



REPUBLIC OF KENYA

**IN THE COURT OF APPEAL OF KENYA
AT MOMBASA**

Criminal Appeal 372 of 2006

- 1. KATANA KARISA
- 2. KANG'OMBE KATANA
- 3. MWALIMU KATANA
- 4. KITSAO KATANA

5. MWATAWARI KATANA KARISA..... APPELLANTS

AND

REPUBLIC RESPONDENT

(Appeal from conviction and sentence of the High Court of Kenya Malindi (Ouko, J)

dated 12th May, 2006

in

H.C. Cr. Case No. 14 of 2005)

JUDGMENT OF THE COURT

The five appellants were convicted by the superior court upon trial with the aid of assessors for the offence of murder contrary to *section 203* as read with *section 204* of the Penal Code and each sentenced to death.

The 1st, 3rd, 4th and 5th appellants appeal to this Court against the conviction for the offence of murder and sentence of death intimating that the evidence disclosed the offence of manslaughter. The 2nd appellant appeals against the entire conviction and sentence.

The deceased, Charo Kadenge Chogo (Charo Kadenge) was a blind old man aged about 80 years. The 1st appellant, Katana Karisa, is a neighbour and cousin of the deceased. Their mothers are sisters. He has six wives and 29 children. The 2nd appellant is one of his wives and the 3rd, 4th and 5th appellants are his sons. The 1st appellant's young son had previously died and had been buried at the home of the 1st appellant. The following account of the

circumstances leading to the death of Charo Kadenge emerged from the evidence of Sumwa Wacharo Kadenge (PW 1) (Sumwa Wacharo), the deceased's wife.

On 4th April 2005 at about 8 p.m., the 3rd, 4th and 5th appellants went to the house of the deceased. The 3rd appellant told the deceased and his wife, Sumwa Wacharo, that the 1st appellant wanted to see them. The 4th and 5th appellants held the deceased by both legs and dragged him to their home. The 3rd appellant beat the deceased's wife and took her to their house. Upon arrival there, the 1st appellant directed the 3rd, 4th and 5th appellants to take the deceased to the grave of his son. Thereafter, the 1st appellant fetched a black goat which was slaughtered and cooked. The 1st appellant then tied the deceased on the legs and neck with a rope as the 2nd, 3rd, 4th and 5th appellants held him. Meanwhile, Ngowa Mwaringa (PW 2) (Ngowa) a neighbour of the deceased and the 1st appellant, went to the home of the 1st appellant. He pleaded with the appellants to forgive the deceased but they refused and threatened him that he would face the same fate as the deceased. PW 2 thereafter left. The appellants ate the meat after which they tortured the deceased by burning the deceased on the private parts, buttocks and chopping off his tongue. With the rope tied around the deceased's neck, he was dragged away by the 1st, 3rd, 4th and 5th appellants leaving the 2nd appellant guarding Sumwa Wacharo. The incident was reported to the chief, Benson Tsoka (PW 3) on the following morning who, with the assistance of the 1st appellant, Ngowa and Changawa Charo (PW 4), the deceased's son, recovered the dead body of the deceased about 1½kms from the home of the 1st appellant.

According to Dr. Mustafa Musaji (PW 5) who performed the post mortem examination, the deceased had multiple lacerations, deep cuts on the mouth and ear, burns on the penis and anus, and fracture of the backbone and skull.

The cause of death was cardio pulmonary arrest due to asphyxiation due to severe head injuries and fractured cervical spine due to assault. Each of the five appellants made unsworn statement at the trial denying involvement in the death of the deceased.

The trial Judge after evaluation of the evidence believed the evidence of Sumwa Wacharo and made a finding that she had recognised all the five appellants and that all the appellants took part in the torture and killing of the deceased. The trial Judge made a further finding that the evidence of Sumwa Wacharo as to the recognition of the 1st appellant was supported by the evidence of Ngowa. Indeed, Ngowa testified among other things, that the 1st appellant went to his home on the material night at 7.30 p.m. and asked him to accompany him to his home to listen to something he wanted to say. He described what he saw upon arrival at the home of the 1st appellant thus:

“At his home I got a shock of what I saw. PW1 was sitting down. Behind her was a grave. Behind the grave was the deceased lying parallel to the grave with a rope on the neck, naked. On the other side of the grave was a bench on which three people sat. I did not look closely at them. 1st accused told me to ask PW1 and deceased to disclose where their son called Kadenge was. I asked PW1 who told me that Kadenge had fled with his family and his whereabouts was unknown to her. I begged 1st accused to release the deceased and PW1. 1st accused told me that he would only release the two on availing their son, Kadenge. I begged him again and promised to involve the chief. Accused told me that they had been to the chief and they had received no help that is why they got hold of the 2. I asked him for the 3rd time to release the two. One of the persons from the bench told me to go away or face the same treatment”.

