



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

**Criminal Appeal 263 of 2006**

**MAKAU MDATA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**(Appeal from a conviction and sentence of the High Court of Kenya  
Malindi (Ouko, J) dated 30<sup>th</sup> May, 2005**

**In**

**H.C. Cr. Case No. 3 of 2001)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT:**

The appellant, Makau Mdata Mwanongo, together with one Karisa Kaingu Jafa alias Mukutulo were charged in the superior court with two counts each of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of each charge as appears in the information dated 13<sup>th</sup> October 2000 were as follows:

**“COUNT I**

1.Makau Mdata Mwanongo. 2. Karisa Kaingu Jafa alias Mukutulo: On the night of the 13<sup>th</sup> and 14<sup>th</sup> January 2000 at Dabaso area in Gede Location within Malindi District of the Coast Province, jointly with others not before court murdered Kahindi Karisa.

**COUNT II**

. Makau Mdata Mwanongo. 2. Karisa Kaingu Jafa alias Mukutulo: On the night of the 13<sup>th</sup> and 14<sup>th</sup> January 2000 at Dabaso areas in Gede Location within Malindi District of the Coast Province, jointly with others not before court murdered Jumwa Kahindi.”

They both pleaded not guilty to the charge and the hearing on that information started before Ouna J. on 12<sup>th</sup> March 2002. After three prosecution witnesses were heard, Karisa Kaingu Jafa alias Mukutulo died on 30<sup>th</sup> August 2002. Thereafter, Justice Ouna retired from the bench and on 1<sup>st</sup> December 2003, Justice Maraga, after hearing an application from the State Counsel, and with no objection from the defence

counsel, ordered the case to be heard afresh. The charges were read afresh to the appellant who pleaded not guilty to both charges. On 25<sup>th</sup> May 2004, the information was substituted and a fresh information introduced. That information dated 25<sup>th</sup> May 2004 carried only one count of murder contrary to **section 203** as read with **section 204** of the Penal Code. It was against the appellant only as the other accused person had passed on. The particulars of that count were the same as the particulars in the first count in the information dated 13<sup>th</sup> October 2000 except that the second accused was not named in the information of 25<sup>th</sup> May 2004. For clarity, the particulars of the charge preferred in the information dated 25<sup>th</sup> May 2004 were as follows:

**“Makau Mdata Mwanongo; On the night of the 13<sup>th</sup> and 14<sup>th</sup> January, 2000 at Dabaso area in Gede Location within Malindi District of the Coast Province, jointly with others not before court murdered Kahindi Karisa.”**

The appellant maintained his plea of not guilty to the charge. Assessors were selected afresh and the case came up for hearing before the superior court (Ouko J.) who after full hearing with the aid of the assessors found the appellant guilty, convicted him and sentenced him to death. All the assessors had returned a unanimous opinion of guilty against the appellant.

We have gone into the early history of the entire case because the learned Judge in the first part of his judgment seemed to have been under the impression that before him the appellant was charged jointly with another person who had passed away with one count of murder whereas the correct position is that before the other accused died, the two were charged with two counts. After the death of the other accused, the appellant faced only one count before the superior court (Ouko J.) and the information containing that one count was introduced long after the other person had died. Be that as it may, the appellant was not satisfied with the conviction and of course the sentence of death. He appealed to this Court citing four grounds of appeal. The grounds were argued together by Mr. Opolu, the learned counsel for the appellant. The main thrust of the appellant's case is that the appellant was convicted solely on circumstantial evidence, but whereas a conviction can proceed on circumstantial evidence, in this case, the evidence was not watertight to form a proper basis for a conviction. His submission was that the conviction was entered as a result of lack of proper analysis and evaluation by the learned Judge of the evidence that was tendered before the superior court.

