



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**HIGH COURT CRIMINAL APPEAL NO 16 OF 2017**

**CHARO KAZUNGU CHENGO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**Coram: Hon. Justice R. Nyakundi**

**Mr Alenga for the state**

**Ms Mwanja for the accused**

**JUDGMENT**

The accused was charged with the offense of murder as read section 204 of Penal Code CAP 63 of the laws of Kenya. It was alleged that on the **6<sup>th</sup> Of Sep 2017** at Gede village Bamba within Ganze the accused jointly with others not before court murdered **Chief Chengo Kitoo**. Accused pleaded not guilty to the charge. He was represented at the trial by **Mrs Mwanja** whereas the prosecution was led by **Mr Alenga** the senior prosecution counsel.

The evidence in summary involved the testimony of **Chengo Juma** whose testimony was to the effect that the accused is his own brother and the deceased his uncle. According to his evidence on 5<sup>th</sup> Sep 2017 he spent considerable time with one **Daniel Hamisi** and also the accused person. The craniology of events as recollected by the witness involved having alcoholic drinks at a club and some other time he was at construction site where he works. In the night of 5<sup>th</sup> September 2017 he testified that he heard screams from the homestead of the deceased and on proceeding to the scene he saw the body of the deceased with multiple injuries with no information on the attackers.

The next witness is **Pw2 Mwalimu Chifu** who gave evidence that on the night of the **5<sup>th</sup> September 2017** he was asleep at his house when he was woken up by **PW4 Kadzo Kazungu** who reported to him there had been attacked at their home thereby sustaining injuries together with the deceased. As a consequence of the report pw4 accompanied to Samburu Hospital to seek medical treatment and thereafter report the matter to the police. Following the incident it was his evidence that the body of the deceased had to be collected from the scene to the mortuary for purposes of postmortem examination. He was later to be summoned by the police to record a statement and the death of the deceased.

Next was **pw3 Daniel Hamisi** who told the court that in the night of **5<sup>th</sup> September 2017** he spent part of the day in the company of Pw1 looking for a broker to purchase their charcoal. That in the course of the day he also visited a nearby club to take some alcoholic drinks on and off. Further it was pw3 evidence on or about 3 am they had some screams from the direction of the deceased's home which forced them to rush to the scene. It was at that scene they saw the deceased with multiple stab wounds apparently inflicted by a panga.

Next was **Pw4 Kadzo Kazungu** the wife to the deceased and who happened to be at home when the assailants made entry and violently attacked each one of them separately inflicting physical harm. She gave a description that the assailants started to attack the deceased and thereafter turned against her as well. It emerged from her testimony that in first instance she had difficulty of identifying the assailants but in the turn of events she told the court to have identified the accused by use of a mobile phone torch. On cross examination she told the court that incident happened inside the house in the presence of **Mwalimu Chifu**.

The prosecution also called **pw5 one Charo Mwalimu** a minor who gave unsworn statement to the effect that the attack against the deceased happened in the night of **6<sup>th</sup> Sep 2017**. On the material day he alluded to the fact that he saw the accused person limping while walking away from the scene of the incident. He also told the court that attackers were armed with a panga which they used to assault the deceased.

**Pw6 Irene Mwangi** an analyst with the government chemist testified in regard to some exhibits forwarded to our office by Pw8 Corporal

Kimani for purposes of conducting a DNA test in respect of the fingernails, human hair, and a panga to establish a DNA match. According to pw6 the analysis on the fingernails and human hair failed to generate any DNA profile except with the Panga. Which generated a male DNA profile. The analyst report was admitted in evidence as exhibit 3.

**Pw7 Kihisa Kisau** gave evidence that between the **5<sup>th</sup> and 6<sup>th</sup> Sep 2017** he remembered to have served alcoholic drinks to the accused, **pw1 Chengo Juma** and **Daniel Hamisi pw3**. It was at that particular night he was to learn the death of the deceased but he had no clue of the perpetrators.

Finally, the prosecution called corporal Kimani who testified to have received a report about the murder and on instruction from the DCIO he proceeded to investigate the crime which included visiting the scene. It is at that scene that the body of the deceased was collected and taken to the mortuary for postmortem examination. In the course of the investigation, he recovered the panga, extracted fingernails and humanly hair which he forwarded to the government analyst for a DNA profile. with that evidence he recommended the accused person be charged with the offense of murder.

Having considered the evidence on record and each of the prosecution witnesses together with the repartal by defense it is now my task to determine whether the prosecution has discharged the burden of proof beyond reasonable doubt.

### **Analysis and Determination**

There are two issues for determination in this trial

**a) Whether the evidence by the state has proved beyond reasonable doubt that it was the accused who killed the deceased in circumstances amounting to murder.**

**b) Whether the accused person was positively identified and placed at the scene of the crime.**

**Its trite that the standard of proof demanded of the state is that of beyond reasonable doubt. In the case of *Woolmington Vs DPP 1935 AC 462* the court held "throughout the web of English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject....to the defense of insanity and subject to any statutory exception. If, at the end of and on the whole of the case, there is reasonable doubt, by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or what the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained". Further in the case of *Miller V Ministry of Pensions* "that degree is well settled. It need not reach certainly, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond a shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favor which can be dismissed with the sentence 'of course it is possible but not in the least probable, 'then the case is proved beyond reasonable doubt, but nothing short of that will suffice."**

**It was emphasized in *Mbugua Kariuki V The Republic (1976-80) 1 KLR 1085 (Law Wambuzi and Potter JJA)* That the burden of proof remains on the state throughout, to establish the case against the case against the accused beyond reasonable doubt. Where the defense raises an issue such as provocation, alibi, self-defense, the burden of proof does not shift to the accused, instead the prosecution must negate that defense beyond reasonable doubt and the accused assumes no onus in respect of any such defense.**

The offense of murder is provided for under section 203 of the penal code to the effect that any person who of malice-aforethought causes the death of another by unlawful act or mission shall be guilty of murder. According to the elements of this offense the state must prove

**a) The death of a person**

**b) That the death was caused by unlawful act or omission and that such death was caused with malice-aforethought**

At the conclusion of the prosecution case in which eight witnesses were called the accused was found with a case to answer. The accused denied the offense and raised an alibi defense. Based on the prosecution witnesses it is not disputed that the deceased chief **Chengo Kitoo** is dead.

The third and fourth prosecution witnesses were within the vicinity where the deceased was violently assaulted and in the process succumbed to death. The evidence of pw3 and pw4 provides a basis for the theory as to what actually happened on the material day. This narrative largely contends that the accused person stabbed the deceased with a panga. Taken against the background of pw3 and pw4 evidence there's credibility that their testimony taken together that the deceased's death was unlawful. Some of the circumstances provided in law where death may be excusable as expressly stated under section 17 of the Penal Code as read in conjunction with section 207 and 208 of the Penal Code were missing to make the death of the deceased excusable or justified. (**See the principles in *Guzambizi Wezonga V R [1948] 15 EACA 65***). It is therefore established as a fact that considering the injuries suffered by the deceased on 6<sup>th</sup> Sep 2017 clearly captured in the postmortem report there's no doubt that the prosecution proved this element of the death being unlawful beyond reasonable doubt.

As reiterated earlier in the offense of murder malice-aforethought, is critical. Section 206 of the Penal Code defines the concept as follows;

**a) An intension 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 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 is caused or not, or by a wish that may it not be caused;**

**c) An intent to commit a felony;**

**d) An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.**

As held in the decision in the superior court malice-aforethought manifests itself when the prosecution leads evidence to prove the manner of the killing, the nature of the weapon used, part of the body targeted and the gravity of injuries suffered by the victim, the conduct of the accused before, during and immediately after infliction of the grievous harm (see **Tubere V R [1945] 12 EACA 63, Ernest Asami Abenga alias Onyango V R CACRA No 32 of 1990, Karani & three others V R[1991]KLR 622, Peter Okoth V R [1964]EA 103**)

