



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
CRIMINAL CASE NO. 26 OF 2014

REPUBLIC

VERSUS

ALI SALIM ALIAS BAHATI TARU 1ST ACCUSED
HUSSEIN SAID ALIAS SNAKE BOY 2ND ACCUSED
SALIM ALI ALIAS CHAPATI BOY 3RD ACCUSED
FRANCIS CHARO BAYA 4TH ACCUSED
SHEE MOHAMMED ALIAS KUHE 5TH ACCUSED

JUDGEMENT

The accused persons are charged with offence of murder contrary to section 203 as read with section 204 of the Penal Code, Cap 63 Laws of Kenya. The particulars of the offence are that the five accused on the 27th November 2014, at Ganda Village in Malindi Sub-County within Kilifi County murdered Kahindi Charo Katana alias Kadindo.

The prosecution called nine witnesses. PW1 CHARO KATANA is the father of the deceased. On 27th November 2014 he was at Malindi town carrying out his duties when he got information that bajaj operators had gone to collect his son. He was informed that his son was going to be burnt. He decided to go home but on his way got information that his son's body had been taken to Malindi hospital mortuary. He went to the mortuary and saw the body had injuries on the head and had burns. PW2 KADZO KAINGU is the wife of the deceased. On 27th November 2014 at about 11.00 am a big crowd of boda boda operators went to their home and asked for the deceased. They alledged that the deceased had stolen a motor bike. They took away her husband and went with him on a motor bike. She followed them while walking but while on the way she got information from one Esha that her husband had already been killed. She went to the mortuary and saw the body of her husband. She was able to identify one person by the name Benge who is not one of the accused.

PW3 EUNICE KATANA is an aunt to the deceased. On the 27th November, 2014 she was at Ganda when she was called on phone and informed that the deceased was being taken to Fundi Hamisi area by Bajaj operators. She decided to go there and on the way she met the bajaj operators. She followed them up to the home of Francis, the 4th accused. She knew the 4th accused. Francis claimed that the deceased

had stolen his motor cycle but the deceased denied and told him that he does not even know how to ride a motor cycle. The 4th accused started beating the deceased with a stick and others started throwing stones at the deceased until he died. She was able to identify Bahati Tari, Diblo, Mushe and Salim alias Chapati. They are boda operators who used sticks and stones to hit at the deceased. The deceased fell down and after he died they buried his body. She fell and lost consciousness. She knew the accused very well.

PW4 CHARO KATANA KAINGU was at Mere area doing his business on the 27th November 2014. He got a call from Changawa Charo that bajaj operators were going to Goshi area for the deceased alledging that he stole a bajaj. He then got information that the bajaj operators were heading to Fundi Hamisi area at the 4th accused's home. He went there and found that the deceased was made to sit on the ground. The 4th accused asked the deceased about the stolen bajaj but the deceased told him that he was not aware. Francis started beating the deceased and other people followed. He saw Bahati Taru, 1st accused, Salim, Kuhe, Hussein Said alias Snake boy attacking the deceased. The 1st accused had a stick from a quaver tree. They also had stones. There were members of public who did not participate in the killing. He even told the 1st accused to leave the deceased alone but he was adamant. The 1st accused went to him held him by the T-shirt and it got torn. He tried to assist the deceased but couldn't. It was the 4th accused who informed the crowd that it was the deceased who had robbed him of his motor bike.

PW5 DR. ABDULAZIZ DHULQARNANIN is a medical officer who was based at the Malindi Sub-County hospital. He produced a postmortem report prepared by his colleague Dr. Salmin Omar on 29th November 2014. The body had multiple injuries on the forehead consisting of four cuts. There were also superficial burns. The cause of death was severe head injury.

CHANGAWA CHARO CHANZERE was PW6. He comes from Ganga area. On 27th November, 2014, a Thursday, at about 11.00 am, he was at Ganga shopping centre. He saw many motor bikes heading towards Goshi area. He heard them shouting "dindo" "dindo". He was informed by one of them that they were going for dindo who had stolen a motor bike. After about 10 minutes he heard that the deceased was being taken on a motor bike to Fundi Hamisi area. Fund Hamisi area is about 2 ½ km from Ganda. He went there and saw a big crowd. The deceased had an injury on the head and was bleeding. He stood at a distance. The deceased went and stood near him and held on a tree. He then went and sat near coconut tree. The 1st accused went and hit the deceased on the head and the deceased fell down. He knew the 1st accused before. He did not know the names of the other accused who were just moving around. The deceased walked upto near a mango tree and the 1st accused went and hit him. Bottles of petrol were thrown on the deceased. PW5 decided to leave. He is also a boda rider. According to him he saw the 1st accused beating the deceased three times with a stick.

