



REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CRIMINAL CASE NO. 23 OF 2012

REPUBLICPROSECUTOR

VERSUS

- 1. GUNGA BAYA**
- 2. SAIDI BAYA..... ACCUSED**

JUDGMENT

1. The accused persons were jointly charged with Murder of John Baya on 2nd August, 2012, contrary to Section 203 as read with Section 204 of the Penal Code. They denied the charge and were represented by Mr. Lughanje.
2. The prosecution case is as follows. The two accused are brothers and were step brothers of the deceased, and cousins to Msanzu Baya (PW1). Ordinarily they all lived at Magarini although the deceased spent a great deal of his time in Tarasaa. Earlier in the year 2012, the deceased evinced an intention to sell the land upon which the mother of the two accused lived, and seemed determined as he evicted the said mother and wife of the 2nd accused. This action angered the 2nd accused who vowed to another relative Chengo Katana Nzombo (PW3) that he would “finish” the deceased. The brothers’ relationship remained strained even though it appears that they continued to relate.
3. On the evening of 2nd August, 2012 the deceased was seen in the village in the company of the 1st accused by Msanzu Baya (PW2), the son of PW3. After the trio walked together some distance, they parted, the 1st accused and deceased proceeding together towards their home. Not long thereafter PW2 heard cries of help to the effect that “I am being killed”. He recognized the distressed voice of the deceased but when he and his companions tried to go toward, the screaming ceased suddenly.
4. Early on the next day, the 2nd accused came to PW2’s home to inquire whether the deceased had “arrived”. He claimed that some people had come from Malindi in search of the deceased, on suspicion that he had stolen a “Bajaj” motor cycle and killed the victim of the robbery. He described the deceased to as a “mkora” – thug - after PW2 told him about the screams he had heard soon after their parting on the previous night. The 2nd accused said the deceased was to go to Tarasaa.
5. When PW2 spoke to the 1st accused he said the deceased had gone to Malindi. Both accused were reluctant to report to police or to participate in a search for the deceased even though three weeks had gone by. In particular the 1st accused was adamant that nobody should conduct any search in

his shamba because his crop would be destroyed. Reports having been made to police and local chief, villagers eventually searched the said farm. The decomposing body of the deceased packed in a gunny bag and, with legs trussed was recovered in a hole in a thicket. That was on 29th August, 2012. Police retrieved the body and a month later the two accused were arrested from their home, and eventually charged.

6. When they were placed on their defence, the two accused elected to make unsworn statements. They confirmed that they were brothers and step brothers of the deceased and were with him on the evening of 2nd August, 2012. Their evidence is that he spent the night at home and on the next morning bade them farewell to return to Tarasaa to sell his land. That PW2 told the 2nd accused about the screams he had heard on the previous night and demanded to know where the deceased was. Eventually they learned that some human remains had been found in a neighbour's farm. They both denied having killed the deceased.
7. There is no dispute that the accused were related as step brothers to the deceased, living together and were the last persons to be with him whether on night of 2nd August, 2012 or morning of 3rd August, 2012. The deceased thereafter disappeared. Remains of a human male were later recovered upon a search mounted by neighbours within the vicinity of the family homestead.
8. The court must determine whether the prosecution has proved:
 - a. that the body recovered on 29th August, 2012 was that of the deceased.
 - b. that the accused through an unlawful act or omission, with malice aforethought jointly caused the death of the deceased.
9. Beyond the admitted fact that the two accused were the last people to see the deceased alive, the prosecution case is based on circumstantial evidence. In the case of **Kipkering Arap Koskei & Anor v R (1949) 16 EACA 135** the court laid down the following test.

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

And again in **Simoni Musoke v R (1958) EA 715** it was held that:

“In a case depending exclusively upon circumstantial evidence, the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt.”

Citing the decision of the Privy Council in **Teper v R [1952] 2 ALL E.R. 447; [1952] A.C. 480** the court stated:

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

10. On the first issue, the initial witnesses who discovered the body in question included PW1 and PW3. They were categorical that was the body of the deceased. PW2 was not cross-examined on that score. It was his evidence that he had known the deceased since childhood. In her evidence, PW3 stated that although it was badly decomposed the subject was the deceased's body. She too said she had known the deceased since childhood. When questioned during cross-examination she

responded:

“The clothes were on the remains. We identified them as John’s body and remains. His head was not completely destroyed. His clothes were at the scene. Body was strapped in gunny bag.”