Mr. Monda, the learned State Counsel, on the other hand argued that the conviction was sound, and though based on circumstantial evidence, the same evidence was watertight and pointed to none other than the appellant as the culprit. Thus, both the appellant's counsel and the State Counsel agreed that the conviction was solely based on circumstantial evidence. The principles to be applied by the court when dealing with a case based solely or partly on circumstantial evidence and the requirements that guide the court before entering a conviction in a case resting on circumstantial evidence are now well documented. In the well known case of **Rex vs. Kipkering arap Koske and another (1949) 16 EACA 135**, the predecessor to this Court stated:

**“As said in Wills on “Circumstantial Evidence” 6<sup>th</sup> edition p. 311, “in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt”. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused.”**

These were amplified by the decision of the same court in the case of **Simoni Musoke v. R (1958) EA 715** in which the court added a requirement that before drawing the inference of the accused guilt from such evidence, the court must ensure that there are no other co-existing circumstances which would weaken or destroy the inference.

First the facts.

The record shows that on the night of 13<sup>th</sup> and 14<sup>th</sup> January 2000 the deceased Kahindi Karisa, his wife Jumwa Kahindi (also deceased), and their two children Zawadi Kahindi Karisa (PW 1) (Zawadi) and Balozi Kahindi Karisa (PW 2) (Balozi) were asleep in the deceased's house. At about midnight, Zawadi said there was a knock on the door and people were shouting "ua Kabisa". The deceased (Kahindi) asked for a panga. He was given that panga by his wife. The deceased, armed with the panga, opened the door. Zawadi saw the deceased cut one person on the head and hand with the panga. As there was more confusion, Zawadi did not wait to see anything more. She ran out of the house towards her brother's house but on the way, she met a man who cut her twice on the hip but she continued to run. As she was running, her mother was following her whereas her brother was left in the house. She then ran towards the house of her step mother. She stayed there for sometime. When she went back to her father's house, she found that her father and her mother had died. The deceased's body had panga cuts all over. She said she saw the man who was cut by her father, but it would appear, she was not asked to identify that person. She however confirmed that there were many people outside her father's house. She was a minor at the time the incident took place. Balozi was also a minor but was an elder brother to Zawadi. He repeated what Zawadi saw that midnight. He saw his father cut somebody with a panga. At that stage he ran back into the house and hid under the bed. When things cooled down, he came out and saw his father lying down dead. He went to his step-mother's house where his sister Zawadi had run to. On hearing the noise from Hamisi who was their eldest brother, they came out and at that stage he saw the body of his mother also outside the house. She was also dead. He also saw Zawadi with cut wounds on the hips. This witness did not see the person who was cut.

Hamisi, the elder brother of both Balozi and Zawadi stated he was in his house near his father's house. About midnight, he heard his mother shouting for help and calling upon him to go and help them as they were being killed. He took a torch, opened his door and started running towards his parent's house. He switched on his torch and saw two people banging his parents' door. Suddenly, Hamisi was hit on the back and the torch fell down. He turned around and the second person among the two who were banging the door started chasing him while threatening that they were going to kill him. He ran to his uncle's house, called out his uncle but there was no response. The assailants were still chasing him. He tried to wake up other people but in vain. He then returned home after sometime and found both his parents dead. His mother had cut wounds but was lying outside the house while inside the house, his father was also dead with panga cut wounds all over the body. His father's body had a panga next to it. That panga belonged to his father, the deceased. Hamisi was injured on the hip. Hamisi together with others reported the incident to Watamu Police Station. Hamisi did not see the attackers and did not see even the person who hit him and those who chased him.

That same night, at 2.00 p.m. Ali Mdata Mwalungo (PW 4) (Ali) who lived at Mida – Malindi and who was the junior brother of the appellant and was staying with the appellant in their father's homestead, heard the appellant crying saying that he was dying. He approached the appellant and found him in pain. The appellant was bleeding. He had injuries on the head and finger. He took the appellant to Kilifi Hospital for treatment and then went to Watamu Police Station for a P3 form but he was arrested. Ali said the appellant had told him that he had been attacked by robbers. Ali was detained for four days at the police station and then released. Ali said when he saw the appellant, the appellant had nothing on him. Ali said further in cross-examination that the appellant told him that the appellant had been stopped by people who posed as buyers of fish but who turned round and attacked him. According to Ali, the appellant had no relation with the deceased's family.