PW7 OMAR HASSAN MAZOA is the Ganda Assistant Chief. On the material day at about 11.00 am he saw many boda riders at a big tree where they normally gather. On enquiry he was informed that they were waiting for the area MP. He went to his house about 20 metres away and decided to call one of them as he was suspicious. The operator by the name Saidi informed him that they were going to collect dindo who had stolen a motor bike. PW7 called the area chief and the Malindi OCS. He kept on communicating with one Kaingu who was following the movement of the bajaj operators so that he could tell the police where the deceased was. He later found that the deceased had been killed at Fundi Hamisi area. He went to the scene near the 4th accused's home. He saw the deceased body near mango tree and it had been partly burnt. He did not witness the killing.

PW8 IP. KIPKEMBOI ROP was based at the Malindi police station as the deputy DCIO. On 15th December 2014 he was requested by PW9, the investigating officer, to conduct a parade. The witness was PW3 Eunice Katana. He conducted three parades for the 2nd, 3rd, and 5th accused. The witness managed to identify all of them by touching.

PW9 IP. MIKE TIROP investigated the case. He was based at Malindi police station. On the 27th

November 2014 he was at the station when they got information that about 50 boda operators had taken someone and had no good intentions. They went to the scene only to find out that the deceased had already been killed at the homestead of the 4th accused. They found stones and sticks at the scene. There was a big crowd. They took the body to the police station. Some member of the public recorded their statements. His investigations revealed that the 4th accused had been robbed of his motor cycle No. KMBF 762Q along the Ganda Malindi road the previous day. A report had been made at the Malindi police station. The following day 27th November 2014 there were rumours that the 4th accused had identified the deceased to be one of the robbers. The motor cyclist went to the deceased's home at Goshi. The deceased was a watchman at a farm and was asleep. He was taken on a motor bike to the 4th accused's home so that the 4th accused could confirm if he was one of the robbers. The 4th accused was asleep and he informed the crowd that the deceased was one of the robbers. The deceased was assaulted and taken about 30 metres from the 4th accused's home. The deceased was killed and his body burnt. The accused were identified by the witnesses to have participated in the killing of the deceased.

Each of the five accused was put on his defence and each opted to give unsworn evidence. The 1st accused ALI SALIM NGUMBAO alias BAHATI TARU testified that he does art work. He comes from Ganda. On the 27th November 2014 he was at home at about 9.00 am when police officers went to arrest him. He was then taken to Malindi police station where he stayed for three days. He was then charged in court with the offence. He knows nothing about the deceased's death. The 4th accused is his brother.

The 2nd accused HUSSEIN SAIDI JUMA RASHID alias SNAKE BOY testified that he is engaged in the music industry at Watamu. On the 27th November 2014 at about 11.00 am he was at Watamu studio doing his music work. He stayed there upto to 4.00 pm and went to his home at Ganda. He then heard that the deceased had been beaten and burnt by motor bike operators. He also heard that the deceased had stolen the 4th accused's motor bike. He was later arrested by twelve police officer on a date he cannot recall but it was on a Friday December 2014. He was taken to Malindi police station and later charged with the offence.

The 3rd accused SALIM ALI DUNGU alias CHAPATI BOY testified that he is a student at Malindi day High School in form two. He had been sent home on 27th November 2014. He heard about the death of deceased and went to the scene. On his way he was informed that the deceased had been killed. He was arrested by the police some days later. He finished his standard 8 in 2010 but due to lack of school fees he stayed at home before joining secondary school. He is 20 years old.

FRANCIS CHARO BAYA is the 4th accused. He comes from Ganda and does boda business. On 26th November 2014 at about 8.00 pm he was at Ganda with his motor bike. The deceased whom they used to call Kadindo in the village asked him to take him to his place of work at Mr. Bakshwein's place. He knew Kadindo who was with another person he did not know. Kadindo and his colleague boarded the motor cycle and they took off. On the way one of the two passengers held his neck. He left the steering and the motor bike fell down with all of them. One of them held his head while the other one held his legs. He screamed twice. The deceased removed his belt and tied it on the 4th accused's neck. He managed to entangle himself. He screamed again and another motor bike appeared from far. The deceased hit him with his hand on the neck and he fell down unconscious. He regained consciousness after three minutes. He found Kadindo's aunt, PW3 at the scene. She was enquiring what was the problem. He told her that he had been robbed of his motor bike. He called a colleague by the name Rambo who took him to Malindi General Hospital where he was put on a drip. The owner of the motor bike reported at Malindi police station. He was released to go home. On reaching home he found many people. He did not give them any name of the suspect. Most of them were his workmates. The following morning 27th November 2014 many motor bikes went to his home at 8.00 am. The riders asked him for the name of the robbers since many riders were being killed. He told them that one of them was Kadindo. Immediately the riders left. Kadindo was picked and brought to the 4th accused's house. He asked the deceased about the motor cycle and the deceased got annoyed. He was told to leave and his mother took him inside his house. The deceased was assaulted and was killed at a

Neighbour's place. He was arrested by the police after three days.