11. According to the postmortem form (exh.1) PW2 and PW3 identified the body for purposes of postmortem on 3rd September, 2012. The P3 form confirms that the body wore a checked trouser and that it was the decomposing body of a human male, not an animal as the 1st accused seemed to suggest in his defence. It was not mere bones either.

12. The postmortem form records the following details of its condition:

- Severe decomposition
- Remaining body tissues
- Larvae and animal bite marks on bones.

All the foregoing evidence in my view removes all doubt that the said body was that of the deceased.

13. The accused persons were admittedly the last persons to be with the deceased some 27 days prior to the discovery of his body. Suspicion was cast on them initially because of their conduct on the day after 2nd August, 2012. According to PW1 the 2nd Accused visited his home early in the morning asking after deceased and claiming that he was being sought by some people from Malindi for robbery. When PW2 told him about the screams heard the previous night he responded by saying the deceased was a thug. It is significant that the screams were heard only some minutes since the deceased who was with 1st accused parted with PW2 and his friends on their way home. PW2’s evidence is corroborated by his mother PW3. He reported to her about the screams he had heard on the fateful night. PW2 maintained he knew the deceased since childhood. It is believable that he knew the voice of the deceased well. His subsequent concern and the recovery of the body confirm that he heard and recognized the voice of the deceased crying out that he was being killed.

14. In addition to insisting that the deceased had gone to Tarasaa on the morning of 3rd August, 2012 the accused persons did not show any interest in looking for him. In particular the 1st accused denied entry to villagers to his farm for the purposes of a search and did not even go to view the body when discovered. For his part 1st accused admittedly left home for Mombasa before the deceased whereabouts could be located, returning a few days before the recovery.

15. Although the exact cause of death of the deceased could not be established due to the state of the body at the postmortem, there can be no doubt that he was murdered, even if we believe the evidence of the accused persons that he was alive and left home seemingly in good state on the morning of 3rd August, 2012. The body was trussed on both legs and it was stuffed in a gunny bag. No animal could have achieved such a feat. Secondly, there is the evidence by PW2 that no sooner had he parted with the deceased who was accompanied by the 1st accused than he heard the deceased wailing saying “I am being killed.”

16. The 1st accused claims that he and the deceased got home and had dinner with the 2nd accused before retiring to bed. It is therefore curious that the 2nd accused visited PW2’s home at 5.00am the next day inquiring if the deceased got home and claiming that the deceased was being sought

for robbery. Like his brother, the 1st accused he showed no concern that the whereabouts of the deceased were unknown and despite PW2's report about his cries of distress on the previous night. In fact the 1st accused denied villagers permission to enter and search the bush in his farm and they had to use force.

17. The foregoing conduct must be viewed in light of the evidence by PW3 the aunt of the accused persons that accused's family was upset that the deceased intended to sell land upon which their mother resided. According to PW3, the 2nd accused was unhappy that the deceased had evicted his mother and wife from the said land. He had complained to PW3 in June, 2012 about this matter. When PW3 advised that the matter be resolved by dialogue, the 2nd accused had uttered the following words:

“Mimi nikija hapo hakuna story ni kumalizana” or

“When I come home there will be no dialogue.

There will be death.”

18. In the circumstances of this case, the court must conclude that the words PW2 heard in the night of 2nd August, 2012 upon parting with the deceased were his last, that indeed he was attacked and killed. He was with the 1st accused who continues to maintain that the duo got home safely. From the next day onwards the two accused persons went out of their way to plant their own versions of where the deceased could be without making any effort, indeed actively hindering the search for the deceased. Their denial of involvement in the death have been completely displaced by the circumstantial evidence adduced by the prosecution.

19. They jointly plotted the death of the deceased to ensure he did not carry out his threats to sell the family land. They were hoping the body which they had concealed in a hole inside a gunny bag would completely decompose and nobody would ever know what happened to the deceased. Thereafter to cover up their role in his death, they attempted to throw wool in the eyes of inquirers that the deceased was being sought for robbery and hence could have fallen victim to lynching or that he had travelled to Tarasaa. I am satisfied that the prosecution has proved its case beyond any reasonable doubt. I find both accused guilty and convict them as charged.

Delivered and signed at Malindi this 3rd day of **March, 2014** in the presence of the Accused, Mr. Lughanje for them, Mr. Kasyoka for the State.

C. W. Meoli

JUDGE