Hamisi, Zawadi and Balozi reported the incident to Watamu Police Station. Cpl. Jared Ndege (PW 7 (Cpl. Jared) was on duty at the police station. He received the report. Zawadi had injuries on the hip which she claimed to have sustained during the incident. In company of the OCS Chief Inspector Kinuthia, Cpl. Mulegwa, Pc Mbale and Pc Kirika, Cpl. Jared went to the scene at Dabaso. At the scene they found the body of the mother of Zawadi and others lying outside the house while that of the father of Zawadi and others was inside the house. Both bodies were naked and had severe injuries all over. Next to the father's body there was a blood stained panga. The police officers escorted Zawadi to the hospital as the scene remained guarded. The police later returned to the scene and Cpl. Jared said they saw blood trails leading towards Mida area. They followed the trails. At some stage, the trails disappeared. Cpl. Jared collected some blood stained leaves and returned to the scene where they organized for the removal

of the bodies. They drew the sketch plan of the scene.

At 2.00 p.m. on the same day, the police received a report of assault from Ali who reported that the appellant was admitted at Kilifi Hospital after an attack by robbers. Cpl. Jared booked the report in the occurrence book (OB) and informed the OCS, Insp. Kinuthia. Ali led both Insp. Kinuthia and Cpl. Jared to the appellant's home at Mida, but the police found nothing in the appellant's house. On 16<sup>th</sup> January 2000, Cpl. Jared proceeded to Kilifi Hospital and found the appellant admitted at that hospital. He interrogated the appellant, guarded him at the hospital for a whole night till the following day when the appellant was transferred to Malindi District Hospital where he was hospitalized for four days. He was then discharged and was taken to Watamu Police Station under arrest. Cpl. Jared said that later the police took the appellant to a clinic, not named, where the appellant's blood sample was taken. Thereafter, blood sample of the deceased Kahindi Karisa was also taken. Cpl. Jared prepared exhibit memo form and forwarded the blood sample taken from the appellant, the blood sample from the deceased Kahindi Karisa, the blood stains collected from the leaves and that on the panga to the Government Chemist on 19<sup>th</sup> January 2000 for analysis. Meanwhile, on the same 19<sup>th</sup> January 2000, the deceased family approached Kaingu Shombo Mweni (PW 5) to provide transport to take the two bodies for post mortem. He did so and identified the bodies to Dr. Athirus Mwadema (PW 6) who on the same day, 19<sup>th</sup> January 2000, conducted post mortem examination on the two bodies. As to Kahindi Karisa, Dr. Mwadema formed the opinion that the cause of death was due to cardio pulmonary arrest due to the head injuries.

Ali Gakwali, (PW 8) was Senior Analyst with the Government Chemist in Mombasa. He received from Cpl. Jared blood sample of the deceased (Kahindi Karisa), blood sample from the accused, a khaki envelop with a panga and a small envelop with dry stained leaves. He analysed the samples and found that the deceased's blood was group **O**, whereas the appellant's blood was group **A**. Blood stains on the panga were of type **A** and dry leaves also had blood stains of type **A**. As a result of all the above, the appellant was charged with the offence as we have set out above.

Put to his defence, the appellant stated that he was a fisherman. On the day in question which he stated was 2<sup>nd</sup> January 2000, he returned home late from his fishing work. When he was returning home, he met three people who asked him where he was coming from and demanded money from him. When he told them he did not have money, they threatened him with dire consequences. He began to run and one of those people slashed him with a panga. He ran home and his brother took him to the hospital. The next day, police went and collected him. The police forced him to sign a certain statement. They refused to sign for him a P3 form. After he was beaten up by the police and after being forced to sign some document, he was taken to court.

