



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA

Criminal Case 11 of 1997

REPUBLIC PROSECUTOR

- VERSUS -

AMBARI GANDANI KONDE..... ACCUSED

JUDGEMENT

The charge facing the accused person in this case is Murder contrary to Section 203 as read with Section 204 of the Penal Code, Cap 63 Laws of Kenya.

The particulars of the charge are that:

"On 21.8.95 at around 9 P.M. at Somali Village, Kariang'ombe Sub-location Rabai Location in Kilifi District of Coast Province, he murdered Nyakondo Gandani Konde".

The prosecution called 9 witnesses to prove that charge beyond reasonable doubt.

The easiest part is to decide the fact of death. For that we have the evidence of P.W.1 KONDE MWANZAMBO, (KONDE), P.W.2, WASHE MUNG' ARO WASHE (WASHE), (P.W.3, MWANZAMBO KONDE (MWANZAMBO) (P.W.4, DZAME MWANZAMBO (DZAME), P.W.5, NDEYE MUNG'ARO MWADZAMBO (NDEYE), and P.W.6, MWADZALA JAKA AMBARI(MWADZALA) all of whom saw the body of the deceased as it lay inside the house before collection by the Police. It was collected by P.W.7 PC OMAR MWAGUMBA (P.C. OMAR) and P.W.9 REUBEN KIMANI (P.C. KIMANI) who took it to the mortuary for Post Mortem Examination before it was released for burial.

What caused the death? Who caused it? Was it caused of malice aforethought to amount to Murder? These questions have to be answered from the evidence on record.

There is no benefit of a Post Mortem report since Dr. Mandalya who performed it and was expected to give evidence did not do so. He would have given his opinion on the cause of death. Lack of such opinion is however not fatal to the entire case as it only reflects on the weight to be placed on the other prosecution evidence on record. Such was the evidence of Konde (P.W.1) and Washe (P.W.2).

They were the first to arrive at the scene and saw the deceased lying down bleeding. According to Washe she had been pierced through her left side and was bleeding. Others who came later like Mwadzala (P.W.6), saw a cut on the head of the deceased, and P.C. Kimani (P.W.9) who also saw a deep cut on the head of the deceased. Assessor Isaac Karania was of the view despite this evidence that the injuries were not proved but Assessor John Radull was satisfied that there were injuries inflicted on the deceased. I have

no reason to reject the observations of the three witnesses which is consistent and accept that there were injuries on the deceased.

As to who caused them, again the star witnesses in this were P.W.1 Konde and P.W.2 Washe. Konde is the elder brother of the Accused while Washe is the Accused's uncle. They all live in one compound and Konde's house almost adjoins that of the Accused and lies between the house of Washe and the Accused's house.

Konde spent the whole morning of 21.8.95 at the home. He was having discussions on family matters with the accused and they were not disturbed except by the Accused's wife at 8 a.m. when she called the accused to go and have tea in the house, and lunch hour when she called him to go and have "sima" for lunch. Konde then went out for a stroll and returned home at 6 p.m. At 8 p.m. Washe, their uncle, came to his house and they also had discussions before retiring to go to bed.

It was Konde's recollection that at about 9 p.m. he heard screams of "Mama Yeee..... " from the Accused's house. Washe also heard the same screams and they meant to him that someone was in pain and in distress. In court they attempted to add "Nauawa" to the screams but admitted in cross examination that those actual words of "Nauawa" were not pronounced. The scream was in Giriama Language "Ma Yooooo..... ". It was their own interpretation of the nature of the scream they heard. Upon hearing the scream which was emanating from the Accused's house they headed there. They found the main door bolted and would not be opened despite their knock on it. Konde broke it down and they both came face to face with the Accused holding a jembe and the deceased lying on the floor at his feet. Konde told him to drop down the jembe and the Accused did so. They held him and dragged him outside where, despite some resistance, they wrestled him down and tied him up with a rope. The accused, they testified, was looking furious and it was not possible to talk to him about the incident. He and the deceased were then collected by Mariakani Police at 11 p.m. after the two made a report at 10 p.m.

