



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MALINDI**

**CRIMINAL CASE NO. 22 OF 2010**

**REPUBLIC .....PROSECUTOR**

**VERSUS**

**IBRAHIM ALI .....ACCUSED**

**JUDGMENT**

1. The accused was charged on 27th September, 2010 with Murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the charge are that:

***“On the nights of 28th and 29th June, 2007 at Kizuliani village, Kipini sublocation, Kipini location within Tana River County murdered Isaiah Mwangangi Mulelya”***

The accused denied the charge and was represented by Mr. Mayaka during the trial.

2. The prosecution case was as follows.

The accused person and Isaiah Mwangangi (hereinafter the deceased) were related by marriage. They enjoyed cordial relations as fellow villagers in Kizuliani village Kipini sublocation in Tana River County, a rural community where homesteads stand several acres apart.

3. On the evening of 28th and 29th June, 2007, the two men were together imbibing traditional liquor – “Koma” – at a local “*mangwe*” (liquor den). The accused wore a green T-shirt bearing the words “Narc Kenya” the name of a political party. Campaigns for the 2007 general elections were already in progress.
4. Early in the night they left the *mangwe* together to walk home. Meanwhile, Habona Emmanuel (PW5) a local trader operating a kiosk about ten metres from the Kizuliani/Mkomani road had retired to bed early, with her children. She was roused from her sleep about 800pm by a pair of quarreling men, whom she identified as the accused and the deceased. She peeped through her widow and saw the men engaged in a loud quarrel one of them uttering words to the effect:

*“wewe ni mjinga – you are a fool.”* Then the deceased exclaimed:

*“Hai kwani ni kuuana? - you mean to kill”*

And he did not speak again. Neither did the accused.

5. PW5 dared not venture outside the house as she was alone with her children. At day break however, she went out to the scene of the night quarrel and found the body of the deceased which

- bore stab wounds on the chest. Also at the scene were a green T-shirt emblazoned with the words “Narc Kenya;” a knife and two jerry cans. Several villagers also came across the body as they headed for their morning chored and the matter was eventually reported to the village elder Alex Mushangi (PW2) and later to police.
6. A search was mounted for the accused who was arrested and detained in police custody. Police visited the scene and collected exhibits. The body was taken away a day later and the post mortem conducted on 12th July, 2007. The pathologist's opinion was that death was due to massive hemorrhage due to transection of the neck.
  7. In his defence the accused elected to make an unsworn statement. He did not call a witness. He stated that he was a farmer at Kipini. And that on the evening of 28th June, 2007 after work he went to the *mangwe* he operates. Presently he was joined by the deceased and they had drinks until 6.30pm when he (accused) decided to leave. But the deceased convinced him to return and the two continued drinking. That is all he remembers of the night, as he came round on the next day at 6.00am he found himself in a neighbour's shamba.
  8. Soon after he arrived home he heard news that the body of the deceased had been found lying on the road. When he approached the scene, neighbours dissuaded him saying that he was suspected to have murdered the deceased. He went to a shamba and remained there until his arrest.
  9. There is no dispute that the accused and the deceased were well known to each other as residents of Kizuliani, Kipini. Further, that on the material night they drank traditional liquor together. That on the next morning the body of the deceased which bore severe stab wounds was found on a road within Kizuliani. The court must determine whether the accused is the person who inflicted the fatal injuries on the deceased. In this regard, the star witness, so to speak was PW5. She narrated to the court the events of that night which she claimed to have observed from her house by the roadside. First, she heard voices of two men quarreling and made out abusive words to the effect “*you are a fool*”, and then one, the deceased pleading exclaiming “*Hai! kwani ni kuuana (Do you mean to kill?)*” Thereafter, the voices were heard no more.
  10. The witness feared to venture outside alone. PW5 said that, not only did she identify the voices of the two contending men, she was able, by peeping through a window to identify the men as the accused and deceased, both of whom she knew well. She said there was bright moonlight illuminating the scene of the incident, which was about ten metres from her house. She said that she had interacted often with the accused and deceased because they frequented her kiosk as customers and as neighbours in the village.
  12. PW5 reiterated this narrative during cross-examination and emphasized that on the material night the moon was full and very bright. She consistently asserted that there were only two combatants. Later when she was recalled by the prosecution, she identified the T-shirt bearing the word Narc Kenya and the knife found at the scene on the next day. She however clarified in that the accused wore no shirt during the fateful night. This aspect in addition to her responses in earlier cross-examination, in my view, casts PW5 as a truthful witness. If indeed she was not, nothing could have been easier than for her to attempt to connect the Narc -Kenya T-shirt with the accused. This answer is also consistent with her evidence earlier that she found the T-shirt on the ground at the scene, on the next morning.
  13. One of the patrons of the accused's *mangwe* on the fateful night was Katana Charo Karisa (PW6). He testified that he was drinking *mkoma* with the deceased and the accused until 8.30pm. At that time the deceased and accused announced that they were going home, and left him in the *mangwe*. This witness was among the first people to view the scene of murder on the next day. He testified that he saw the Narc Kenya T-shirt with blood stains at the scene and recognized it as the one worn by the accused on the previous night at the *mangwe*.

