



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

Criminal Case 49 of 1995

REPUBLIC.....PROSECUTOR

VERSUS

CHARO NZAI KATANA.....ACCUSED

JUDGMENT

CHARO NZAI KATANA, (the accused) faces a charge of murder contrary to Section 203 and 204 of the Penal Code. It was alleged that on 23.05.1994 at Maduguni Village in Gada location within Kilifi District of the Coast Province he murdered two persons KAHINDI KATANA MANGI and CHENDA CHARO RANDU.

In order to discharge its statutory duty of proving the said charge and particulars of the offence beyond reasonable doubt, the prosecution called 10 witnesses. These may be loosely grouped into three:

1) Those who were involved in or witnessed the incident:

These were:

PW1: - KITSAO BAYA NYAWA (KITSAO)

PW2 - SIMON KITSAO NGALA (NGALA)

2PW3 - SAFARI KABADU MAZARAPWE (SAFARI) PW7 - NGARAMA KATANA NGUNG'OMBE (NGARAMA)

2) Those who investigated the incident: PW5 - JOSEPH ZIRO NYANJE (JOSEPH)

PW6 - PC OBED SAMUEL MULUNGA (PC MULUNGA) PW8 - IP WAFULA KERE (IP WAFULA)

3) Those who filed reports:

PW9 - DR MATHIAS KAI (DR KAI) PW10- GEORGE OPELO OGUTU (OGUTU)

Not included in those groups was PW4, KATANA MANGI BOKIRA, the 70 year-old father of the deceased, KAHINDI KATANA. When he gave evidence in the witness box, he looked confused and incoherent. He was not present when the incident occurred and his evidence may appropriately be dismissed as hearsay and therefore inadmissible. That is, save for the detail that Kahindi Katana was his son and that he died.

Qualification may also be made on the evidence of one other witness before his evidence is examined in detail. That is the evidence of PW3 SAFARI. This witness was declared hostile by the Prosecution with leave of the court. That is because the evidence he gave on oath before the court was inconsistent with the statement, not on oath, given to the police at the investigation stage. The Prosecution then proceeded to cross examine the witness to show that he was unreliable. The assessors were accordingly directed on the effect of such procedure, that although the evidence is admissible and can be considered, its weight or value to be attached to it is negligible and at times worthless. If it was the only evidence, no finding of guilt can be based on it since the unreliability of the witness must itself introduce an element of reasonable doubt. They were also directed that it was possible for them to believe the hostile witness to have been truthful in some part of his evidence if he was consistent in that part and if it can be separated from the rest of his evidence which is inconsistent. The evidence of PW3 shall therefore be considered in that context.

On the afternoon of 23.5.1994, the Prosecution witnesses in the first group were among many villagers who had gone to attend the funeral of another villager at Manduguni village. The deceased there was one CHENGO MWANYALE, the grandfather of the accused. The funeral started at about 1 p.m. and ended at about 4.30 pm. As is the tradition in this area after funerals, the villagers started looking for traditional liquor or Palm wine, commonly known as "MNAZI" to drink. No food is normally served in funerals in the area and none was served in this particular funeral.

At about the time the funeral was ending, PW7, Ngarama, a Palm wine seller was passing by transporting a 50-litre jerrycan full of Mnazi for sale at Malindi on his bicycle. Many people at the funeral stopped him to buy Mnazi from him, but he did not have any bottles or containers to sell from. So the people brought their own and he started selling the Mnazi to them. He could not remember how many people bought. But he remembered one group that bought and sat nearby to drink - about 10 yards away. He joined them later and also drank with them.

At first it was a group of four people who bought their Mnazi in a 5-litre jerry can. Among the four were PW1 (KITSAO), PW3 Safari and one of the deceased persons, Kahindi Katana. They had no way of sharing out the Mnazi from the container since they had no glasses or cups. But traditionally they use a small cup-like container known as "MBOKO" which only PW2 Ngala had. Ngala had bought his own four bottles of the same Mnazi and he, together with other four villagers joined the group of PW1, Kitsao. It seems that there were two women in the group who were sitting on the side but sharing the same Mnazi from the same Mboko. One of them was CHENDA CHARO RANDU, the second deceased. So that, there was now a group of eight villagers, excluding the Mnazi seller who were partaking of this drink and sharing it from one Mboko. About half an hour later, that is about 5 p.m. the group had cleared about half the Mnazi in the 5-litre jerrycan. The seller PW7, Ngarama was also about to finish selling from the 50-litre jerrycan when the accused arrived with two empty bottles and bought his own Mnazi. He did not have a Mboko either. He went and sat behind PW1, Kitsao facing the same direction.

