



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT MALINDI**  
**CRIMINAL CASE NO. 31 OF 2011**

**REPUBLIC ..... PROSECUTOR**

**VERSUS**

**SAIGORANI MENGENOI ..... ACCUSED**

**JUDGMENT**

The accused is charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code Chapter 63 Laws of Kenya. The particulars of the offence are that the accused on the 8th December 2011 at 17.30pm at Mbuzi Wengi area, Shella location within Malindi district of Kilifi County, the accused murdered JOHN HINZANO.

Five witnesses testified for the prosecution. PW1: ALICE SIDI's evidence is that she operates a kiosk at Mbuzi Wengi area. On 8th December, 2011 she went to her kiosk and found that the door was wide open and all her stuff had been stolen. There are many kiosks at Mbuzi Wengi and the owners had employed two watchmen. She met one of the watchmen who asked to go and look for his colleague. She informed her son John Fondo George who is an administration police officer. She reported the matter to the police.

While at her kiosk after making the report, PW1's son John Fondo started interrogating one of the watchmen. People gathered and started beating the watchman. They decided to take the watchman to the police station. One the way, the accused tapped him and pleaded with her not to take the watchman to the police. The accused wanted to have the issue settled amicably PW1 declined and insisted that the matter be handled at the police station first. The accused had a rungu and the crowd became hostile. The rungu was snatched from the accused. The accused pulled a long knife and assaulted the deceased by cutting him on the left hand several times. The crowd set upon the accused who ran and hid himself at a kiosk. The victim of the attack died at Malindi Hospital. According to PW1 the crowd was of about 200 people. The deceased was drunkard was PW1's employee. The watchman who was being taken to the police station was called Simon.

PW2: FRANCIS BAHATI owns a kiosk at Malindi new stage. On 8th December, 2011 at about 5.00pm. She was at her kiosk when the accused entered. Shortly a big crowd emerged pursuing the accused. PW2 tried to ask the accused to leave but he told her to leave him alone. The crowd started throwing stones at the accused. PW2 ran to Malindi police station and made a report. According to PW2 the accused was holding a blood stained knife in his hand. The police went to the kiosk and disarmed the accused. It is her evidence that there was a big crowd of about 200 people. The mob wanted to kill the accused and lynch him as it was said he had stabbed someone.

PW3: PC. PETER KIMANI was based at the Malindi Police Station. On 8th December, 2011 at 5.00pm a report was made at the station that a man was being beaten by a mob. They rushed to the scene and found a big crowd surrounding kiosk while shouting "kill, kill the masai". PW3 introduced himself to the

accused and managed to take a knife the accused was holding on his right hand. It is PW3's evidence that the mob wanted to lynch the accused.

PW4, DR. RUTH MAPENZI was based at the Malindi District Hospital. She produced the postmortem report on the deceased conducted by Dr. Tayabali Mohamed on 17th December, 2011. According to the report, the deceased sustained a deep cut on the left forearm which transversed through the muscle bone. The doctor opined that the cause of death was respiratory collapse due to acute hemorrhage secondary to the cut wound. The deceased also had fractures of the 6th and 7th right ribs.

ZACHARIA NJENGA testified as PW5. He was attending a church meeting on 8th December, 2011 when they heard noise. He came out and found a large crowd assaulting one man. The one who was being assaulted was called Simon. Suddenly another man went and tried to intervene. The man produced a sword from his waist and started waving it. People tried to attack the accused. The accused used the sword trying to ward off the surging crowd.

The accused was put on his defence. In his sworn defence he stated that on 8th December, 2011 he was heading to his place of work at about 5.00pm. On reaching Mbuzi Wengi area he heard people saying "uwa uwa – kill kill". He went to the scene and saw someone being beaten. On inquiry he was told by two women that the one being beaten was a watchman as some items had been stolen. He told them to take the person to the police or allow him to pay. Two people from the group tried to enquire from the women as to what the accused was telling them. Five other people joined them and the women told them that the accused was asking them not to kill the arrested man. The crowd assaulted him and they took his club – *rungu*. He managed to run away and entered in a hotel. He was bleeding and he removed his shirt to wipe out the blood. The crowd followed him to the hotel. There were many people totaling about 100. He saw a crate of soda in the hotel and started throwing bottles to the crowd. Shortly police officer went there in a vehicle. The hotel owner was a woman and she had ran away.