We will deal first with the 2nd appellant's appeal. She is challenging the conviction for the offence of murder on the ground that no evidence connected her with the charge at all.

According to the evidence of Sumwa Wacharo, the 2nd appellant did three overt acts. First, she held the head of the deceased and twisted it when deceased was being tied with ropes. Second, she brought the fire close to where she and deceased were. Third, after deceased was dragged away, the 2nd appellant was left with Sumwa Wacharo before she cheated the 2nd appellant and escaped. Sumwa Wacharo further testified that the deceased was killed at the grave and that he was already dead when he was dragged away. The trial Judge considered this evidence and said:

“The 2nd accused person brought the fire which was used to burn the deceased. She also held the deceased’s head”.

The finding that the 2nd appellant brought the fire which was used to burn the deceased is not, with respect, supported by evidence. The evidence of Sumwa Wacharo was that the 2nd appellant brought fire close to her and to the deceased. There was also the evidence of Ngowa who testified that he did not see the 2nd appellant at the scene. Furthermore the evidence of Ngowa contradicts the evidence of Sumwa Wacharo in other respects. According to Sumwa Wacharo, there was moonlight. This is contradicted by Ngowa who stated that it was dark. The evidence of Sumwa Wacharo shows that the 1st appellant was at home during the ordeal and that Ngowa went to the home of the 1st appellant on his own. However, according to Ngowa it is the 1st appellant who went to call him from his house. These contradictions and the surrounding circumstances cast doubt as to whether Sumwa Wacharo correctly observed the role that the 2nd appellant played at the graveside. The trial Judge did not consider the contradictory evidence.

It is apparent that the 2nd appellant did not personally strike, cut, torture or drag the deceased and that it is her husband (the 1st appellant) and her three sons (3rd, 4th and 5th appellants) who actively tortured and caused the death of the deceased.

On our own analysis of the evidence, we find that the prosecution did not prove beyond all reasonable doubt that the 2nd appellant had formed a common intention with her husband and sons to either kill the deceased or cause grievous harm to him. The 2nd appellant is entitled to the benefit of doubt.

As we have already stated above, the 1st, 3rd, 4th and 5th appellants’ appeals are against the conviction for murder instead of manslaughter and against the sentence of death. The first ground of appeal states:

“1. That the learned trial Judge erred in law and fact in passing the sentence when the appellants were not asked whether they had anything to say as to why sentence should not be passed against them according to law contrary to section 323 Criminal Procedure Code Cap 75 Laws of Kenya.”

Section 323 Criminal Procedure Code (CPC) relied on provides:

“PASSING SENTENCE

S. 323: If the judge convicts the accused person or

if the accused person pleads guilty the Registrar or other officer of the court shall ask him whether he has anything to say why sentence should not be passed upon him according to law but the omission so to ask him shall have no effect on the validity of the proceedings.”

In grounds 2(a) and 2(b) of appeal, the appellants set out the matters that they could have

brought to the court's attention had they been given an opportunity to mitigate, which matters include the fact that after a traditional oath, the Giriama elders found that the deceased had bewitched the deceased's 10 year old son; that the elders ordered the deceased to pay compensation for the death of the 1st appellant's son in conformity with Giriama Customary practices and that instead of settling the claim the deceased made further threats that he would wipe out the appellants' family.

The appellants proceed to state in ground 2(c) thus:

“THAT the appellant and his family namely appellants 3rd, 4th and 5th had great fear and apprehension and out of utter desperation and through grave provocation decided to do away with the deceased. This is in conformity with the Giriama customary practices. In the circumstances, the appellants should have been dealt with on a manslaughter charge and not a murder charge.”

The appellants ask this Court to set aside the conviction and sentence and direct that the 1st, 3rd, 4th and 5th appellants be heard in mitigation or, alternatively, treat the contents of ground 2(a), 2(b) and 2(c) of the memorandum of appeal as the appellants' mitigation and on that basis set aside the conviction for murder and substitute a conviction for manslaughter.

It is true that the superior court sentenced the appellants to death without giving them an opportunity to be heard in mitigation but as **section 323** CPC provides, such omission does not affect the validity of the proceedings.

As the grounds of appeal show, and as Mr. Gikandi, learned counsel for the appellants contended before us, it is apparent that Mr. Gikandi construes **section 323** CPC as permitting a trial court after conviction to alter the nature of the conviction upon considering mitigation from the convicted persons if the mitigating facts disclose the commission of a different offence.

