference to a fact which could be heard, the evidence of a witness who says he heard it;**
- c. **with reference to a fact which could be perceived by any other sense or in any other manner, the evidence of a witness who says he perceived it by that sense or in that manner;**
- d. **with reference to an opinion or to the grounds on which that opinion is held, the evidence of the person who holds that opinion or, as the case maybe, who holds it on those grounds:”**

15. Thus the evidence of PW1, PW2 and PW3 was direct evidence. Is the evidence believable? I think so. It had been almost a year since the deceased was murdered. The accused continued to stay at home, unmolested. The witnesses particularly PW3 may have suspected the accused because of the strained relationship between them, but nobody knew for sure who murdered their father. PW1 could not have invented his conversation on 15th September, 2010 with the accused, whose contents were also confirmed by PW2 and PW3 after speaking separately with the accused. If PW2, PW3 had any reasons to make up the admission, PW1 did not. He was an uncle to the deceased. All three witnesses acquitted themselves well during cross-examination. There seems to be no reason why out of the blue, one year after the death, the three would conspire to blame the accused for the murder.

16. In his defence, the accused did not specifically state whether he had any conversation with the witnesses the material period, and or the subject. It would appear that the accused had continued to live in their homestead without any problems following the murder, only disappearing for three days after his admissions. There is firm evidence through PW3 that the accused and his father had a strained relationship in the period preceding the murder. The accused was unhappy with the fact that the deceased did not send him to secondary school after KCPE. Secondly he complained of

bouts of headaches, unusual heartbeat and fever. He believed that his father had bewitched him. He stated this to PW1 and also to PW2 and PW3 together when they sought to know the reasons behind the murder.

17. Reviewing all the evidence, I believe that the accused admitted to the murder of his father, perhaps out of a stricken conscience. His denials are completely displaced by the credible evidence of the persons (PW1, PW2, and PW3) to whom he freely made the admissions one year later. The reasons he gave for the murder and the extent of the injuries found on the deceased's body indicate clear malice aforethought on the part of the accused. I find him guilty as charged and convict him.

Delivered and signed at Malindi this **11th** day of **March, 2014** in the presence of the accused, Mr. Obaga holding brief for Mr. Lughanje for accused. Mr. Nyongesa for State.

Court clerk – Samwel

C. W. Meoli

JUDGE

MR. NYONGESA – No records. Treat as first offender.

C. W. Meoli

JUDGE

COURT – Record and sentencing on 12th March, 2014.

C. W. Meoli

JUDGE

12-3-14

Before Hon. Lady Justice C. W. Meoli – J

Mr. Nyongesa for State

Mr. Lughanje for accused

Court clerk – Samwel

Accused present

Interpretation – English/Kiswahili

MR. LUGHANJE – The accused is 31 years old and is married with two children. The accused is mentally disturbed and we ask for leniency.

C. W. Meoli

JUDGE

NOTES ON SENTENCE

The accused was certified fit to stand trial. The defence of lunacy was not canvassed. He has been convicted of a serious charge. The sentence has been prescribed by law and affirmed by the Court of Appeal. The court's hands are tied.

C. W. Meoli

JUDGE

SENTENCE

Accused to suffer death in the manner authorized by law.

Right of appeal 14 days.

C. W. Meoli

JUDGE