14. The witness said he remained at the scene hoping to see the accused to inquire from him what happened. But the accused was arrested before he could talk to him. Thereafter when the accused was released from custody (on police bond) the witness met him. It is the testimony of PW6 that the accused threatened to 'finish' him if he dared testify that he had left the *mangwe* accompanied by the deceased on the fateful night. PW6 was scared enough to report to the police. In the course of cross-examination, PW6 confirmed that as they left, the deceased and accused were "very drunk" and that the former fell down in the *mangwe*. He however denied that the accused was staggering.
15. In many respects the evidence of PW6 corroborates that of PW5: the location of her house vis-a-vis the scene of murder, the companionship of the accused and deceased on the material night, the Narc Kenya T-shirt recovered at the scene (which he said the accused wore on the material night). Like PW5, PW6 stood firm in his evidence during cross-examination.
16. As I understand it, the accused's defence is that he was so drunk that he either lost his senses or was rendered unconscious while drinking at the *mangwe*. However, this line of defence was not directly put to PW6, the person who last saw him at the mangrove. The witness admitted that though the two men were "very drunk" as they left the *mangwe* although the accused was not staggering. He said the accused carried a jerry can – or water bottle (Kilimanjaro brand) as they left.
17. Certainly, from PW6's evidence, if the accused did pass out, it was not in the *mangwe* as the accused seems to suggest in his defence. Secondly, the evidence of PW5 was that the accused and deceased were loudly quarreling as they approached her home. The time 8.00pm approximates to the time (8.30pm), when PW6 said the two men left the *mangwe*. Since the time was an estimate, it is safe to say that all the events occurred early in the night, at least before 10.00pm.
18. PW5's description of the quarrel is vivid: the two men were engaged and speaking. She recognized their voices clearly. It is unlikely that a man who had passed out as the accused seems to suggest could engage another in that manner. PW5 said he heard the deceased remark about being killed before all fell silent.
19. That to my mind must be when he was stabbed and his neck severed. Then all fell silent. The subsequent conduct of the accused as disclosed by the prosecution witnesses, PW6 and the first police officer to arrive at the scene PC Munga (PW9) puts to doubt his alleged passing out and in fact points to guilty knowledge. He not only threatened to "finish" PW6 but also ran off to hide in a shamba after the incident. He claims that he ran away because he was warned by neighbours that he was a suspect. There is no explanation however for his threats against PW6. The threats specifically related to fact of his departure from the *mangwe* with the deceased on the fateful night. He did not challenge or deny this threat and I believe that PW6 did not make it up.
20. The prosecution evidence was principally circumstantial as nobody testified to have seen the accused actually stab the deceased. In order to support a conviction such evidence must meet a certain legal threshold. In the case of **Kipkering Arap Koskei & Ano v R (1949) 16EACA 135** the court discussed this aspect by stating:

***".....in order to justify, on circumstantial evidence, 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, and 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 always on the prosecution and never shifts to the accused"***

Further in **Musoke v Uganda [1958]EA** the Court stated:

***"In a case depending exclusively upon circumstantial evidence, the court must, before***

***deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt.”***

Quoting the judgment of the Privy Council in Teper v. R(2), [1952] A.C. 480 at p. 489 the Court further stated:

***“It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.”***

21. The evidence in this case in my considered opinion points consistently at the accused as the sole person who had opportunity at the given time to stab the deceased in the midst of their night quarrel. The injuries were severe: stabs to the ribs and severed neck. Under Section 206 of the Penal Code, Malice aforethought is disclosed where the injuries inflicted are of such a nature that the person inflicting them must be deemed to have intended to cause grievous harm or death.

22. Section 206 states:

“Malice aforethought shall be deemed to be established by evidence proving any one or 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 killed or not.”

The deceased appears to have discerned the same intention in his attacker hence his plea: “*Kwani ni kuuana?*” The deceased not only sustained stabs in the chest, his neck was literally truncated.

23. In the circumstances of this case all the evidence points consistently at the accused's culpability. His defence is totally displaced by the overwhelming evidence tendered by the prosecution. It is not believable. I find the charge against him proven beyond any reasonable doubt and will convict him as charged.

Judgment delivered and signed at Malindi this **21st** day of **June, 2013** in the presence of accused, Mr. Mayaka for accused, Mr. Nyongesa for the State.

Court clerk – Evans.

**C. W. MEOLI**

**JUDGE**

MR. NYONGESA

I do not have his record. I treat him as first offender.

**C. W. MEOLI – J**

MR. MAYAKA

The accused has a family. He is married with three children, the first a student at Kipini Primary School. Others are in nursery school. The accused is the family breadwinner. The accused regrets events of the fateful night. We urge the court to consider the circumstances and pass a lenient sentence.

Court now has discretion. The court can give a sentence other than death. I urge the court to

consider that the accused regrets.

**C. W. Meoli- J**

**NOTES ON SENTENCE**

The accused has been treated as a first offender. I have considered the mitigation raised especially the fact that the accused is a family man and is remorseful. I have also considered the circumstances in which offence occurred. The accused and deceased were friends and what began as a drunken brawl ended up in the death of the deceased. The accused literally beheaded the deceased following the quarrel. Such gratuitous cruelty is hard to understand.

**C. W. Meoli**

**JUDGE**

**SENTENCE**

Accused sentenced to life imprisonment.

Right of Appeal in fourteen (14) days.

**C. W. Meoli**

**JUDGE**