In our view, that construction of **section 323** CPC is erroneous. The trial court after convicting an accused person for a specific offence becomes *functus officio* and the conviction so entered can only be altered by an appellate court. The mitigation envisaged by **section 323** CPC relate to the personal extenuating circumstances of the convicted person which may lead to a lenient sentence.

The appellants are in effect asking the court to receive and admit the “evidence” contained in the memorandum of appeal and use it to alter the nature of the conviction. Such “evidence” can only be correctly introduced in aid of the defence case if this Court were to order a re-trial.

However, the fact that the appellants did not raise the defence of provocation at the trial did not preclude the trial court from considering such alternative defence if it emerged from the evidence, for the prosecution had not only to dispose of the defence set up by the appellant herein that they did not kill the deceased but had also to prove that evidence adduced by the prosecution was only consistent with murder. In **R v Sharnpal Singh s/o Pritam Singh [1962] EA 13**, the Privy Council (in an appeal arising from the decision of the predecessor of this Court) said at page 15 paragraph H:

“It is now well established by a series of authorities, in which Mancini v D.P.P. [1942] AC 1, is the first and still the best known, that it is the duty of the Judge to deal with such alternatives if they emerge from the evidence as fit for consideration notwithstanding that they are not put forward by defence”

In that case, the appellant had merely denied the charge of murder of his wife but did not give evidence to show that his action amounted to manslaughter. The Privy Council nevertheless dismissed the appeal by the Crown against the reduction of the offence from murder to

manslaughter by the predecessor of this Court saying at page 17 paragraph 1 to page 18 paragraph A:

“How did he come to squeeze his wife’s throat?”

When the prisoner who is given the right to answer this question chooses not to do so, the court must not be deterred by the incompleteness of the tale from drawing the inferences that properly flow from the evidence it has got nor dissuaded from reaching a firm conclusion by speculation upon what the accused might have said if he had testified”.

It is true that in this case, the appellants did not in their respective defence claim that the deceased or his son Kadenge had caused the death of the 1st appellant’s son through witchcraft. It is also true as conceded by Mr. Gikandi that the issue of killing of the 1st appellant’s son by either the deceased or by Kadenge through witchcraft did not clearly emerge from the prosecution case. Nevertheless, the circumstances show that this was not a mere cold blooded murder of an old man. There was evidence that the 1st appellant’s son had died some time back. There was also evidence that the 1st appellant and the deceased are closely related. Moreover, the torture of the deceased and the bizarre ritual at the grave of the son of the 1st appellant was not secret as the 1st appellant called Ngowa to witness the ritual. In addition, the 1st appellant said in the presence of Ngowa that he was ready to forgive the deceased and his wife, if they availed their son Kadenge. The 1st appellant disclosed to Ngowa that he had reported to the chief but the chief had not resolved the problem. All these circumstances showed that the 1st appellant at least suspected that the deceased or his son Kadenge had caused the death of his son through witchcraft which should have put the trial Judge on inquiry necessitating full inquiry of the circumstances under which the deceased was killed. After full inquiry, the trial Judge should have summed up to the assessors appropriately. This is so because as the case of **Patrick Tuva Mwarengu v Republic, Mombasa Criminal Appeal No. 272 of 2006** (unreported) shows a threat to kill by witchcraft taken together with the existing circumstances of the death of the 1st appellant’s son could amount to legal provocation.

It is probable that the assessors could have found the appellant guilty of manslaughter instead of murder had the trial Judge fully inquired into circumstances surrounding the death of the deceased and directed the assessors properly.

We are satisfied that the trial Judge misdirected himself in failing to inquire into the full circumstances leading to the death of the 1st appellant’s son and the deceased causing death to the 1st appellant’s son by witchcraft and in failing to direct the assessors appropriately. We would, in the circumstances, give the benefit of doubt to the 1st, 3rd, 4th and 5th appellants.

In the result, we allow the appeal by the 2nd appellant, Kang’ombe Katana, in its entirety, quash the conviction and set aside the sentence of death. She will be released forthwith unless otherwise lawfully held.

And for reasons stated, we allow the appeal by 1st, 3rd, 4th and 5th appellants to the extent that we set aside the conviction for offence of murder and substitute a conviction for offence of manslaughter contrary to **section 202 (1)** as read with **section 205** of the Penal Code and sentence each of them to **20 years** imprisonment to run from the date of their conviction by the superior court i.e. **12.5.2006**. Those are the orders of the Court.

Dated and delivered at Mombasa this 25th day of January, 2008.

R. S. C. OMOLO

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JUDGE OF APPEAL

E. O. O'KUBASU

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR