



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

**Criminal Case 40 of 1995**

**REPUBLIC ..... PROSECUTOR**

**- Versus -**

**KAHINDI DAVID KENGA ..... ACCUSED**

**JUDGMENT**

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.

Section 203 states:

"Any person who of malice afore-thought causes the death of another person by an unlawful act or omission is guilty of murder."

The particulars of the charge facing the accused person are these:

"KAHINDI DAVID KENGA, on 20th day of November 1993 at about 5 p.m. at Kanani village, Jimba sub-location Gede location within Kilifi District of the Coast Province murdered JOHN YAA ELISHA".

The evidence tendered by the prosecution to prove that charge came through 11 witnesses, in summary:

P.W.1 - FADHILI OMAR KOMBO (KOMBO) - the Watamu tour guide into whose room the deceased ran, collapsed and died.

P.W.2 - YUSUF MWATSUMA MWARABU (MWARABU) the brother-in-law of the accused who saw the deceased as the deceased went to look for his son at the home of the accused.

P.W.3 - PETER MWARUWA KENGA (KENGA) the son of the owner of the building within which the deceased died. P.W.4 - GIBSON MARINGA NGOA (NGQA) brother-in-law of accused (accused married to his sister) who was present at the home of the accused when the deceased arrived and left.

P.W.5 - DOUGLAS YAA JEFWA (JEFWA) the brother of the deceased who identified his body for Postmortem and took it for burial.

P.W.6 - DR. MATHIAS KAI (PR KAI) The Medical Doctor at Malindi Hospital who carried out the Postmortem and gave an opinion on cause of death.

P.W.7 - PC KEAH RASHID (PC RASHID) of Malindi Police Station who accompanied other officers to Watamu Police Post and visited the scene to collect the deceased and exhibits.

P.W.8 - IP MUNYALO WANYAMA (IP WANYAMA) the duty officer at Malindi Police Station who was the Investigating Officer.

P.W.9 - IP ABDALLA WAFULA KERE (IP KERE) the officer who recorded a charge and cautionary statement from the accused.

P.W.10 - PC PETER WACHIRA (PC WACHIRA) Now a taxi-driver but at the time at the report office at Watamu Police Post who received the accused on his surrender and took custody of the alleged murder weapon.

P.W.11 - PC MASITA ATEI (PC ATEI) another Police Officer from Malindi who accompanied the others to the scene upon the report of death being received from Watamu Police Post.

There is no difficulty in making the finding that one JOHN YAA ELISHA died and that he died due to severe bleeding that led to heart failure. There was medical evidence adduced through Dr. Kai who performed a postmortem examination of the body on 21.11.93. The body was identified to him by the deceased's brother JEFWA (P.W.5) who subsequently took it for burial. It is the same body that was collected from a building occupied by Kombo (P.W.1) and Kenga (P.W.3) who were present when the deceased took refuge there and died. And it was the same body that was collected from the same house by PC Rashid, IP Wanyama and PC Atei on the evening 20.11.1993.

Was cause of death and who caused the death proved beyond reasonable doubt?

There is once again Medical evidence from Dr. Kai that the body of the deceased which he examined was of a 37 year old male of good nutrition and strong physique. The Post mortem report (Exhibit 3) showed no internal abnormalities but the external appearance showed massive bleeding from cuts all over the body. The most extensive cut was behind the head and the elbow. It was the bleeding or haemorrhage from those wounds that caused heart failure and consequent death. Similar observations on the external appearance of the body were made by Kombo (P.W.1), Kenga (P.W.3), Ngoa (P.W.4), and the Police Officers who visited the scene, all of whom saw the fresh cut wounds assessed by Dr. Kai to have been the cause of death.

As to who caused those cut wounds there is the evidence of several witnesses who testified that the accused did so.

