



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MOMBASA**

**Criminal Case 6 of 1997**

**REPUBLIC..... PROSECUTOR**

**=VERSUS=**

**1. CHARO WANJE ZIRO..... 1ST ACCUSED**

**2 . NYUNDO BAYA..... 2ND ACCUSED**

**3 . KATANA NYALE..... 3RD ACCUSED**

**RULING**

The three Accused persons were committed to this court for trial on a charge of Murder contrary to S.203 as read with Section 204 of the Penal Code. It is alleged in the information laid that the three of them jointly with others not before the court murdered KADZO JEFWA ON 23rd day of October, 1994 at Kibarani Village, Kilifi.

The prosecution set out to prove that at 1 p.m. that day a group of people led by the 3rd Accused Katana Nyale (Katana) went to the home of the deceased, Kadzo. On the same day there was a funeral of another lady called Salama d/o Kazungu who was suspected to have been bewitched by Kadzo. The three Accused with others dragged Kadzo from her home to the funeral home and demanded from Kadzo that she should resurrect the dead woman, Salama. On the way Kadzo was beaten up. At the funeral home she was unable to resurrect Salama. So she was taken back to her home and was seriously beaten up and left for dead. Her children took her to hospital at Kilifi. She died there The two Accused Charo Wanje Ziro (Charo) and Nyundo Baya (Nyundo) tried to escape but were arrested and charged. Katana went underground but was also arrested and charged. The prosecution was going to prove the participation of the three Accused in the crime and also prove that they did it of malice aforethought.

The prosecution called four witnesses to prove the charge before closing its case. At that point Mr. Ngombo, learned defence counsel for all the Accused, submitted that there was no case to answer and the Accused should be acquitted at that stage. Section 306(1) of the Criminal Procedure Code provides:-

" 306. (1) When the evidence of the witnesses for the prosecution has been concluded, and the statement or evidence (if any) of the accused person before the committing court has been given in evidence, the court, if it considers that there is no evidence that the accused or any one of several accused committed the offence shall, after hearing, if necessary, any arguments which the advocate for the prosecution or the defence may desire to submit, record a finding of not guilty".

I must therefore consider whether there is evidence that the three Accused persons or any of them committed the offence on the evidence on record.

In a charge of murder there must be evidence not only that there was a dead person but also that the death was caused by the Accused person or persons and it was of malice aforethought. Both malice aforethought and causing death are defined under S.206 and 213 of the Penal Code respectively. In proving malice aforethought it has to be shown that there was an intention to cause the death or do grievous harm to some person, or knowledge that the act or omission causing death would probably cause the death or do grievous harm to some person or an intention to commit a felony or to facilitate escape from custody of a felon or a combination of those acts.

Death will not be caused by an Accused person unless it is immediate or he inflicts bodily injury on another person in consequence of which that person undergoes medical treatment which causes death, so long as the treatment was in good faith; or inflicts bodily injury on another person which would not have caused death if he submitted to proper medical treatment; or through violence causes another person to perform an act which causes death; or by any act or omission he hastens the death of a person suffering from disease or injury; or if his act or omission would not have caused death unless it had been accompanied by an act or omission of the person killed or of other persons.

The four witnesses who were called to prove those elements of the offence may be examined, first in summary.

There was PW.1 KADZOSI JEFWA (Kadzosi), a thirty-two year old daughter of the deceased, Kadzo, who said she was at home with Kadzo on the fateful day. PW.2 KAFEDHA JEFWA MKARE (Kafedha), another daughter of Kadzo and the younger sister of Kadzosi.

PW.3 CHARO MANDENGE JOGOO (Jogoo) a neighbour who responded to the screams of the deceased and found a large group of people throwing stones and sticks.

PW.4 KATANA MKARE JEFWA (Mkare) the grandson of the deceased who assisted in taking her to hospital and found her dead the following day.

Out of the four witnesses only PW.1 and PW.2 purport to have witnessed the incident. But at the end of the day, their evidence turns out to be contradictory and difficult to accept as truthful. It may be analysed.

Kadzosi (PW.1) said she was alone at home with her mother, Kadzo, at about 1 p.m. that day. She had remained home the whole morning from 11 a.m. up to 1.30 p.m. when she saw a large group of people heading there. Kadzo ran away when she saw the group. Kadzosi put the group at 200 people and swore it was no less. The group ran after her mother and she followed behind. Shortly they caught up with the mother and grabbed her. Kadzosi was following behind. The group then led the mother to the neighbouring home where the funeral of Salama Kazungu was being held. It is there that Katana is said to have asked Kadzo to talk to the dead woman and resurrect her. When Kadzo could not resurrect the deceased, Katana pushed her. The group of people then took Kadzo back to her house and started beating her. Kadzosi said she was present and saw Nyundo and one "Kafagio" referring to Charo, in that group Kadzo started screaming but no one came to her help.

Kadzosi then ran off to inform the police and left the group still beating Kadzo. She reached Kilifi Police Station on foot at 3.30 p.m. and made a report.

The Police left by car with Kadzosi. As they headed back to Kadzo's home, they passed through Kibaoni, a market place, and Kadzosi saw Nyundo and "Kafagio". She told the Police the two were part of the group. The two were arrested and put in the Police car. Further on they met a vehicle of one Njoroge transporting Kadzo to hospital. They all went to hospital and Police Station to record statements. Between 6 and 8 p.m. Kadzosi received a report from one of her sisters that their mother had died.

In cross-examination Kadzosi turned round and said she was not alone with her mother at home but was also with her elder sister, one Kafere. She also said she did not leave their home at all to go to the funeral home. She could not remember who was on the group of 200 people but she gave 10 names to the Police including those of the three accused. Charo's name was uppermost in her mind because Charo is said to

have warned Kadzo that she and her brother were witches and they would be buried with Salama. Kadzosi could not confirm that story as she was not present when the allegation was made by Charo.

In further cross-examination Kadzosi said the three accused were not in the group of 200 that went chasing after her mother. They were at the funeral home of Salama. She said Katana pushed her mother and Nyundo kicked her at the funeral home. She added there were many people at the time and her mind was confused. She said it is Katana who took Kadzo to her home and then left her there. The crowd then set on her with beatings. During the beating she said, Katana was not there. He had returned to the funeral home.

She said she went alone to the Police Station after screaming at the scene for 2-3 hours.

Kafedha (PW.2) her sister tells a different story. It first turns out that Kadzosi was never at the home of Kadzo on the material day. She was at Takaungu where she works. It was Kafedha and some children who were at home with Kadzo that day. She refuted the claim by Kadzosi that a group of 200 people came to their home and chased after their mother. She said if any one says so they would be lying. She had gone to hide herself and the children in a neighbours house when some group of people started beating her mother. She never went to the funeral home of Salama but in the same breath says she saw the three accused at their home killing their mother before she ran off to hide. She particularly mentioned Katana whom Kadzosi had said was not present but had returned to the funeral home.

She heard Kadzosi's screams near the road and came out of hiding. Both went to the Police at Kilifi on foot and made a report. They were together when Nyundo and Charo were pointed at by Kadzosi at Kibaoni. In the end Kafedha had to admit in cross-examination:-

" I did not see anyone pushing mother to the ground. I did not see the 2nd accused (Nyundo) kicking mother. I did not see the 1st Accused (Charo) beating mother".

She did however confirm that when they arrived at the hospital after being informed of their mother's death, she saw the body in the mortuary.

The evidence of Jogoo (PW.3) is of no material substance. He did not come from the neighbourhood and was only there because he was working in the Cashewnut Factory at Kilifi. So he knew no one except some daughters of Kadzo who used to take bananas to him. He was sleeping after working overnight when he heard screams. When he went out he saw Kafedha who told him their mother was being killed. He went there and found a big group of people he did not know throwing stones and sticks hitting someone. He was pushed to the ground as he tried to go near. Then he left and saw Kadzosi holding a child and advised her to go to the Police. When the rowdy crowd heard someone shouting "Police" they dispersed. He never recognised anyone or saw any of the three accused in the group or beating the deceased.

He was among those who organised for the deceased's transportation to hospital.

Mkare (PW.4) knew about the beating of his grandmother at 5 p.m. and together with Jogoo arranged for her transportation to hospital.

The significant part about Mkare's evidence was his assertion that he found Kadzosi at the home and she never went to the Police Station. It was Kafedha who had gone. Kadzosi did not go and if she says she did she would be lying. He was sure he found Kadzosi in the house as they arranged to take Kadzo to hospital.

Such is the prosecution evidence that forms the basis of a prima facie case which can sustain a conviction if no explanation is made by the accused persons.

Although the evidence may safely be accepted that the dead body of Kadzo was seen by Kafedha and Mkare, at the Kilifi Hospital Mortuary and the inference may safely be made that Kadzo did infact die,

there is no medical evidence on record as to what caused that death. The allegation made is that the three accused persons beat up the deceased and inflicted injuries from which she died. But as shown about the evidence on such beating; it was neither consistent nor cogent. It does not prove beyond reasonable doubt that the three accused did in fact cause death as legally defined. If such evidence is lacking, it would be futile to look for evidence establishing that the accused persons were actuated by malice aforethought. It seems the Police either did not investigate the case fully, or if they did, they never bothered to present the witnesses before court.

On the totality of the evidence before me I am unable to say that the three accused committed the offence for which they are charged. Accordingly I record a finding of not guilty and order that the accused persons shall be set at liberty forthwith unless they are otherwise lawfully held.

Dated at Mombasa this 6<sup>th</sup> day of March 1998,

P.N. WAKI

JUDGE