



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MOMBASA

Criminal Case 34 of 2010

REPUBLIC PROSECUTION

=VERSUS=

KATANA KENGA CHARO ACCUSED

JUDGEMENT

The accused **KATANA KENGA CHARO** faces a charge of **MURDER CONTRARY TO SECTION 203** as read with **SECTION 204 OF THE PENAL CODE**. The particulars of the charge were that:

“On the 15th/16th of February 2010 at Kinarani Village of Kaloleni District within Kilifi County murdered HALIMA KATANA”

Upon being arraigned in court the accused entered a plea of ‘**Not Guilty**’ to the charge. The prosecution led by learned State Counsel **MR. ONSERIO** called a total of seven (7) witnesses in support of their case. The accused was represented by **MR. ONJORO** Advocate.

The brief facts of the case were narrated by **PW1 SADAKA KAHINDI KAZUNGU** who is the wife to the accused and mother to the deceased child. She told the court that on 15th February 2010 she was at home with her husband and children. The accused requested **PW1** to give him one of her chickens as he needed it to take to a witchdoctor. **PW1** declined the request. The accused then went out. In the evening **PW1** prepared supper and ate with her children. The accused had by then not returned so **PW1** and her children retired to sleep. The accused came home at 12.00 midnight. He was drunk and in a foul mood. He began to abuse **PW1** and held a knife to her temple. He also woke up all the children and instructed them to put on their shoes. **PW1** managed to escape with her infant child leaving her 12 year old daughter ‘**H**’ [the deceased herein] the other children and accused in the house. **PW1** went to seek refuge at her parents’ home which was nearby. The following day **DANA SAFARI WANJE PW5**, came to inform **PW1** that her daughter H was dead. **PW1** rushed home only to find her beloved daughter lying dead on a mat outside the house. The matter was reported to police after which the accused was arrested and charged.

At the close of the defence the court ruled that the accused had a case to answer and he was placed on his defence. The accused elected to make a sworn statement in which he denied having in any way causing the death of his child. This court must now consider and evaluate the evidence adduced by the prosecution witnesses to determine whether the charge of Murder has been proved beyond a reasonable

doubt.

The offence of Murder is defined in Section 203 of the Penal Code as follows:

“Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder”

This definition establishes three crucial ingredients for the offence of Murder:

- 1) Proof of the death of the deceased and the cause of that death
- 2) Proof that the accused caused the death of the deceased by an unlawful act or omission and thirdly
- 3) Proof that said unlawful act or omission was committed with malice aforethought

The fact of the death of the deceased is not in any doubt. **PW1** the mother of the deceased, **PW2 KAHINDI KAZUNGU** the child’s maternal grandfather, as well as her siblings **PW3 HAMISI KATANA** and **PW4 ZAWADI KAHINDI** all testify to having seen the dead body of the deceased laid on a mat outside their house on the morning of 16th February 2010. They all identify the deceased whom they knew well as ‘**H**’.

The cause of death of the deceased is however not so clear-cut. The witnesses testify that they saw blood and foam oozing from the deceased’s nose and mouth. **PW1** told the court that upon examining the body of the deceased she noted that ***“Her neck was loose and rolling about”***. By this she implies that the deceased’s neck could have been broken. However this evidence is not supported by the evidence of **PW6 DR. K.N. MANDALIA** the consultant pathologist who conducted the autopsy on the body of the deceased. **PW6** told the court that he was unable to conclusively determine the cause of death as the body was extensively decomposed when it was brought to him for examination. However **PW6** did state that:

“There was no evidence of fractures or any other injury”

The Pathologist did go on to state that he did see features of Pneumonia upon examining the deceased lungs. Death by pneumonia and death by strangulation are two entirely different things. Clearly a death due to pneumonia cannot be deemed to have resulted from the unlawful act or omission of any third party.

In his defence the accused states that on the night in question the deceased was ill and was coughing continuously. He stated that after his wife ran away he decided to take the child to a local medicine man for treatment. On the way there the child died in his arms. This defence raised by the accused provides a probable explanation of how the deceased met her death. The defence is given credence by the evidence of the Pathologist that the deceased died due to a pneumonia attack. All in all there is no tangible evidence of foul play in the death of the deceased. All the indications are that she met her untimely death as a result of natural causes. Therefore there is no evidence to prove that the death of the deceased resulted from the unlawful act or omission of any person let alone the accused. The actus reus for the offence of Murder has not been proved as against the accused person. Thus the charge of Murder cannot stand. I accordingly acquit the accused of this charge. Accused is to be set at liberty forthwith unless he is otherwise lawfully held.

Dated and Delivered in Mombasa this 16th day of July 2012.

M. ODERO
JUDGE

In the presence of:

Mr. Onserio for State

Mr. Onjoro for Accused