The above is a brief summary of the entire evidence that was adduced in the superior court. None of the witnesses saw the appellant inflicting any injury on the deceased. None of the witnesses saw the appellant at the scene of the incident. It is not in dispute that Kahindi Karisa (the deceased) met his death at the hands of assailants who attacked him, his wife and his two children Zawadi and Balози as they were in their house about midnight. Hamisi, their adult son who was living in the same homestead but in his own house came to their help but before he could offer any help, he too was attacked on his way to the house of his father and he was also injured as he was running away for his dear life. They could not identify the attackers. Zawadi, a minor but who gave evidence on oath, testified that he saw his father cut one of the people who attacked them with a panga on the head and hand. She said she saw the person who was cut by her father but as we have stated, she was apparently not asked whether she could identify that person. It was at night and there is no evidence as to whether or not there was any light, and if so, the source of that light and its intensity. To cut the long story short, no attacker was identified that night. However, that was not all, Cpl. Jared, in his testimony narrated how police on returning to the scene after taking Zawadi to hospital at day break found a panga near the deceased (Kahindi Karisa). That panga had blood stains on it. They also observed trails of blood from the scene on the way to Mida where the appellant lived. They followed the trails of blood but the same trails disappeared at some stage. He did not state at what stage the trails disappeared i.e. after what distance from the scene of the incident. Unfortunately, the sketch plan also does not indicate how far the trails of blood went from the house of the deceased as there is no measurements indicating the distance on it. All in all, the only evidence that connected the appellant to the offence is that the appellant's blood group is **A** whereas the blood group of

the blood on the panga that Zawadi says was used for cutting one of the attackers by her deceased father is also **A**, and the blood stains on the leaves picked along the route covered by the blood trails was also of group **A**. The superior court was alive to that aspect of the case. It found that the person the deceased cut with the panga which belonged to the deceased and who was one of the attackers must have been the appellant. If that be so, the trial court argued, then that person was one of the assailants of the deceased, his wife and his children and that then must have been the appellant. The learned Judge, in considering the evidence addressed himself thus:

**“In the course of the attack one members (sic) of the gang was cut by the deceased. The blood trail was followed, a few hours after the attack, from the deceased’s home towards Mida direction. There could have only been four source (sic) of blood from the scene. Blood from the assailant who was cut by the deceased; blood from Zawadi who slashed (sic) on the hips; blood from the deceased, or blood from the deceased wife.”**

The learned Judge then proceeded to eliminate blood from the deceased and his wife as there was, in his view, evidence that the two died at the scene. He found further that Zawadi also did not leave the scene, stating that she only went to her step-mother’s house. He found that the person who had been cut by the deceased was not at the scene. The superior court considered whether it was by rare coincidence or by design that the appellant was also injured that same evening and was injured in the same way Zawadi had described. The thug cut by the deceased was cut on the head and hand, similar to the appellant’s injuries and on that account, the learned Judge concluded that it could not have been by coincidence. He proceeded thus:

**“A scientific analysis of the blood samples drawn from the deceased and the accused and those on the panga and the dry leaf established that the blood on the panga and those on the dry leaf matched the blood group of the accused. I am satisfied from the evidence of Zawadi and Balozi that they saw the deceased cut one of those who were banging on the door. Zawadi was even more specific. According to her the deceased cut the person on the head and hand. This evidence was corroborated by the evidence adduced by PW 4 – Ali Mdata Mwalungo and PW 7 Cpl. Jared Ndege which confirm that the accused had injuries to his hand and head. I am persuaded to find that these can only lead to one conclusion. That the accused jointly with others having common intention invaded the home of the deceased where the accused received injuries and in the process of executing their common intention the accused and others in his company inflicted fatal injuries on the deceased.”**

We have anxiously considered the evidence on record, which we have analysed above and the judgment part of which we have reproduced herein. We have certain difficulties with the analysis and conclusion of the superior court. The guiding principles in a case such as the one that was before the trial court and which is now before us on appeal are as set out in the case of **Rex vs. Kipkering Arap Koske & 2 others** (supra) as read together with that of **Simoni Musoke vs. R.** (supra). First is that the inference of guilt can only be justified if the inculpatory facts are incompatible with the innocence of the accused and, second, that the same inculpatory facts are incapable of explanation upon any other reasonable hypothesis than that of guilt and lastly that the court has to be sure that there are no other co-existing circumstances which would weaken or destroy the inference. The same case also establishes that the burden of proving those three requirements is upon the prosecution and never shifts to the accused at any time.