There is consistent evidence that the accused brought the two bottles and bought Mnazi from PW7, Ngarama. It is not clear from the prosecution witnesses however, what the description of those bottles was.

PW1 Kitsao said one was "white"/ the other "black". He was not shown any bottle to identify in court. PW2, Ngala said one was "white" the other "Green". PW7, Ngarama said one was "white" the other "black". Shown a "Green" bottle that was produced as an exhibit by the prosecution as the "Black" bottle he referred to, this witness denied that it was the bottle that the accused had.

What followed after the accused is said to have bought his Mnazi and sat with or near the group of 8 or 9 other drinkers is most crucial and the assessors were directed to consider that evidence carefully. For it was part of the evidence relied on by the Prosecution to establish that the accused had malice aforethought and is the one who caused the death of two people in that group.

The Prosecution set out to prove that when the accused joined the group, he asked for a "Mboko" and proceeded to serve the mourners from one of the bottles while he himself tasted or drank nothing from that bottle but strictly drank from the second bottle. It was soon after the mourners were served with Mnazi

from that bottle that they became sick and two of them died. The inference is that the accused knew that the bottle contained poisoned Mnazi and he served the mourners with the intention of killing them.

This was basically the evidence of PW2 - Ngala. He was clear about the Green bottle which was produced in court as an exhibit. He gave a graphic account of how the accused would personally pour out a Mboko of Mnazi from that green bottle and in turn give to each of the persons in the group who would drink the whole Mboko while he himself, the accused, was only swigging from the white bottle. Within no time - about 5 minutes - everyone of the 9 people who were given the Mnazi started vomiting and having abdominal pains and diarrhoea. Kahindi Katana who was the first to drink it died at the bus stage before he could be taken to hospital. Chenda Charo Randu died at the Hospital undergoing treatment. She was Ngala's uncle's daughter while the accused was Ngala's uncle's son. They were cousins. Ngala himself did not drink the whole Mboko that he says he was given by the accused. He only tasted it and found the Mnazi bitter. Ngala was so insistent that his account of events was the correct version that he would not accept that anyone else would give a different account. He called such a person a liar. But he was also called a liar by that person who also gave an account of what he insisted was the true version of events. That was PW1, KITSAO.

Kitsao testified that when the accused arrived with his two bottles* of Mnazi, the Mnazi from the black bottle was poured into a 5-litre jerry can where everybody was drinking from. It was mixed up with the Mnazi already remaining in the jerry can. The accused however continued to drink from the white bottle. The person who poured the Mnazi from the black bottle into the jerry can was Safari Kabado, PW3. It was also PW3 who was pouring out the Mnazi from the jerry can into the Mboko and giving it out for drinking. He was positive that the accused never at any time poured out any drink into the Mboko to give it to any of the mourners including him. The police had recorded in his statement that he had said it was the accused who poured out the Mnazi from the black bottle and gave it to each one of the eight people who fell sick and two of them died. He disowned those parts of the statement ascribing such evidence to him. He was not declared hostile however, and his evidence on oath must have been presented as truthful. On this score the evidence of PW1 and PW2 are contradictory. That contradiction was not resolved by PW7, Ngarama.

In one breath, Ngarama said the accused borrowed a Mboko and started pouring from the black bottle and gave the others while he drank from the white bottle. He, the witness, was then called by Safari PW3, and asked why the Mnazi was tasting different. He was given a Mboko which he tasted and started sweating and shaking. In another breath he said it was Safari Kabado who had been given the Mboko to serve the Mnazi. He was not serving from the bottle but from the jerry can. It was Safari who complained that there was a problem with the Mboko. In the end, "it was not possible for PW7, Ngarama, to state positively or at all whether the "poison" was in the Mboko or in the bottle. He told both the police and the Assistant Chief that he suspected Ngala's Mboko and accused's bottle to have contained poison.

This was the same theory that was advanced by the witness who was declared hostile by the Prosecution, P.W.3. He said on oath that he had suspected the Mboko which belonged to Simeon Ngala P.W.2. That is because even before the accused came with his two bottles, Ngala had poured out some Mnazi in his Mboko, given it to the deceased, Kahindi Katana, and then to the two women who were sitting separately, one of whom died. He saw nothing wrong with the accused having requested to join their company to share their Mboko since this is the custom. He testified that he poured out some of the Mnazi from the black bottle for the accused to drink and the accused did, before the Mnazi was poured into the jerry can. Safari confirmed that he was the one who was pouring out the Mnazi from the jerry can and serving the others. He disowned some parts of his statement to the police, saying that he had been forced to sign it under threats. He was not shown any bottle to identify in court.

That is as far as the eye-witness account of events went.

The assessors were also directed to consider carefully the manner of arrest of the accused and the investigations that were carried out subsequent to the arrest.

The arrest was carried out by the Assistant Chief of the area, P.W.5 Joseph. He said, when he arrived at the funeral he found some people being carried away as they could not help themselves. On enquiry he was

told by P.W.2 Ngala, that they had drunk Mnazi from a green bottle which the accused had. Joseph then started looking for the accused and found him outside his house, very drunk. He was not responding to his questions. He went into the accused's house and took the green bottle which was said to have been used to serve the poisonous Mnazi. He then said, the accused still had the bottle in his hands when he found him outside his house. He took the bottle and smelt it. It smelt of alcohol (Mnazi) and he took it for further investigations. He went straight to the police where the accused was rearrested and handed over the bottle at 7 p.m. It had taken him fifteen minutes to go to the accused home from the funeral.

Other eye witness account of how the accused was arrested however, is different. P.W.2, Ngala was positive that the accused was not arrested at his home but was found at the scene immediately people became sick. The Assistant Chief, he said, found him there. He, Ngala, was indeed the one who told the Assistant Chief the suspected source of the problem. The Assistant Chief then took the bottle there and then. It still had a little wine. The accused had not finished drinking from his white bottle either, nor was the Mnazi in the jerry can or the 50 litre container of Ngarama, finished when the Assistant chief came. He came when people were vomiting. P.W.7, Ngarama, also, confirmed that when the Assistant Chief came, the 5 litre jerry can was still there and the 'black' bottle, was still with the accused. He was positive that the accused was arrested on the spot and the bottle taken by the Assistant Chief, adding, if the Assistant Chief was not there, the accused would have been beaten by members of the public. He said the Assistant Chief took both the "white" and "black" bottles from the accused.

The "Green" bottle taken by the Assistant Chief was handed over to the Investigating Officer P.W.6, PC Mulunga at Malindi Police Station. It was in turn handed over to The Government Chemist for chemical analysis and report. The analysis was done by P.W.10, Ogotu who filed a report confirming that the Green bottle had no traces of pesticide or any other poison. But the same witness P.W.10, also carried out chemical analysis on the blood, liver, kidney and stomach contents of the two deceased persons. He detected organochlorine Pesticide in the stomach contents only. This is a chemical used as a pesticide which has chlorine content which, if taken by human beings above minimum level can kill. It is thus poisonous.

That poison ended up in the stomach contents somehow and it was for the prosecution to prove beyond reasonable doubt that the source of the poison was the Green bottle that was exhibited in court. In considering whether such proof was available, the assessors were directed to consider the evidence available on record that there were other containers which had Mnazi that day but none of them was subjected to investigations.

There was the large container where all the Mnazi sold at the funeral home came from. There was the 5 litre jerry can which was used by the group of 9 mourners including the deceased persons and the Mnazi seller. There was the Mboko which was commonly used by the mourners in that group. And there were four bottles which P.W.2 Ngala said he bought and poured the contents into the same 5 litre jerry can before the accused came later to join them. None of these containers was available for examination and investigation to eliminate any possible connection with the poison detected in the stomach contents of the two deceased.

The accused gave a statement to P.W.8 IP Wafula and also testified in his defence. He denied knowledge of the poison or that he intentionally or at all administered it to the deceased persons. He admitted however that he met the Mnazi seller at the gate of the funeral home and on being told that there were no containers to sell the Mnazi he rushed to his house to collect containers and came back with two bottles - one green and one clear - which were then filled up with Mnazi. Contrary to what some of the witnesses said that he joined the group of 9 drinkers, he said he only sat nearby and drank his two bottles because the people in the group were not his age mates. On finishing them he started going home. But before he reached there, some people came running after him and the Assistant Chief took the bottles he had and smelt them. He was told he had poisoned people and was immediately arrested and taken to the police with bottles. He denied having poisoned any person or having any reason or motive for so doing.

That the two persons alleged to have been murdered did actually die, was proved beyond doubt through oral evidence of the prosecution witnesses and through the evidence of P.W.9 Dr Kai. He performed the

Post Mortem on the two bodies and confirmed that they had died of poisoning. He could not however determine the exact nature of the poisoning. This was done by P.W.10 Ogutu who found Organochlorine pesticide in the stomach contents of both deceased persons and gave the opinion that the substance is toxic and taken by human beings beyond minimum levels, it can lead to death. That evidence was not sufficiently challenged and I therefore find it proved beyond reasonable doubt that the two persons died and that they died of organochlorine Pesticide poisoning.