There was Kombo (P.W.1) who said he was at his house when he heard screams of 'help help' from outside. On checking he saw two people who were strangers to him fighting and the one screaming was running towards his house with the other chasing behind holding a panga. The one being chased was the deceased while the one holding the panga was the accused whom he identified in the dock. Other people, including Kenga (P.W.3) who were occupying the same building came and prevented the accused from reaching the deceased who had by then entered into the building and either collapsed on the corridor or inside Kombo's room. The accused was still wielding the panga and was insisting that he wanted to cut off the deceased's head and take it to the police. The panga was already blood stained. The people there were terrified. Shortly the deceased bled to death and the accused was told so and saw it. He left to go to the police and Kenga (P.W.3) was also sent to report the matter to Watamu Police Post.

In cross examination Kombo testified at first that he did not see the two fighting but said he saw the accused cutting the deceased with the panga on his body when they were about 20 yards away from him. He could not recall which part of the body was cut or how many times the accused cut him. He could also remember the shape of the panga held by the accused and identified it as the exhibit in court. He could not however say to whom the panga belonged.

On his part Kenga P.W.3 who was in same house, which is rented to several tenants by his father, opened the door after hearing the screams of "help" and saw the deceased running towards the house dripping blood. Behind him was the accused holding a panga and had blood stained clothes on him. He did not wait to see the panga clearly but quickly closed the main door as soon as the deceased had entered the

building. He did not know the deceased who collapsed on the verandah or corridor upon entering the main house. He knew the accused and could identify the clothes he wore. Kenga did not however see the accused cutting the deceased with the panga he saw him holding which he was not positively sure was the one produced in court nor was he sure of the shorts the accused wore. There was a suggestion that he was lying on the aspect of identification of the shorts and panga, but he explained that he meant he could not remember whether the short and panga produced in court are the same ones he saw the accused with on the material day. In my assessment such discrepancy does not cast doubts as to whether the witness did in fact see the accused wielding a panga and running after the deceased that day.

The other witness who connects the accused with the cause of death was Mwarabu (P.W.2). He was alerted by some children as he was heading to another village near Watamu junction, that his brother-in-law was killing someone nearby. He rushed there and found the accused holding a blood-stained panga and with blood-stained clothes. The accused was just standing there alone. The person who was being killed was not there but had entered into a house. He then persuaded the accused to accompany him to the Police Station, which they did and he heard the accused tell the police that the person who was troubling him is probably dead.

This witness was however pressed in cross examination to admit and did admit, that he lied to the court on several material particulars of the evidence. The statement he gave to the Police only four days after the event said nothing about his accompanying the accused to police. He found him in the cells. He rejected the panga exhibited as the murder weapon and said he saw a different one. He blamed the uncertainties in his mind to the length of time between the event and the time he was giving evidence. I find in the circumstances that the evidence of Mwarabu is of little probative value although it is probable that he found the accused at the scene of the murder holding the alleged murder weapon.

The last important prosecution witness on this aspect was Ngoa (P.W.4). His evidence is crucial. It is the nearest to direct evidence on the person who caused the injuries, outside any other evidence, which I will revert to shortly.

Ngoa was on the day in question visiting the accused, who was his brother-in-law, for a special traditional ceremony relating to a new born baby of his sister, the accused's wife. He was at the accused's homestead at about 4.30 p.m. but the accused was at his shamba at the time. Presently the deceased came to the homestead and found him there. The deceased looked at the accused's house but did not say why he was doing so. He stood there for about five minutes. In the meantime the accused's children had gone to call him from the shamba to inform him about the visitors. The accused came and found the deceased standing there. He asked him what he was doing in his homestead. The deceased did not respond. He left. The accused then went into his house, took out what looked like a maize flour paper bag, put it on his bicycle, and peddled away. He told Ngoa to wait for him.

The accused then followed the way to Watamu which is the same way the deceased had taken. After a short while (about 15 minutes) Ngoa also took a bicycle and followed them. About one and a half kilometres away he found the two wrestling on the ground near the homestead of one Kazungu. The accused was holding a panga. He cut the deceased on the hand with it and then the panga fell on the side. Both struggled to reach it but the accused reached it first. He took it and cut the deceased on the side of the neck. That is when the deceased rose up and ran towards the house of Kazungu where he entered through an open door.