The 5th accused SHEE MOHAMED KITOROBI comes from Ganda. He sells wood carvings at the beach. On the 27th November 2014 he was at Tawfiq hospital where his father had been hospitalized. He went home at about 4.00 pm so that he could get food that is when he heard about the killing. He took food and returned to hospital. Three days later while at the hospital and sleeping on the floor, the police went there and arrested him. He was later charged with the offence.

The above is the summary of the evidence for both the prosecution and the defence. What is required of this court is to determine the issue as to whether the prosecution evidence proves the charge of murder against each accused person. In view of the number of the accused, it is prudent to analyze the prosecution evidence vis-à-vis each accused person.

The evidence against the 1st accused is that of PW3, EUNICE KATANA. PW3 informed the court that she followed the bajaj operator's up to the home of the 5th accused. She was able to identify the 1st accused as one of the people who assaulted the deceased. There is the evidence of PW4, CHARO KATANA KAINGU. He testified that the 1st accused had a stick from a guava tree. He tried to talk to the 1st accused to leave alone the deceased but the 1st accused turned on him. According to PW6, CHANGAWA CHARO CHANZERE, he saw the deceased bleeding. The deceased held on to a tree. The first accused hit the deceased on the head and the deceased fell down. The deceased then walked upto near a mayo tree. The 1st accused went and hit him again. It is PW6's evidence that he saw the 1st accused hitting the deceased three times.

In his evidence, the 1st accused testified that he was arrested on 27th November, 2014 while at home. He knows nothing about the death of the deceased. According to PW2, KADZO KAINGU, the deceased's wife, the bajaj operators went to her home at 11.00 am. The incident occurred during the day. It is the evidence of P4, CHARO KATANA KAINGU that by 1.00 pm, the deceased had been burnt. PW6 and PW4 saw the 1st accused at the scene. PW4 saw him with a guava stick while PW6 saw him assaulting the deceased. It is clear from the evidence that indeed the first accused participated in the killing of the deceased. PW4 tried to stop the 1st accused from assaulting the deceased but the accused turned on him leading to the tearing of PW4's T-shirt. There is no doubt that the 1st accused was one of those people who assaulted the deceased. The defence evidence does not displace the prosecution evidence.

The 2nd, 3rd and 5th accused were also mentioned by PW3. The witness mentioned these three accused. She did not know their original names according to the investigating officer. That is why a parade was conducted for her to identify the three accused. She knew them ph7ysically. PW4 also mentioned the three accused. He did not state what each one of them did to the deceased. PW6, CHANGAWA CHARO CHANZERE did not know the other accused. It is PW6's evidence that the other accused were just moving around.

In his defence, the 2nd accused stated that he is engaged in the music industry and was at Watamu on the material day. He stayed at Watamu up to 4.00 pm. The 3rd accused, SALIM ALI DUNGU's defence is that he is a student. He heard about the deceased's death and went to the scene. The 5th accused, Shee Mohamed Kitorobi testified that his father was hospitalized at Tawfique hospital. He was arrested at Tawfique hospital.

From the evidence of PW3, PW4 and PW6, I cannot conclude with finality that the three accused participated in the killing of the deceased. The evidence of PW6 is to the effect that the other accused were three but just going around. There is no specific identification of the roles played by each of the three accused. It could be possible that the three accused were present at the scene. The defence evidence does not displace the prosecution evidence. However, since there was a large crowd as per the prosecution evidence, and the roles played by each of the three accused is unclear, I will give the three accused the benefit of doubt. I do find that the prosecution evidence is not sufficient to safely convict the 2nd, 3rd and 5th accused.

Lastly, there is the 4th accused Francis Charo Baya. The entire case is built on this accused. The prosecution evidence as per the investigating officer does confirm that indeed on 26th November 2014 the 4th accused was robbed of his motor cycle. The motor cycle was not recovered. The owner of the motor cycle reported at Malindi police station. According to the 4th accused, the deceased was one of the two robbers.

It is the evidence of PW3, EUNICE KATANA that when the deceased was taken to the home of the 4th accused, the 4th accused claimed that the deceased had stolen their motor cycle. The deceased denied the allegations. PW3 saw the 4th accused beating the deceased with a stick. The evidence of PW4 is similar to that of PW3 in relation to the 4th accused. PW4 saw the 4th accused asking the deceased about the stolen motor cycle. The deceased told the 4th accused he was not aware about the incident. The 4th accused started beating the deceased and other people followed.