Was the poison administered by the accused and if so was it done with malice aforethought? Mr. Gacivih, for the Prosecution submitted that the poison could only have been introduced by the accused who had the necessary intention to kill. That is because the group of people, including the deceased, had no problem with the Mnazi they were drinking until the accused came along, half an hour later, with his own. Knowing that there was poison in the green bottle, the accused did not taste any drink from that bottle which he served to the group but drank from the other bottle. This, he submitted, established that the accused's presence in the group was not innocent and he had intended to poison and kill many people. As for the evidence from the Government Chemist that the green bottle contained no traces of poison, Mr. Gacivih submitted that there was evidence from PC Mulunga that it had been washed before it was taken away and handed over to the Police.

For the accused, Mr. Anyanzwa forcefully submitted that it was the crux of the Prosecution case that the accused brought along a green bottle knowing it to have contained a poisonous substance, filled it with Mnazi and personally served it to various persons, two of whom died as a consequence of that poison. But it is also the same Prosecution which tendered unequivocal evidence from a Government analyst that there was "no pesticide or any other poison detected in the green bottle." It was also the same Prosecution which tendered evidence that the Mnazi in the green bottle was poured into a larger container and served from there by someone else other than the accused. He further observed that the allegation of the green bottle having been washed before it was taken to the police was only a supposition made by one witness, PC Mulunga. Other witnesses, including the Assistant Chief who handed over the bottle to PC. Mulunga gave no evidence to suggest that there was any opportunity by the accused to wash the bottle. More importantly, it was Mr. Anyanzwa's submission that the Prosecution made a grave error in failing to subject all the containers, which on evidence, could have provided leads to the poisoning, to chemical analysis. These included the main container from which all the Mnazi was sold that day, the jerry can from which the group of mourners drank from, the four bottles which P.W.2 Ngala had bought Mnazi and poured into the Jerry can, and the 'Mboko' which was commonly used by the 9 mourners who all became sick and two of them died. There was no explanation, he submitted, for such an omission, which casts grave doubts on the source of the poison. The possibility was not excluded that other persons present had an opportunity of introducing poison into the Mnazi.

Finally Mr. Anyanzwa, submitted that the prosecution made no attempt to establish any motive for such dastardly offence. There was no evidence that the two deceased were known to the accused prior to that day or why there should be any malice against persons unknown to the accused.

In their opinions, the two assessors assisting me in this trial, were forthright that the accused person was not guilty as charged.

The first assessor PURITY CHONGA based her opinion on the prosecution evidence that there was no poison in the Green bottle although this had been put forward as the source of the poison. She was of the view that the omission by the prosecution of subjecting other containers of Mnazi which was drunk by the two deceased that day to chemical analysis, was fatal to the case as this left unproved the source of the poison. There was no direct evidence that the accused was seen putting the poison in the green bottle. She also accepted the evidence of P.W.3, who was declared hostile that the accused drank the first Mboko of the Mnazi from the green bottle as tradition demands before he joined the group of the other drinkers. The same view found favour with the second Assessor JULIUS KIVUVA. He added that he found no evidence of any Motive and at best, the prosecution evidence on the presence of poison in the green bottle was based on Conjecture. The accused would otherwise, in his view have got rid of the bottle after the killings instead of going home with it or keeping it until it was taken from him at the scene as some prosecution witnesses testified. There was evidence that the poison could have emanated from the Mboko which was

owned and was introduced in the group by one of the prosecution witnesses. It was also that witness who introduced the idea of the poison having been in the green bottle. But the Mboko mysteriously disappeared and could not be subjected to chemical analysis. It was the view of this assessor that that may amount to a cover-up or at best leave grave doubts as to the source of the poison.

I have carefully considered all the evidence, the submissions of Counsel and the opinions of the two Assessors, which in law are not binding on me. It is clear in my mind that the prosecution has not proved beyond reasonable doubt that Charo Nzai Katana, of malice aforethought or at all administered a poisonous substance which caused the death of Kahindi Katana Mangi and Chenda Charo Randu, on 23.5.94. I accept the submissions of defence counsel and the reasons for the opinions given by the two assessors in this regard.

The prosecution evidence on the source of the poison was not only conflicting and variable but was in the main based on conjecture. There was no direct evidence that the accused introduced the poison alleged to have been in the green bottle that was produced in evidence as the source of the killer poison. On the contrary scientific evidence confirmed that there was no such poison. It was necessary in the circumstances for the prosecution to carry out further investigations to eliminate any other possible source of the poison by examining other containers evidently used by the deceased persons. This they did not do and I am of the view that it was fatal to their case. The burden of proof imposed on the prosecution has not been fully discharged.

In the circumstances I find the accused not guilty as charged and I acquit him accordingly. He shall be set at liberty forthwith unless he is otherwise lawfully held.

Dated at Mombasa this 2nd day of September 1997

P. N. WAKI

JUDGE