Ngoa in his evidence in chief swore that he witnessed the accused cutting the deceased on the hand, the neck and abdomen. He also witnessed the accused following the deceased towards the house of Kazungu only to be prevented from going further by members of the public. Ngoa then returned home to report what he had seen to some elders. On returning to the spot he saw the accused leaving and then he followed him to Watamu Police Post.

In cross examination Ngoa said he could not tell whose panga it was which the two were struggling to get on the ground. He reiterated however that he saw the accused reach it, take it, and cut the deceased. Ngoa at the time was about 10 metres away and the two men had been wrestling for about 5 minutes. He

reiterated further that he saw the accused cut the deceased with the panga on the hand, neck and abdomen. He also saw the accused going after the deceased as the latter ran for refuge towards Kazungu's house which was about 15 metres away.

Finally, on the same issue, there is the admission of the accused himself which came through a statement recorded from him by IP KERE (P.W.9). The accused was cautioned after being charged with the offence of murder that he was not obliged to say anything unless he wished to do so, and that if he chose to say anything it would be recorded and may be used in evidence. The accused then voluntarily, without threats or promise, made a statement which was recorded by IP KERE and was signed by the accused. It was produced in court as exhibit 5 without any objections. In that statement the accused admits he was the one who killed the deceased by cutting him with a panga on the head and on the stomach.

When he testified on oath in his defence, however, he gave his own version of events at length. He only admitted there having been a fight between the two but he denied having inflicted any cuts on the deceased or killing him. In his own words, the deceased had waylaid him only to appear from the bushes and demand money. The deceased had a panga.

"Before I replied he swung the panga at me. I ducked behind the bicycle. Then I threw it and started running away backwards. He followed and when he was about 5 metres away I kicked the hand holding the panga. The panga fell. I pushed him. He started hitting me with blows and kicks. We started fighting and wrestling around the panga. There were stones and thorns. He wanted to pick the panga but I moved faster and took it.

I retreated and he jumped on me. I fell on my back".

At no time therefore does the accused say he ever used the panga to cut the deceased.

On the aspect of what caused the death of the deceased and who caused it, the two assessors were of the unanimous opinion that the prosecution had proved that the deceased died due to bleeding from cut wounds on his body which bleeding caused heart failure. They found, despite denial by the accused in his sworn evidence, that he was the person who inflicted those cut wounds.

I defer to this opinion of the assessors as there is consistent and credible evidence from Dr. Kai, Kombo (P.W.1), Kenga (P.W.3), Ngoa (P.W.4), the Police Officers who visited the scene, and IP Kere (P.W.9) who recorded the accused's statement. There was no challenge to the statement which the accused gave voluntarily. His denial in court that he never used the panga to cut the deceased rings hollow in view of overwhelming evidence from the prosecution which corroborates his confessionary statement, that he killed the deceased.

Was malice aforethought, a necessary ingredient of the offence, proved?

It would be proved if there is evidence to show in terms of Section 206:

- (a) an intention to cause the death of or to do grievous harm to any person whether that person is the person actually killed or not.
- (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not although such knowledge is accompanied by indifference whether death or grievous bodily harm may not be caused.
- (c) an intent to commit a felony
- (d) an intention by the act or omission to facilitate the fight or escape from custody of any person who has committed or attempted to commit a felony."

It is the case for the prosecution that the accused made a deliberate and conscious decision to take the

murder weapon, follow the deceased on his way home and inflicted the deep wounds that were the direct cause of death. It is also the prosecution case that there was a clear motive for such decision by accused. He was out to avenge the death of his sister who was the wife of the deceased and was herself killed in mysterious circumstances, several weeks before the deceased was struck dead.

