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**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**Criminal Case 5 of 2008**

**FUJO NGUA MUPE .....1<sup>ST</sup> ACCUSED**

**KATANA KAHINDI KAREMA .....2<sup>ND</sup> ACCUSED**

**=VERSUS=**

**REPUBLIC.....DEFENDANT**

**JUDGEMENT**

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Fujo Ngua Mupe (1<sup>st</sup> accused) and Katana Karema (2<sup>nd</sup> accused) are jointly charged with murder contrary to section 203 of the Penal Code as read with section 204 of the same Act. The particulars of the offence are that on the 7<sup>th</sup> day of January 2008 at M village in Malindi District of the Coast Province, jointly with others not before court, murdered Kanze Fondo. Both denied the charge and were represented by Mr. Gekanana.

PW1 K.C.C is a minor whose age could not be established but he informed the court that he was a student at T Primary School in standard KG3 (meaning Kindergarten level 3). He testified that K.F was his grandmother and he was with her in the house – he was sleeping when some people came at night saying they wanted tobacco. He stated that the people were Tufuni (whom he identified as the 2<sup>nd</sup> accused, and also named him as Katana Kahindi), and the other was Franco, whom he identified as the 1<sup>st</sup> accused. The two removed his grandmother from the house and went away with her. It was dark, but he saw hem because there was a tin lamp burning.

The first person he saw was Fikiri, but he ran away and is not in court. He was followed by Franco whom he says is not present in court and that the person he saw on that night was the 2<sup>nd</sup> accused and 1<sup>st</sup> accused was the last one to enter.

He told this court that his grandmother did not give the people the tobacco and they dragged her outside. He slept and when he went to check on her, he found that she was dead.

R.K.K (PW2) a daughter to the deceased and mother of PW1 confirmed that her children were living with her mother and in the morning when she went to see the children she asked them:-

*“where is your grandmother and they told her that some men had come to the house, demanding money from her and when she said she had none, they took her out and killed her”*

Her child K.C (PW1) said the killers were Fikiri, Katana, Franco and Modi. She went where her mother lay dead and then rang police. On cross-examination it turns out she only mentioned the name Fikiri to police.

Joshua Katana Mbogo (PW2) a member of the Community Policing group in M told this court that on 7<sup>th</sup> January 2008 at 8.00am, he was in the village elder’s office when he got information that a woman had been killed. He proceeded to the scene, saw the body, then made a report at the police station.

The next day, he tried to establish who had killed her – he carried out investigations and at a mnazi club, he heard the two accuseds (who were known to him as neighbours in M village) discussing as follows;

*“since mama has refused to give money, it is better that we finish her”*

They never mentioned any name, but PW1 and his fellow elder relayed this information to police and the accuseds were arrested. It was his evidence that he had known the accuseds for one year.

On cross-examination PW2 stated that when receiving the report about the killing, he was in the company of Martin Safari and James Iha. Although he went to the scene, he did not observe the body because he has a phobia for dead bodies.

When he overheard the discussion at the palm wine den, he says he saw two people in discussion – being the two accuseds. It was at about 7.00pm and darkness had fallen – he knew the discussants were the two accuseds because he knew their voices very well then he says:-

*“I did not see them, but I heard their voices...”*

According to him, there were only two people

PW3 Martin Safari who is also involved in community policing within M village testified. He knows accused 1 as a neighbour

going by the name Franco – they have been neighbours for seven (7) years.

He also knows accused 2 by the nickname Tofali but his real name is Katana Kahindi. He has known him for 5 years. He accompanied PW2 to the scene where K.F lay dead – he had known her for two years as she lived in the same neighbourhood.

He was in the company of PW2 when they passed by the mnazi club/bar and saw two people discussing about mama Kanze saying

*“we had to kill her because she reused to give us money”*

PW3 knew they were referring to the deceased, because she was the only one who had been killed. It was his evidence that there were six people inside the club i.e Katana Kahindi, Franco Fujo, Balozi, Kayondi alias Fikiri Kahindi and Modi Mwahinga.

On cross-examination PW3 stated:

*“I got closer to the body, it had injuries, the neck was broken and she had soiled herself with faeces and a stick had been shoved up her anus.”*

He was also certain that Franco i.e accused 1 was the one who said:

*“mama, mama hakupeana pesa ndiyo maana tumemufanyizia”*

Further that they mentioned her name saying:-

*“we have killed Kanze Fondo”*

And that it is accused 1 who mentioned her name.

He denied seeing one Rama at the scene and clarified that “Franco is not Rama, nor is accused 2 known as Rama” – upon being shown his statement where he recorded that

*“one by name Rama was saying he did not have time to rape the deceased before she died” –*

PW3 disowned that statement saying he never said such a thing to the police. His evidence is that when he saw the people at the palm wine club having discussions it was at about 11.00am on 7-1-08 and the sun was shining.

Pc Phillip Nyakako (PW5) who visited the scene testified that he found the deceased dead outside her house.

A child K.C, narrated to him how one Fikiri entered the house and removed the deceased out of the house PW5 collected the body and took it to the mortuary – when he arrived, he found the body naked, but local women covered it with lessos, so he never got to observe the injuries. His observation was that the scene suggested that there was a struggle. On 13<sup>th</sup> January 2008, he and other police officers carried out a raid in M village and arrested number of suspects, among them being Fujo Ngua Mupe (accused1) who was identified as being among those suspected to have killed the woman.

He also received information regarding accused 2, from a vigilante group. His investigations revealed that the two accuseds were connected with the death and so they were charged.

On cross-examination he said he received a call about the incident from the area chief and not from PW4, Joshua Katana Mbogo or Martin Safari nor did he ever see the latter two at the police station. He confirms finding Mbogo (PW2) and Safari (PW3) at the scene where there were many people but PW2 and PW3 stood out because they were members of a vigilante group. He stated that it would be difficult for him to know whether accused 1 and accused 2 were at the scene that morning as he had not known them before. He reiterated that K.C and R told him at the scene, that Fikiri was the one who dragged the deceased out of the house and no other names were mentioned by Joshua Katana Mbogo (PW2) and Martin Safari (PW3) and that if it was not for the information given by these two, he would not have arrested accused 1. He says an identification parade was carried out in respect of the accuseds but they were never identified. He drew a sketch of the scene and the body, he produced the sketch as exhibit 1. On further cross-examination PW5 stated that PW4 told him the accuseds were heard while hiding somewhere, talking about the deceased and the deceased had sold her “kokoto” and the suspects knew she had money.

A postmortem was carried out by Dr. Taha Sheberrali (PW6) at Malindi District Hospital on 11<sup>th</sup> January 2008. His observations were that on external appearance, the tongue was protruding from the mouth, clenched between the upper and lower jaw, and strangulation collar was visible artery around the neck. There was also evidence of cervical vertebrae strangulation. However there were no features of trauma or injury on the limbs or private parts. Internally there were no injuries to the lungs and heart, and all the major vessels were intact. The digestive systems and pancreas were normal nor was there any injury to the genital-urinary system or the kidneys. He found that cause of death was cervical spine dislocation and asphyxia – the postmortem report was produced as exh.2.

In his sworn defence the first accused confirmed that he lives in M with his parents and siblings and that he knew the deceased

Kanze Fondo as she lived about 300 metres away from his home.

His testimony is that on 6-1-08, in the evening, he got home at about 8.00pm and found his parents and siblings there. He did not leave home the whole night having slept in his own room alone.

He denies drinking palm wine nor being in a palm wine den/club with Katana, Fikiri or Rama.

On 7-1-08, at 7.30am he went to the scene where he found a large crowd staring at a dead body. He saw PW2 and PW3 at the scene. On 15-1-08 while at Soweto Bar, he was arrested by members of a vigilante group and police officers and he only got to learn about the reason for his arrest, at the police station. He pointed out that an identification parade was conducted but no one picked – saying that PW1 participated in the identification process and that he knew PW1 very well. On cross-examination accused 1 said he does not drink and explained that his presence at Soweto Bar was simply to watch a musician perform there. He only learnt about the deceased's death in the morning.

The 2<sup>nd</sup> accused also gave sworn testimony saying that before his arrest, he lived in M and was a fisherman. He knows the first accused whose home is about one kilometre (1km) away from his residence. The deceased's home is about 700metres from his although he had never been to her home. He told this court that on 6-1-08, in the evening, he was within M, in the company of a friend known as Kazungu Charo. When darkness fell, he went to his home where he lived with his parents and siblings and whom he found present. He then went to his room and slept. He learnt about Kanze's death on 17-1-08 at 11.00am because he had left home at 6.00am to go to the sea to fish, so its only when he returned from the sea that he got the news. He went to the scene, but the body had already been removed. Later he was arrested and an identification parade was conducted but PW1 failed to identify anyone.

On cross-examination he denies the suggestion by the State Counsel Mr. Naulikha (who held brief for Mr. Ogoti) that he had gone to sea to cover up his tracks, saying the sea has no set time and just depends on the tide, which deermiens when he can go fishing.

The first accused called his brother Mariko Ngua as his defence witness. Mariko's testimony is that on the night of 6<sup>th</sup>/7<sup>th</sup> January 2008, he was at home with the other family members including the 1<sup>st</sup> accused. Each one of them went to sleep in his own room but he explains that they have a communal door and that 1<sup>st</sup> accused never left home until 7.00am the next day.

On cross-examination DW3 he states that whenever someone moves out through the door he will know because he will hear and in any case, they always let each other know when one is leaving.

