



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MALINDI

CRIMINAL CASE NO. 29 OF 2011

REPUBLIC.....PROSECUTOR

VERSUS

**BENSON KATANA KITUNGA**

**SHARIFF KITUNGA KAGONDA**

**KINGI KITUNGA.....ACCUSED**

### JUDGMENT

1. The accused were charged with murder contrary to Section 203 as read with Section 204 of the Penal Code Chapter 63 of the Laws of Kenya and the particulars are that on the 16<sup>th</sup> day of November, 2011 at an unknown time (a.m.) at Bomani Sub-Location, Magarini Location within Magarini District of the Kilifi County murdered **THOMAS SULUBU NGOWA**. They denied the charges and were represented by Mr. Nyakoe. The prosecution called eight witnesses. It does appear from the witnesses that there was a longstanding land dispute between the deceased and the family of the accused persons. They were related as cousins. The dispute was exacerbated when the deceased obtained a title deed in his name in respect of the disputed land parcel a few months to the murder.

2. Evidence shows that the deceased was drinking *mnazi* at the “*mangwe*” (beer den) run by Kadzo Kazungu (PW3) with **Charo Masha Bohole** (PW2) before leaving for home on the material night. He was murdered on the way home and his body discovered on the next morning by villagers.

3. The only evidence tending to connect any of the accused with the murder is that by **Nicholas Rambo Kenga** (PW4) and by **Katanga Kenga Charo** (PW7) who claimed that the 2<sup>nd</sup> accused who wore a white cap on the material night was also seen with another person at a scene close to where the body of the deceased was found. PW4 allegedly saw the 2<sup>nd</sup> accused at a *mangwe* in the night. He did not indicate the source of light at the *mangwe*. Equally PW7 allegedly spotted the 2<sup>nd</sup> accused with another unidentified person lingering in the dark close to the murder scene on the material night. PW7 stated vaguely that there was light emanating from a nearby school. Its intensity, proximity or nature were not described.

4. In **Joseph Muchangi Nyaga & Anor v R [2013] eKLR** the Court of Appeal stated:

***“Evidence of visual identification should always be approached with great care and caution (see Waithaka Chege v R [1979] KLR 271). Greater care should be exercised where the conditions***

*for a favorable identification are poor. (Gikonyo Karume & Another v R [1980] KLR 23). Before a court can return a conviction based on identification of any accused person at night and in difficult circumstances, such evidence must be water tight. (See Abdalla Bin Wendo & Another v R (1953) 20 EACA 166; Wamunga v R [1989] KLR 42; and Maitanyi v R [1986] KLR 198). Before acting on such evidence, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him...”*

Viewed in this light, the evidence of these two witnesses does not bear the prosecution case out and cannot form the basis for placing the 2<sup>nd</sup> accused on his defence.

5. As for the 1<sup>st</sup> and 3<sup>rd</sup> accused it seemed that they were key suspects in the murder due to threats previously issued against the deceased regarding the land dispute. That too is not sufficient to justify their being placed on their defence. I do therefore find that the prosecution case has no weight to merit the accused being placed on their defence. They are all acquitted under Section 306(1) of the Criminal Procedure Code and are to be set at liberty unless otherwise lawfully held.

**C. W. Meoli**

**JUDGE**

Delivered and signed at Malindi this 3<sup>rd</sup> day of **July, 2014** in the presence of accused, Mr. Nyongesa for State, Mr. Nyakoe for accused.

Court clerk – Samwel

**C. W. Meoli**

**JUDGE**