The evidence of motive came from Mwarabu (P.W.2) who met the deceased at his home heading for the accused's homestead to look for his (the accused's) son. Mwarabu told the deceased he did not see his son at that homestead but the deceased insisted on proceeding there to check. Mwarabu told him not to go because of the pending case between the accused and deceased regarding the accused's sister who was alleged to have been killed by the deceased. The deceased did not take the advice but instead proceeded to the homestead.

The story is then taken up by Ngoa (P.W.4) whom the deceased found at the accused's homestead. The accused according to Ngoa said nothing when he came to the homestead and only looked around. When the accused came and found him there and he talked to the deceased, the deceased did not respond either but left the compound. That is when according to the prosecution the accused went into his house, took the murder weapon which he wrapped into a maizeflour paper bag and peddled away on his bicycle to attack the deceased. The assessors unanimously agree, and on my own evaluation I concur, that this is the irresistible conclusion to be drawn as there is no direct evidence on the accused having taken or owned the panga that was the murder weapon. Ngoa was aware of the allegations having been made that the deceased had killed his wife, the sister of the accused.

That there were suspicions of the deceased having killed his wife, was confirmed by the accused himself who was aware that the deceased had been charged with manslaughter at Malindi court.

But the accused denied any involvement at all with that case as he was never asked by the police to record any statement or appear to identify his sister's body or in any other way get involved in the issues arising from his sister's death. He said he was in good terms with the deceased throughout. He said Mwarabu and Ngoa (P.W.2 & P.W.4) did not speak the truth about his relationship with the deceased suggesting that there was a grudge on the accused's part.

The first assessor Joshua Riunga Mahehu, in considering this aspect of the matter was of the clear opinion that malice aforethought was proved beyond doubt by the prosecution and that therefore the accused was guilty of murder as charged. He found support for that view in the evidence of NGOA (P.W.4) who saw the accused dash into his house and come out with something wrapped in a paperbag and peddle away after the deceased. It was shortly thereafter that Ngoa found the two in a fight and saw the accused slash the deceased. There was no evidence that the deceased was armed or that the accused sustained any injuries himself. It was the assessor's view that the accused acted emotionally and was fulfilling his wish to keep the deceased away from his homestead once and for all, hence the intention to cause death or grievous harm. He also relied on the Doctor's evidence and on Kombo (P.W.1) and Kenga (P.W.3) who locked the deceased in the house to prevent the advancing and irate accused from cutting off his head as he swore he would.

The second assessor NJOROGE WAKANYUTE, accepted the same evidence as probative that it was the accused who caused the death of the deceased after pursuing him and cutting him with the panga he took from his house and wrapped it in a maize flour paper bag. He accepted as truthful the evidence of Ngoa (P.W.4) on the sequence of events that followed after the accused picked up the panga and peddled away in pursuit of the deceased. But the assessor was of the clear opinion that the deceased brought the death on himself since his actions were highly provocative of the accused and would relegate the accused's offence to one of manslaughter.

He found provocation in the act of the deceased proceeding to go to the accused's house despite the warning by P.W.2 Mwarabu that he should not do so since there was evidently bad blood between the two. There was a pending court case relating to the death of the accused's sister, (the deceased's wife;), and the accused had also made a report to the police warning that the deceased should not go to his house.

On that particular day the deceased had gone to the accused's house but simply looked around without saying anything. No greetings were exchanged between the two brothers-in-law when the accused arrived in the compound. The assessor did not accept the evidence of the accused that he was in good terms with the deceased because there was other evidence to the contrary. He was of the view therefore that in the heat of that moment, the accused went into his house took the murder weapon and set upon the deceased as narrated by prosecution witnesses, before there was time for the passion to cool.

I had in summing up directed the assessors to consider the issues of self-defence and provocation both of which had been touted by the defence and are inherent in the sequence of events.

In law if a person acting in good faith exceeds the power given by law to defend himself and kills his assailant, the resultant homicide while not justifiable may yet be a mitigating circumstance so that his offence can be regarded as manslaughter and not murder.