At the close of the case, Mr. Gekanana who appeared for the accuseds, submitted that the State had not met the legal requirements for proving the case beyond reasonable doubt to warrant accused's being convicted on charge of murder. It was his contention that the evidence of prosecution is riddled with contradictions which is prejudicial to the prosecution case. He poked holes at the testimony of Pw1, pointing out that initially his position was that the only person he saw was Fikiri (who is not in this court). Further, that it was difficult for PW1 to identify the 1<sup>st</sup> accused, whom he had initially said he knew yet he could not identify him. Also that accused 2 was identified by PW1, only as Tofali only for PW1 to later state in his evidence that he had forgotten the people who took his grandmother outside and on cross-examination he said he had forgotten the names of the assailants.

Mr. Gekanana invited this court to consider PW1's statement to the police where he stated that it was Fikiri who asked for money from the deceased and tore the deceased's clothes and he saw Fikiri murder his grandmother.

He also points to the contradictions in the evidence of PW2 and PW3 – whereas PW2 says the people he heard discussing about the killing never mentioned any name, PW3 was insistent that the name Kanze was mentioned. Also that PW2 stated there were only two people at the palm wine den whereas PW3 says they were six. Even the times referred to are different, PW2 says it was at 7.00pm whilst PW3 says it was at 11.00am.

He wonders why the palm wine seller was not called to come and clarify whether the two accuseds were really in the said place whose name and location remain undisclosed.

As for the investigating officer, (PW5) Mr. Gekanana submits that he simply relied on what the vigilante group told him and was unaware as to why the accuseds were arrested. He also tears down the sketch plan by PW5, saying it is just a drawing with no evidential value. He urged the court to acquit the accuseds saying their evidence remained unshaken even on cross-examination and that their defences were cogent and believable.

Mr. Ogoti did not wish to make any submission on behalf of the State.

What emerges from the evidence presented to his court is that some men went into the house where the deceased and her grandchild K.C (PW1) were it was at night, it seems that K had already slept. It is not clear whether he was fast asleep or was just lying in bed. It is also not clear whether he was suddenly woken up by the intrusion – however the men asked for tobacco, demanded for money, then dragged the deceased Kanze outside. Thereafter she was killed, not too far from her house. Does the evidence prove that the two accuseds were the assailants" The eye witness is a minor who did not know his age, but he certainly appeared less than ten years of age. He stated that there was a tin lamp burning but did not describe position of lamp in relation to the accused persons. Initially in his evidence in chief, he stated that it was the two accuseds who came into the house and took his grandmother

away. Later, still in his evidence in chief he said

*“the first person I saw is Fikiri but he ran way and is not here...”*

*I have forgotten the one who dragged grandma outside”*

This is given a further twist by the witness on cross-examination when he says:

*“Fikiri is the one who entered into the house accompanied by two others but I have forgotten the names of those two others and they are not present in court.”*

He was even encouraged to look around the court to be sure whether the people he saw that night were present in court and he said:-

*“I have looked round, I do not see them here. In total I saw four people. That night I saw 1<sup>st</sup> accused at M at the shops. I also saw accused 2 inside our house AFTER my grandmother had been killed.*

*...Franco and Fikiri took grandma out of the house. Fikiri had a pang in his hands...”*

The odd thing is that when events were still fresh in his mind, PW1 only mentioned Fikiri to PW4 and to the police officer PW5 – infact his statement to police as read out in court also only mentioned Fikiri, which then begs the question - is the witness being honest, is he mixed up, or has he decided that since the two accused had been arrested then they had to be the culprits"

He was unable to identify anyone an identification parade conducted.

This shifting and reshifting of positions in the evidence of PW1 is certainly prejudicial to prosecution case, which places it on very shaky grounds.

Then of course there are the contradictions regarding evidence of PW2 and PW3 – from the words purportedly heard, the number of people seen in the palmwine club and the time – and the contradictions are so glaring that there is no way of reconciling them in favour of the prosecution. In fact their evidence digs a major loophole in the prosecution case and makes me wonder whether there even existed a palmwine club as purported. There were no investigations done in this case, PW5 (the investigating officer) simply visited the scene, made a drawing which had no legend, or measurements, took the body to the mortuary, got wind from the vigilante group that accuseds were the culprits and decided to charge them. The next thing PW5 knew was that an identification parade had been unsuccessfully conducted – he took very feeble steps in this matter.



The accuseds have explained their movements which in the face of the contradictory prosecution case remains unshaken.

The result is that prosecution has failed to prove its case beyond reasonable doubt and the accused are acquitted under section 215 Criminal Procedure Code.

Delivered and dated this 17<sup>th</sup> day of December 2009 a Malindi.

**H. A. OMONDI**

**JUDGE**



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