In the instant case evidence of pw1, pw2, pw3, pw4 and the pathologist's postmortem examination indicates beyond peradventure that the deceased suffered serious injuries at the upper limb which was severed by a sharp object. This devastating brutal killing occasioned massive hemorrhage on the affected areas and within no time the deceased succumbed to death. Secondly the injuries so inflicted were by use of a panga duly recovered at the scene by the investigating officer. It is clear from pw3 and 4 evidence the assailant had premeditated to execute the murder in the wee hours on the **6<sup>th</sup> of Sep 2017**. I am of the considered view that the killing of the deceased was not only unlawful but was accompanied with malice-aforethought as defined under section 206 (a) and (b) of the Penal Code.

Finally, the instant case raises the element of identification as a subject for consideration. In numerous occasions the identification of an accused person in any crime scene is a key imperative issue which must be proved beyond reasonable doubt. This is more or so where the offense committed occurred on the night when the surrounding circumstances pose a challenge to the victims to positively recognize or identify the attackers. The evidence on identification must be inquired into with the greatest care to ensure the prevailing conditions were favorable for the accused to be identified by the witnesses. The enquiry to be carried out is as stated in the case of **R-vs- Turnbull and others, (1976)3 All ER 549**, **"First wherever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defense alleges to be mistaken, the Judge should warn the jury of the special need for caution before convicting the accused in reliance correctness of the identification or identifications. In addition, he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Secondly, the Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and the actual appearance?"**.... **"It is also stated in Wanjohi & Others V Republic (1989) KLR 415 the strange fact is that many witnesses do not properly identify another person even in daylight...it is at least essential to ascertain the nature of light available. What sort of light, its size and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care? It is not a careful test if none of these matters are unknown because they were not inquired into"**

In the present case it is not disputed the crime of murder was committed in the night of 6<sup>th</sup> Sep 2017 or on about 2:00am. The evidence on identification came from the testimony of pw3 and pw4 alleged stated to be at the scene of the killing. There's no dispute there's was no proper source of light to illuminate between the witnesses and the deceased. It was in pw4 recollection in that particular house the only source of light she mentioned to have assisted her was that of a mobile torch. That evidence unfortunately was never placed before this court for scrutiny and evaluation. Besides that, there was no description given by pw3 and pw4 as what special features were in existence to make them positively identify the accused in those very difficult circumstances. From the record in a moment pw4 was categorical that it was not possible to identify any of the assailant at their home but in the same vein she introduces some shred of evidence which apparently points to the accused person.

The main issue to consider is whether what were the change of circumstances on the surrounding area which could have made her positively identify the accused. So that if I were to reconstruct the sequence of events the picture one gets is that pw3 and pw4 were victims of this heinous crime. What opportunity did they have to identify the accused person? I have anxiously considered this issue of identification particularly on the reliability and credibility of the two star witnesses but nevertheless I have come to the conclusion that there was an error to fault the evidence on this issue. The discrepancies and contradiction formed in the evidence of the two witnesses impeaches the truthfulness, velacity and cogency of the evidence on identification.

The result I find the offense of murder under section 203 as read with section 204 not proved on the key element of identification to place the accused squarely at the scene to warrant this court to find him guilty to subsequently convict him as such. For all those reasons given I disagree with the prosecution that the charge was proved beyond reasonable doubt. It follows that the accused is at liberty unless otherwise lawfully held.

**DATED, SIGNED AND DELIVERED AT GARSEN THIS 29<sup>TH</sup> DAY OF APRIL, 2021**

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**R. NYAKUNDI**

**JUDGE**

*In the presence of:*

1. Ms Agatha for the state
2. Accused person

**NB:**

In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 by Her Ladyship, The Acting Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules. ([toniamwania@gmail.com](mailto:toniamwania@gmail.com) and [dpp@odpp.go.ke](mailto:dpp@odpp.go.ke))