Applying the above principles, we find it difficult to conclude that the inculpatory facts in this case are incompatible with the appellant’s innocence and incapable of any other reasonable hypothesis.

First, the evidence of the two eye witnesses to the incident namely Zawadi and Balozi starts in respect of each with their waking up in response to a knock at the deceased’s door and ends with their witnessing the deceased cutting one of the attackers with a panga. Zawadi, a minor said:

**“At about midnight we heard a knock on the door and people shouting “ua Kabisa” (kill) – My father then opened the door. He was armed with panga. He cut the person who had been knocking on the head and hand. At this stage in the confusion I ran out of the house. On the way I met a**

**certain man who cut me but I continued to run.”**

She said that after she ran out she did not go back immediately but when they did, they found both their parents dead. Balozi stated:

**“My father took a panga. He cut with the panga somebody. At this stage I ran back and hid under the bed. When things calmed down I came out. I saw my father lying down dead.”**

He then left the house and went to his step-mother’s house where Zawadi had ran to. On hearing the noise from Hamisi is when he went back to the scene and saw that his mother was also dead. In effect, these two young children did not see their father and mother being killed. They did not see how many other people among the invaders were cut by their father if he cut others after the first attacker at all. They did not witness the main fight ending in their parents’ death. It is instructive that the panga which belonged to the deceased was found near him meaning that those who killed him and his wife may not have dislodged the panga from him. His having cut more of the assailants is a possibility that cannot be ruled out. Thus, it is not totally correct to conclude, as the learned Judge concluded, that:

**“There could have only been four sources of blood from the scene. Blood from the assailant who was cut by the deceased; blood from Zawadi who slashed the hips (sic); blood from the deceased; or blood from the deceased wife.”**

Whereas we agree that those were the four sources of blood the two witnesses and others testified about, it was clear that more blood letting could have taken place when they were away from the scene as they left the fight going on and indeed they did not even witness their parents being hacked to death. Other assailants could have been injured by the deceased and could have ran along the same path where blood trails were found.

Secondly, the blood that was of the group of the appellant’s blood was the blood stains on the panga and the blood stains on the leaf. We have stated that the panga could have been used in cutting more people than only the one person Zawadi and Balozi witnessed. The evidence of blood on the leaf is from Cpl. Jared. He said:

**“We followed the trails. The trails were on the left side of the road as we faced Mida. At some stage the trails disappeared. I was able to collect some blood stained leaves and returned to the scene.”**

That evidence does not state exactly where the blood stained leaves were collected from and how far was that place from the scene of the incident. It is of note that Jumwa Kahindi, the other deceased, was found dead outside the house where the body of Kahindi was. Zawadi said that as she ran out of the house, her mother was following her. Her mother did not go to the step-mother’s house. Where did she run up to before she was killed? It is not known. Indeed, the sketch plan produced in evidence shows dots starting from where Jumwa’s body was found. These are the dots leading from where her body was to a road or a path. One cannot in the circumstances rule out her having run to the road after she was cut or as she was being cut to save her life like her children Zawadi, Balozi and Hamisi also ran away from the fight. We have evidence that the attackers were chasing members of that family. Unfortunately, her blood sample was not taken and so the possibility that the blood stains on the leaf could have been hers was not eliminated. It is however clear from the evidence on record and particularly the sketch plan produced in evidence by Cpl. Jared that Kahindi Karisa and his wife did not die “at the scene” as the learned Judge stated. Kahindi died in the house while his wife Jumwa Kahindi died some distance outside the house.

