

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL CASE NO. 44 OF 2008

REPUBLIC PROSECUTOR

V E R S U S

FENEDARD ASHIMOSI ACCUSED

J U D G M E N T

The accused person is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that the accused *on the 15.9.2008 at Ikuywa village, Shidodo sub-location, Khayega location, Kakamega East district within Western Province jointly with others not before court murdered **BENARD ATSANGO KENYATTA.***

Eight witnesses testified for the prosecution. **PW1, CORNELIUS MANYONYI**, testified that he was 18 years old. On the 15.9.2008 at 5.00 p.m. he had been sent to go to Khayega when he met 5 boys on the way including the accused. One of the boys assaulted him with a whip and while he inquired the accused and the other boys started assaulting him. He ran and on the way met the deceased together with Shikoti and Musiomi. The deceased asked him why he was crying and PW1 informed them that he had been assaulted. They went back and reached the homestead of Mzee Muteshe. The deceased was talking to the old man informing him that some boys were assaulting children along the public road when the accused came out and held the deceased by the neck. The deceased informed the accused that he had not gone for war but wanted to know why PW1 had been assaulted. The accused started hitting the deceased with blows and called for a panga. Another person by the name Induleti brought a panga and the accused took it and cut the deceased on the head once. The accused's brothers came out with runigus and started attacking the deceased and the other people he had gone with. One of the accused's brothers came out with a piece of timber and hit the deceased and it broke. The accused's mother started shouting that there were thieves. PW1 ran away and met his mother on the way. They went back and on the way met Shikoti who had also ran away from the scene. Shikoti and PW1's mother went to the scene while PW1 went home. The same day at about 7.00 p.m. PW1 saw the deceased bleeding from the mouth and the following morning PW1 was informed that the deceased had passed on.

FREDRICK SHIKOTI was **PW2**. On the 15.9.2008 at about 5.00 p.m. he was coming from Khayega market with the deceased and one Musiomi when they met PW1 crying. They went back with PW1 so that they could ask those who had assaulted to explain the reasons. They went to the homestead of an old man and while the deceased was talking to the old man the accused emerged from a bush and held the deceased by the neck. The accused started assaulting the deceased with his fist and hit him with a stick at the back. The accused called for a panga and PW2 together with Musiomi started to run away. They left the deceased who had fallen down while bleeding from the mouth, nose and ears. PW2 after running away dived to go back as he could not see the deceased. They found the deceased unconscious and took him to his home. On the way they met PW1 and his mother. They met the deceased's wife and they took him to Mukumu hospital where he was admitted. The deceased's wife informed PW2 in the morning that the deceased had passed on.

PW3, was ELIZABETH IMBUHILA. She is the deceased's wife. Her testimony is that on the 15.9.2008 she was at home when the deceased went home at about 7.00 p.m. in the company of PW2 and one Musiomi. The deceased was bleeding and he sat on a chair. The deceased vomited blood. She took him to Mukumu hospital where he was admitted but died at about 5.30 a.m. that morning. **PW4, SYLVESTER MILIMU** is the deceased's relative. He identified the body at Kakamega Provincial hospital together with **PW5 JARED OSORE** for postmortem purposes. The postmortem was conducted

on 17.9.2008. **PW6, DR. BENARD OREKE** performed the postmortem on the 17.9.2008. He produced the postmortem report. His evidence is that the deceased was about 44 years old. He had a linear oblique wound on the head that had been stitched. There was skull fracture from the left occipital to the left temporal region. He formed the opinion that the cause of death was cardiopulmonary arrest due to acute subdural hematoma caused by blunt head trauma. **PW7, PC STEPHEN MUSYOKI** was based at the Kakamega police station and went with the deceased's relatives on the 17.9.2008 to witness the postmortem.

SGT. STANLEY MUROHIA, investigated the case. He was based at the Kakamega police station when on the 16.9.2008 he got a report about the incident. He went to Mukumu hospital and found that the deceased family had taken the body home. The body was taken to the Provincial Hospital. According to PW8 the accused reached home and heard the deceased beating his children. The accused was showering and came out. He took a big stick and hit the deceased. The deceased suffered a head injury. He recorded some of the witnesses statement and decided to charge the accused with the offence. According to PW8 the accused was incensed by the beatings of the children by the deceased.

The accused was placed on his defence. In his unsworn testimony stated that he does boda boda business. He was arrested on the 15.9.2008 by the area chief who informed him that he was required by the OCS. He went to the OCS who asked him whether he had assaulted and killed the deceased. He denied and was charged with the offence.

From the evidence on record, it is established that the deceased was assaulted on the 15.9.2008. The main issue for determination is whether it is the accused who assaulted the deceased thereby causing his death. The evidence of PW1 is that he was assaulted by the appellant and his colleagues. PW1 went with the deceased together with PW2 to inquire why he was assaulted.

The prosecution evidence does further establish that the deceased reached the homestead of an old man and while talking to him, the accused appeared and started quarrelling with the deceased. It is the evidence of PW1 and PW2 that the accused hit the deceased with a piece of timber. The accused then called for a panga and it was brought. On his part, the accused testified that he was arrested on 15.9.2008 by the area chief and taken to the O.C.S.

Given the evidence on record, I am satisfied that it is the accused who assaulted the deceased using a piece of timber and fists. PW1 and PW2 witnessed the incident. It is the evidence of PW1 and PW2 that the accused started assaulting the deceased using fists. The defence evidence does not disprove the prosecution evidence. The prosecution did prove that the deceased suffered his death as a result of the injuries inflicted on him by the accused.

The evidence of the investigating officer is that the deceased was beating the accused's children and this incensed the accused. This line of evidence is not in line with that of PW1 and PW2 who testified that it is the accused who assaulted the deceased while the deceased said he had not gone for war. Since PW8 investigated the case and his evidence is part of the prosecution evidence, I do find that his line of evidence leads to the issue of provocation. According to PW8, the accused seemed to have been provoked by the act of the deceased when he started beating the accused's children. It is PW8's evidence that upon seeing the deceased beating the accused's children, the accused picked a big stick and hit the deceased.

The post mortem report does not establish that the deceased sustained injuries inflicted by a sharp object. According to PW6, the deceased had a linear fracture on the head and skull fracture from the left occipital to left temporal region. This is in line with the evidence of PW1 and PW2 that the accused hit the deceased with a piece of timber on the head.

From the evidence on record, I am satisfied that the accused assaulted the deceased. From the evidence of PW8, the accused hit the deceased on the head after he was provoked by the deceased. I do find that the provisions of **section 207 and 208** of the **Penal Code**, Chapter 63 Laws of Kenya do apply. The accused acted in the heat of passion caused by sudden provocation. There was no malice

aforethought.

In the end, I do find that the accused is not guilty of the offence of murder as charged. The accused is hereby found guilty of the offence of manslaughter contrary to **section 202** as read with **section 205** of the **Penal Code** and is convicted accordingly.

Delivered, dated and signed at Kakamega this 4th day of December 2013

SAID J. CHITEMBWE

J U D G E