It is the accused's evidence that had the police delayed, he would have been killed. It was now about 7.00pm. He was arrested and taken to hospital where he was treated. He was later charged with the offence. He denied killing the deceased. He denied that he had a knife that day. The man whose was being assaulted was his fellow watchman.

Mr. Ogeto, counsel for the accused submitted that none of the witness saw the accused assaulting the deceased. The deceased was drunk. No weapon was produced the man who was being assaulted by the name Simon was never called to testify. The investigating officer also did not testify. Counsel contends that malice aforethought was not established.

The main issue for determination is whether the accused killed the deceased. The prosecution evidence shows that the deceased was part of a mob that had arrested one Simon who was a watchman as PW1's kiosk had been broken into and items stolen. It is clear from the prosecution evidence that the deceased was hit on his left and right forearm as per the postmortem report and he died due to excessive bleeding that caused the respiratory failure. According to PW1, PW2 and PW5, the accused emerged as the crowd was assaulting Simon. The accused wanted to have the matter resolve amicably.

It is the evidence of PW1 that the accused had a club (*rungu*) and it was snatched from him by the crowd. PW1 and PW5 saw the accused removing a sword from his waist. According to PW1, she saw the accused assaulting the deceased with the knife. The deceased was drunk. PW5 saw the accused waving the sword trying to ward off the singing crowd.

In his sworn defence, the accused denied that he had a knife. It is his evidence that he had a club that was snatched by the crowd. He was assaulted and was bleeding on the head. The police simply arrested him.

Although the investigating officer did not testify, PW3, PC PETER KIMANI, went to the scene. He is the one who arrested the accused. It is the evidence of PW3 that the accused was holding a knife. He disarmed him and took the knife. Unfortunately, the knife was not produced as the investigating officer did not testify.

Given the evidence of PW1, PW3 and PW5, I do hold that indeed the accused person was having a knife on the material day. I also find that it is the accused who inflicted the fatal injuries on the deceased. PW1 saw the accused assaulting the deceased. The defence evidence that the accused was bleeding and he used his shirt to wipe out the blood does not disprove the prosecution evidence that PW2 and PW3 saw the accused with a blood stained knife inside the kiosk. The non-production of the knife does not disprove the evidence of PW1, PW21, PW3 and PW5 who saw the accused with the knife. The postmortem report indicate the injuries sustained by the deceased and it is established that those injuries were caused by a sharp object.

The next issue is whether the accused intended to kill the deceased. From the evidence of PW1, it is shown that the accused wanted to have the issue resolved amicably. This is in line with the defence evidence as well as the evidence of PW5. PW5 testified that the accused tried to intervene. According to PW1, the accused asked her if the matter could be resolved by allowing Simon to pay for the stolen item. It is clear from the evidence that the accused was not present when Simon was being beaten by the mob at the initial stage. The accused only found the mob assaulting Simon. PW5 came out of a church meeting and saw the crowd assaulting a man. The prosecution evidence shows that the accused tried to be the peacemaker and have the dispute resolved amicably. The deceased was drunk and it is established that the crowd also assaulted the accused. The accused acted in self defence.

Given the circumstances of the case, I do find that the accused did not use excessive force. The accused estimated the crowd to be about 100 people. PW1 and PW2 estimated the crowd to be about 200 people. It is evident that there was tension and the mob as per the evidence of PW1, PW2 and PW3, wanted to lynch the accused.

From the prosecution evidence, I do find that the crucial ingredient of malice aforethought is not proved. The accused was heading to his place of work and tried to intervene when he saw a mob assaulting a fellow watchman. It is not clear how PW1's son, John Fondo George who is an administration police officer could not have intervened and calm down the situation. He could have simply told the crowd that he was a police officer and was taking Simon to the police station. There was no malice aforethought on the part of the accused. He only defended himself when the mob turned against him.

The upshot is that the prosecution failed to prove the offence of murder against the accused. The accused person is found NOT guilty of the offence of murder as charged. However, the accused is found guilty of the offence of manslaughter contrary to Section 205 of the Penal Code and is accordingly convicted of that offence.

Dated and delivered at Malindi this **19th** day of **February, 2015**.

**Said J. Chitembwe**

**JUDGE**