Thirdly, it is not clear to us as to the circumstances under which the appellant’s blood was taken. The appellant had been admitted to Kilifi Hospital. Cpl. Jared saw him there on 16<sup>th</sup> January 2000 and the next day he removed him to Malindi District Hospital where he stayed for four days. His blood sample was however not taken at those two government hospitals. After his discharge, Cpl. Jared said in evidence that he took him to a clinic to have his blood taken. Cpl. Jared never told the court the name of that clinic and who took the blood sample from the appellant, but one wonders why no blood sample of

the appellant was taken at Malindi District Hospital and why the name of the clinic to which the appellant was later taken for blood sample was not disclosed. There is need for the chain of evidence to be established particularly as this was the only evidence that was relied on in such a serious charge. Further, Cpl. Jared did not state who took the blood sample from the deceased and when the same was taken. In our view, these were important aspects in the circumstances of this case which depended mainly on the circumstantial evidence based on blood tests. We note from the evidence of the doctor who performed the post mortem that the bodies reached the mortuary when they were seriously decomposed.

Fourthly, the report of Government Analyst stated that the accused was of blood group **A**, the panga had human blood stains of type **A**, and dry leaves had human blood stains of type **A**. We take judicial notice that the blood group **A**, like blood group **B**, is a general grouping. It is indeed on the main divided into group **A** positive and group **A** negative. The report which is like any other evidence, though expert evidence, needed to be specific. It should have stated in broad outline whether that blood group of the appellant was group **A** positive or negative and whether the stains on the leaves and on the panga were of the same group or different as to whether they were, or any of them was, of different group. We do feel that was necessary as those sharing the general group **A** are many and it would be dangerous to base a conviction on the mere fact that the blood sample of the appellant falls into that category.

Lastly, when Ali heard his brother (the appellant) crying and saying he was dying, he approached the appellant, who was in pain and had injuries. At that time, the appellant claimed he had been attacked by robbers. Ali reported that to the police at Watamu Police Station and requested for a P3 form. Cpl. Jared confirmed that he received the report and booked it in the OB. In his defence, the appellant reiterated that claim. There is no evidence to show that that claim was ever investigated. Mr. Opolu in his submission raised the issue that lack of investigation of the appellant's claim as an omission that made it impossible to ascertain whether indeed the appellant was also a victim of a robbery attack that fateful evening. In our mind, that omission cannot be wished away. There was enough evidence that robbers were in that area that night. Whether indeed the appellant was attacked in another robbery or not and at what place would have thrown light into whether his claim had any foundation or whether it provided co-existent circumstances, and if he was attacked, then the place where he was attacked and his movement that night would or would not have included the road or the way where there were blood trails. The prosecution, as is stated in the case of **Rex vs. Kipkering Arap Koske & 2 others** (supra), had the burden of proving all these and that burden could not shift to the appellant. That the appellant's consistent allegation that he was himself the victim of an attack by robbers that fateful night was not investigated and found to be false allegation leaves that possibility hanging on the entire case and the chain of the circumstances required to prove his guilt was, in our view, broken.

We think we have said enough to show that we entertain serious reasonable doubts in this case. We feel that had the learned Judge considered the aspects of this case we have mentioned in this judgment, he might have come to a different conclusion as a result of the doubts raised. In law, the appellant would be entitled to the benefits of such doubts as we feel it would be unsafe to uphold conviction in the face of the same doubts.

In the result, we allow the appeal, quash the conviction and set aside the sentence. We order that the appellant be released forthwith unless otherwise lawfully held.

**Dated and delivered at Mombasa this 20<sup>h</sup> day of July, 2007.**

**S.E.O BOSIRE**

.....

**JUDGE OF APPEAL**

**J.W. ONYANGO OTIENO**

.....

**JUDGE OF APPEAL**

**W.S. DEVERELL**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**