It is also the law that when a person unlawfully kills another under circumstances which would constitute murder, does the act in the heat of passion caused by sudden provocation and before there is time for his passion to cool, he is guilty of manslaughter only. I have carefully and respectfully considered the opinions of the two assessors. I have also evaluated the evidence on record and I am unable to accept that either the defence of self-defence or provocation is available to the accused person.

The unchallenged confessionary statement of the accused made 18 days after the event (on 8.12.93) which was tendered in evidence by the prosecution stated:

"It is true I killed John Yaa Elisha. I killed him because he looked for a chance to kill me. He had looked for me many times. Even I reported the matter at Watamu Police and the police warned him not to come to my home. On that day he came at my home, that is when I started chasing him and then killed him by cutting him with a panga on the head and on the stomach."

The accused turned round however in his evidence on oath in defence and said he had nothing against the deceased. He found the deceased at his home with his other brother-in-law, Ngoa, and greeted them before he changed and took his bicycle to go to the market. He could not explain why, and was surprised to find, the deceased had way-laid him and had a panga with which he wanted to assault him. All the accused did in the ensuing fight was to wrestle the panga from the deceased which was an act in self-defence. I have no hesitation in dismissing this scenario as there is overwhelming prosecution evidence that it was the deceased who was attacked. Indeed the evidence on the manner of attack, position and intensity of the wounds showed that they were inflicted on the back which is suggestive that the deceased was on the run when he was assaulted. The inflicted wounds were also multiple, and the accused himself did not suffer injuries, which puts paid to the theory that he was defending himself. The evidence of Kombo and Kenga who saw the deceased running away from the accused assailant puts the matter beyond doubt.

As for provocation, the issue was raised by the accused's Counsel, Mr. Odiaga who submitted that there was evidence of bad blood between the two brothers-in-law and the only reason why the deceased went to the home of the accused was to provoke him. The deceased, he submitted, should not have gone to that homestead when he knew the animosity existing between the two. State Counsel, Mrs. Mwangi, was however of the view that the two defences of self-defence and provocation were an afterthought and untenable. She observed that the evidence of the prosecution was undisputed that the deceased had left the accused's homestead before the accused followed on a bicycle. It was not therefore possible for the pedestrian deceased to overtake the cyclist accused and lie ahead in wait for him as suggested. That there were more cuts on the back of the deceased and no injury on the accused was evidence of a vicious attack on a defenceless person with the intention of killing him or inflicting grievous harm.

It is a necessary ingredient of the defence of provocation that even if there is evidence of "heat of passion caused by sudden provocation", the circumstances must show that there was no time for the passion to cool. Provocation itself as defined under Section 208(1) Penal Code, inter alia

"means and includes except as hereinafter stated, any wrongful act or insult of such a nature as to be likely; when done to an ordinary person to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person committed upon the person by whom the act or insult is done or offered."

The provocative act touted in this matter is the deceased's presence at the home of his brother-in-law. Ostensibly he was looking for his son and the visit would thus on the face of it have been lawful. There would be no objective reason to find such visit as provocative. A lawful act is not provocation to any person for an assault. The accused however had his own subjective reasons to feel threatened by the deceased's presence in his homestead. He explained it in his confessionary statement although the story changed in the witness box. With respect, I do not find the act of provocation as legally defined proved. Even if it was (which it is not), I find that the deceased withdrew from the scene and there was sufficient time for any "heat of passion" to cool. There was ample opportunity for the accused to go back to the police and report the matter if he felt that it warranted such reporting. I find on the contrary that the accused formed a clear and conscious intention to kill or inflict grievous harm on the deceased, soon after the deceased left his homestead, hence the sequence of events that followed as narrated by the prosecution. Malice aforethought was therefore proved beyond reasonable doubt and I have no hesitation in finding the accused guilty of the offence as charged. The homicide was premeditated.

The accused is convicted for the offence of murder as charged. As there is only one sentence provided for under the Law upon such conviction, the Accused is sentenced to suffer death.

Dated at Mombasa this 4th day of September 1998.

P.N. WAKI

JUDGE