Other members of the Accused's family also testified about his presence at home in the course of that day. His mother Dzame (P.W.4) testified that she had seen the Accused before she went for "Matanga" ceremony in the neighbourhood earlier that evening. During the day, she said, she also saw the Accused and greeted him. She told him she would be going for "Matanga" or funeral ceremony. He was with his wife when she saw him.

The Accused's Aunt NDEYE (P.W.5) who is the wife of Washe (P.W.2) also confirmed that the Accused was at home during the day. She saw and spoke to him at the homestead. He was conversing with other members of the family. She was also with the Accused's wife during the day. She went to bed in the evening only to be awakened by screams from the Accused's house which is about 15 metres away from hers.

There is also on record the evidence contained in the Charge and Caution Statement recorded from the Accused by S.P. SOLOMON ONGORO OLIECH (S.P. OLIECH). It was recorded on 27.8.95 and was produced without objection that it was taken without compliance with the law. The evidence of SP Oliech was not challenged that the statement was given by the Accused voluntarily and without threats or promises. In it the Accused admitted that he killed his wife but he did so after he found her in bed with another man making love. He got mad and wanted to beat up the man but he escaped. He then turned to his wife and cut her with a jembe.

In court however, the Accused gave evidence on oath. He denied that he was at home during the day on 21.8.95. On the contrary he had been on duty at his place of work at Dal-Ur-Um-Mosque at Likoni Mombasa where he is a watchman.

He left work at 6,30 p.m. and took a bus home. He arrived at 9 p.m. carrying some provisions he had bought. He found the main door of his house was open. He went inside and found his wife with a man on his bed. He was shocked but did not talk. It was the other man who rose up and picked up a jembe which was nearby. He swung the jembe intending to hit the Accused. His wife was at that very moment trying to run out and when the Accused ducked to avoid the jembe which was swung at him, it hit his wife instead.

He screamed "Jamani Mtu eeh" and the man escaped. Other people - his brother and his uncle, then came to the scene but did not find the other person. He never recognised the stranger although there was a small tin - lamp alight in the house. His brother and uncle caught and tied him up alleging that he had hit his wife although he had not.

That line of defence was alluded to during cross examination of the prosecution witnesses Konde and Washe, that the son of Konde was having a sexual affair with the Accused's wife who is his Aunt. That son was called as P.W.3 MWADZAMBO. He has a serious stammer and his evidence in chief was not completed but he was offered to the defence for cross examination. He denied having had a sexual affair with his Aunt, the Accused's wife or having been in the Accused's house on the evening of 21.8.95.

In considering the totality of that evidence Assessor Isaac Karanja was of the view that there was a reasonable doubt as to whether the Accused found a man in bed with his wife when in the process of the paramour escaping the deceased sustained injuries. He gave the doubt as to whether the injuries were caused by the Accused or the paramour, to the Accused and was of the opinion that the offence was not proved beyond doubt. The only other assessor remaining in the trial, John Radull, accepted as proved beyond doubt, that the deceased died and that she was injured. He also accepted that it was the Accused who caused the injuries that led to the death. In this he believed the evidence of Konde (P.W.1) and Washe (P.W.2). He also believed Dzame (P.W.4) and Ndeye (P.W.5) that the accused was at home that day despite the accused's assertion that he was elsewhere. As for intent, the Assessor was of the view that it was not proved. The Accused's confession was not unconditional. It could well be the case that his wife was found in bed with someone else in which case there was sufficient provocation. He would acquit the accused of the charge of Murder but find him guilty of Manslaughter.

Learned Defence Counsel Mr. Magolo submitted that the absence of a post mortem report or a Pathologist's report would mean that the deceased never died and was buried alive or asleep or unconscious or in a coma. That the cause of death was not proved since the deceased who was in bed with another person could have been strangled, or died of a sickness. Counsel urged the court to accept the Accused's evidence that the deceased was hit by her lover and not the Accused. There was no direct evidence on the death except the statement given to the Police by the accused. In that statement he gave a reason for the killing and the admission cannot therefore amount to Murder.

