



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MALINDI**

**CRIMINAL CASE NO. 19 OF 2010**

**REPUBLIC .....PROSECUTOR**

**VERSUS**

**DOKICHA SALATO ABASHORE .....ACCUSED**

**JUDGEMENT**

1. The accused is charged with the murder of Omar Ijema Godana contrary to Section 203 as read with Section 204 of the Penal Code, on the 6th August, 2010 at Handaraku Sublocation in Tana Delta District. The Accused denied the charge and was represented by Mr. Shujaa.
2. The Prosecution case is as follows. On the material date towards evening, the deceased's son, who testified as Pw4, had been grazing his father's herd near the Accused's farm. He further stated that in the said farm one Huko, another pastoralist was grazing his herd. It was maize harvest time and the Accused's farm had already been harvested; Huko's herd was feeding on the left-over maize stalks. His father, who customarily used to assist PW4 drive the herd back home, had been harvesting maize at their farm nearby. He arrived to find the Accused chasing away Huko's herd which resulted in the two sets of animals mixing. The Deceased was riled as the Accused had chased his herd and it was at this juncture the two men begun fighting. The Deceased had a stick whilst the Accused had a thorny 'mathenge' stick, a panga and a knife. As they fought, the Accused drew his knife from the waist and stabbed the Deceased in the thigh, fatally injuring him.
3. Pw1 and Pw2 arrived at the scene. Pw1, a cousin of the Deceased, having heard crying women say that the Deceased had been killed by the Accused rushed to the scene and found the Deceased lying in a pool of blood from a stab wound. Pw2, the nephew of the Deceased, who was working at a nearby farm heard children screaming that the Deceased had been killed. On arrival he found the deceased had died having sustained an injury on his thigh. He also testified that he saw the Accused at a distance fleeing while holding a knife. Pw3, a clinical officer produced the postmortem report indicating that the cause of death was massive bleeding from a deep cut wound in the thigh.
4. The Accused gave an unsworn defence statement. He stated that on the material date he found the Deceased's herd grazing in his farm and had caused damage to it. He chased them off. When the Deceased confronted him about his action, he informed him that he was driving the herd to the Chief. An argument ensued the Deceased hit him with a stick and he became unconscious. When he came to and attempted to stand, the Deceased hit him again, stepped on him and kicked him. He proceeded to knead him with his knees and told him that that would be his last day. The Accused then drew his knife from the waist and stabbed the Deceased in the thigh. The Deceased then managed to crawl under a shade to rest and the Deceased lay dead close by. He also stated that he and the Deceased had been friends.

5. There is no dispute that the deceased were known to each other prior to the material date. Both resided at Handaraku sublocation where they practised farming and cattle rearing. On the 6th August, 2010 the Deceased's son by the name Yusuf Omar Ijema (Pw4) was herding his father's animals. There is no agreement as to whether grazing location had any crops or belonged to the accused. It is not disputed that the Accused came out and started to drive off the cattle (**herd**) from the land. The Deceased confronted him and an argument started. It soon degenerated into a fight, the Accused produced a knife and stabbed the Deceased in the inner thigh. The Deceased died. Pw4 ran to call his relatives Pw1 & Pw2. By the time they got to the scene, the Deceased had succumbed to the injuries.
6. The Court must determine whether the State has proved the charge preferred, from the facts proved by the prosecution, and accepted by the defence. The two men belong to a pastoralist community where adult males are usually armed with knives or sticks as they go about the risky business of herding in the wild. The Accused sparked off the fatal incident when he chased away the cattle being grazed, on what he said was his farm, by Pw4. This irked the Deceased who confronted the Accused. An argument led to a fight in which the Deceased sustained a stab. It was one stab but deep. According to Pw3 (who unfortunately testified again as Pw5), the stab punctured the main artery from the heart, the aorta, leading to massive bleeding and quick death.
7. The Accused's act was definitely unlawful. To my mind however, the circumstances of the assault on the Deceased who also had a stick, point more to an offence of manslaughter than murder. There is no evidence of prior disagreement between the combatants. The fight occurred after an argument and only one stab, albeit fatal, was inflicted.
8. Although I do not accept that the fight necessarily took the form described by the Accused, I would agree with the submission by the counsel for the Accused that the proven facts appear to negative malice aforethought. In the case of RC v R [2005] eKLR, the Court of Appeal considered the defence of provocation as defined under Section 208 of the Penal Code. The court stated:  
  

***“An unlawful killing in circumstances which would constitute murder would thus be reduced to manslaughter but only if the act which causes death is done in the heat of passion caused by sudden provocation. That is the language of Section of 207 the Penal Code. It is a question of fact whether the accused in all circumstances of the particular case was acting in the heat of passion caused by grave and sudden provocation when the killing was done see Wero v Republic [1983]EA 549.”***
9. It would seem that the Accused was offended first by the act by the Deceased's son to graze his father's cattle on the Accused's farm. When the Accused sought to drive them out, the Deceased confronted him wielding a stick and then proceeded to engage him in an argument, then a fight. These facts together with the single stab inflicted suggest strongly that the accused acted in the heat of passion. I would therefore find the Accused guilty of the reduced charge of manslaughter contrary to Section 202 of the Penal Code and convict him accordingly.

Delivered and Signed on this **15th** day of **October, 2013** in the presence of Mr. Nyongesa for the State, Mr. Shujaa for the Accused, Accused present.

Court Clerk – Jamila Mohamed/Samwel

**C. W. Meoli**

**JUDGE**

**COURT**

Let the Probation Officer prepare report on the accused.

Mention on 24th October, 2013.

**C. W. Meoli**

**JUDGE**

**ORDER**

Interpreter Orma/Swahili – Jamilla Mohamed be paid interpretation fees for the session.

**C. W. Meoli**

**JUDGE**

24-10-13

Before Hon. Lady Justice C. W. Meoli – J

Mr. Nyongesa for State

Mr. Shujaa for accused

Court clerk – Samwel

Accused – present

Interpretation – English/Kiswahili

PROBATION OFFICER – Inquiry not yet complete. We need two weeks.

**C. W. Meoli**

**JUDGE**

COURT – Probation Officer's report on 13th November, 2013. Remanded in custody to 8th November, 2013.

**C. W. Meoli**

**JUDGE**

13-11-13

Before Hon. Lady Justice C. Meoli – J

Miss Mathangani for State

Mr. Shujaa for Accused

Court clerk – Samwel

Accused – present

Interpretation – English/kiswahili

COURT – Probation Officer's Report ready.

**C. W. Meoli**

**JUDGE**

MISS MATHANGANI – Treat as first offender.

**C. W. Meoli**

**JUDGE**

MR. SHUJAA – The accused is 39 years old. He is epileptic. He is first offender. He has been in custody since 2010.

**C. W. Meoli**

**JUDGE**

**NOTES ON SENTENCE**

Accused first offender. Probation Officer's Report positive.

Accused's family and that of victim seemingly reconciled after traditional compensation paid.

**C. W. Meoli**

**JUDGE**

**SENTENCE**

Accused sentenced to serve three years' probation.

**C. W. Meoli**

**JUDGE**