In his defence, the 4th accused testified that after he was robbed of the motor cycle, he went to Malindi Sub-County hospital. He was released and when he reached home, he found many people. He did not give their any name. The following morning of 27th November, 2014 many motor cyclists went to his home at 8.00 am. He told them that one of the robbers was the deceased. The deceased was picked by his fellow boda operators and taken to his home. When he asked the deceased about the motor cycle, the deceased got annoyed. The 4th accused was told to leave and was taken inside his house.

From the evidence on record, it is established that it is the 4th accused who told the bajaj operators that the deceased was one of the robbers. When the deceased was taken to the 4th accused's home, the 4th accused enquired from him about the motor cycle. The evidence shows that the 4th accused started assaulting the deceased with a stick and the other bajaj operators joined him.

The 4th accused was very much aware that a report had been made at Malindi police station. He did not go to the police station and give the deceased's name as one of the suspects.

Section 20 of the Penal Code, Cap 63 Laws of Kenya states as follows:-

- 1. When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say –**
 - a. Every person who actually does the act or makes the omission which constitutes the offence;
 - b. Every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;
 - c. Every person who aids or abets another person in committing the offence;
 - d. Any person who counsels or procures any other person to commit the offence;

And in the last-mentioned case he may be charged either with committing the offence or with counselling or procuring its commission.

- 2. A conviction of counselling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence.**
- 3. Any person who procures another to do or omit to do any act of such a nature that, if he had himself done the act or made the omission, of an offence of the same kind, and is liable to the same punishment, as if he had himself done the act or made the omission; and he may be charged with doing the act or making the omission.**

It is the 4th accused's actions which led to the ultimate killing of the deceased. Had the 4th accused informed the bajaj operators that he would report to the police the suspect, the deceased would not have been killed. The 4th accused aided in the killing of the deceased. He could have declared to give out the

deceased's name. The bajaj operators did not know that the 4th accused had a suspect in mind. The 4th accused was not forced to mention the deceased. He is to blame for the deceased's death. Apart from that, the 4th accused also participated in the killing. His evidence that he was taken inside their home is misplaced by the evidence of PW3 and PW4 who knew him before the incident.

Under Section 203 of the Penal Code, malice aforethought has to be proved in a murder case before one can be found guilty of the offence. Section 206 of the Penal Code defines malice aforethought and states as follows: -

“Malice aforethought shall be deemed to be established by evidence proving any one of more of the following circumstances: -

- a. **An intention 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 of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference by a wish that it may 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 the custody of any person who has committed or attempted to commit a felony.**

The evidence herein shows that the 1st and 4th accused assaulted the deceased with sticks. They knew that their attacks on the deceased would have caused him grievous harm. The 1st accused even kept on assaulting the deceased when he appeared to have absorbed severe beating. There was no mercy on the part of the two accused. They had the intention to kill the deceased. They even went ahead and burnt his body. That proves that the intention was to kill the deceased. I do find that the two accused had common intention to kill the deceased.

The 4th accused testified that he was robbed of his motor cycle by the deceased the previous night. Assuming that contention is true, that could not justify the killing of the deceased. The 1st accused became the complainant, the investigator and the one determinant of his own case. Thereafter, he punished the deceased whom he found guilty of the offence of robbery with violence. That act is not justiciable. This country is governed by laws. The matter had been reported to the police. It would have been easy for the accused to have informed the police that the deceased was one of the robbers. The accused knew where the deceased was living. He would have been arrested. Even if it were true that the deceased stole the 4th accused's motor cycle, I do find that there was no provocation on the part of the 4th accused. The 4th accused was treated at Malindi Sub-County hospital, safely went home, slept that night and in the morning woke up to find his fellow bajaj operators at his home. The 4th accused had all the time and power of self-control. He was just driven by euphoria and not by provocation. Mob justice cannot be justified in law. It is the 4th accused who started assaulting the deceased. It is immaterial whether the fatal blows were administered by the mob. Indeed the evidence shows that the fatal blows were administered by the first accused.

In the end, I do find that the prosecution has proved its case beyond reasonable doubt. There is proof that the deceased died of the injuries inflicted by the accused. There is evidence beyond reasonable doubt that it is the two accused persons who caused the deceased's death. It is equally established that the accused had malice aforethought. There is doubt that the 2nd, 3rd, and 5th accused were not active participants of the killing. They could have been present at the scene but were not actively involved. I give the three other accused the benefit of doubt.

The upshot is that the 2nd, 3rd, and 5th accused are not found guilty of the offence of murder as charged. They are hereby acquitted of the offence and shall be at liberty unless otherwise lawfully held. The 1st accused ALI SAUM alias BAHATI TARU and the 4th accused, FRANCIS CHARO BAYA are hereby

found guilty of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code and are convicted accordingly.

Dated and delivered in Malindi this 29th day of June, 2016.

S.J. CHITEMBWE

JUDGE