Learned State Counsel Mr. Ngeno on the other hand urged the court to accept the confessional statement recorded from the Accused and disregard his evidence in court which was merely tailored to exonerate the Accused from the killing and to confuse the court. There was evidence that the Accused was at home throughout that day despite his denial. There was no basis for making the submission that the deceased was buried alive or was not killed. In his view, on the evidence, the offence of Murder and not Manslaughter was proved beyond doubt.

I have carefully considered all the evidence on record, the submissions of Counsel and the opinions of the assessors. The opinions of the Assessors are not binding on this court but I thank them for assisting in this trial.

As I stated earlier the lack of an opinion on the cause of death is not fatal to the prosecution case as it affects the weight of evidence and not the root of the charge laid. I am satisfied beyond doubt from the evidence related above that the deceased died and there is evidence from the same prosecution witnesses which is buttressed by the statement of the Accused himself that before the accused was found dead she, was violently attacked and injured. As to who attacked her I accept and believe the evidence of Konde (P.W.1) and Washe (P.W.3) who were the first to arrive at the scene and found the accused behind a locked door which they broke and found him standing over the dead body. The two were the brother and uncle of the accused and they impressed me as witnesses of truth. The accused himself did not deny having killed the deceased and made such admission in his own charge and caution statement produced as Exhibit 2, without objection, by SP Oliech (P.W.8).

I do not accept the accused's evidence that he never was at home on the day in issue or that he was at his place of work the whole day. That story cannot stand against the overwhelming evidence of the accused's

brother (P.W.1), Uncle (P.W.2), Mother(P.W.4) and Auntie (P.W.5) all of whom testified that he was at home, I believe those witnesses.

It may well be true however, although it only remains a mere possibility, that the accused may have found another man in bed with his wife when he entered his bedroom. The allegation was that it was P.W.3 Mwadzambo whose evidence could not be clearly extracted because of his serious stammering condition. He nevertheless denied the allegation. But the possibility was not wholly displaced by the prosecution. Whoever it was that was in bed with the accused's wife, it would afford the accused the mitigation of provocation, thus reducing the offence of Murder to that of Manslaughter. I agree with assessor John Radull in that view.

Accordingly I give the Accused person the benefit of doubt that he was not actuated by malice aforethought in the commission of the offence. I reduce the charge to one of unlawful killing and convict the accused for Manslaughter. I acquit him of the charge of murder. \

Dated at Mombasa this 8th day of October 1999 .

P.N. Waki

JUDGE

Magolo for Applicant

Court clerk - Lewa Judgement brought forward to 8.10.99 and read over, signed and dated.

P.N. Waki

JUDGE

Sentence

Gumo - Accused is a first offender. Magolo

I am instructed to confirm accused is a first offender. He is an old man. He is very sorry and remorseful to have allowed his temper to involve him in such offence.

He has been in custody for 4 years. He has been affected by the death. I request that the accused be treated leniently. Accused has a family of 5 children. That is a case of anxiety. The accused has decided to start a new life and provide for them. He has decided never to be involved in crime again. He wants to start a new life.

His brothers will help him to start life again. Purpose of sentence should help him to start life again. Justice will be served if accused is not sent to prison. Sentence

I have considered the mitigating circumstances that have been ably put forth by defence Counsel Mr. Magolo, The purpose of sentencing however is not only to assist an accused to reform as submitted by Mr. Magolo although it is a central consideration in sentencing. It is equally crucial to consider matters of restitution for the crime committed and deterrence if there is a threat of repetition of the crime by other members of society.

In this case the deceased was the Accused wife. She deserved love and not death. It may well be true that the accused was provoked when he found her with another man. But his temper got the better of him and he killed her instead of dealing with such provocation in a more civilized manner to rid himself of an unfaithful wife. It is the kind of reaction that deserves a deterrent sentence to keep like-minded people

from killing unfaithful spouses. There is always Divorce as an option.

I appreciate that the accused has decided to start a new life and is now reformed as his Counsel believes he has. I hope he marries again and cares for other people's lives when he leaves prison, I sentence him to serve 5 years imprisonment.

Dated this 8th day of October, 1999.

P. N Waki

JUDGE

Further Orders

Assessors who participated in this trial are discharged for a period of 12 months.

P.N WAKI

JUDGE