



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
CRIMINAL CASE NO.63 OF 2008

REPUBLIC.....PROSECUTOR

VERSUS

PHILIP KENEI1ST ACCUSED

ANTHONY NDEMBA2ND ACCUSED

RONALD ORORA3RD ACCUSED

JUDGMENT

Philip Kenei, Anthony Ndemba and Ronald Orora, hereinafter 1st, 2nd and 3rd accused respectively, were on 10th September, 2008 arraigned in court on an information charging them with the murder of one, **Andrew Ndeti Muia**, hereinafter “**the deceased**”. It was alleged that on 22nd January 2008 at EPZ Pond Camp area, Kinanis Location, Athi River Division, Machakos District within the Eastern Province, they jointly with others not before court murdered the deceased. The alleged murder was contrary to section 203 as read with section 204 of the Penal Code. All the accused returned a plea of not guilty and on 16th February, 2009, their trial began in earnest before **Lenaola J.**

PW1, **Benson Njeru Munene**, testified that on 22nd January, 2008 at about 10.30 a.m. whilst at work at EPZ, Athi River, he heard noises from his living quarters. He proceeded there and found a man being beaten by 4 other men, among them were the accused. The 4th person was **Ismail** and was not among the accused. The accused were using slasher and simi in assaulting the deceased. He knew the accused very well as they were workmates and lived in the same quarters. He talked to the accused and

they retorted that the deceased had stolen a phone and money from **Ismail** the previous day. His intervention almost got him in trouble as the four threatened to beat him as well. He left the scene and called the police and his security officer, **Mr. Mwanzia**. The deceased had been seriously injured on the head and hands. By the time the police arrived on the scene, however, the deceased had passed on. The relatives of the deceased got wind of the death and came to get the assailants and when they failed to find them, they burnt a nearby forest in anger. The 1st and 2nd accused were then arrested on the same day. The 3rd accused was arrested the following day but **Ismail** remains at large to date.

Cross-examined by **Mr. Konya**, learned counsel for the accused, he stated in response that he was a sewerage attendant at EPZ. The accused were not in his department but worked as security officers. He denied having found a crowd of 50 people beating the deceased. Nonetheless there were about 5 people watching the accused assault the deceased. The deceased was not killed by a mob. He could not recall which accused had what weapon. The 2nd accused was arrested on the same day at the scene by one, **Mutinda** and in his presence. The 1st accused had hidden in the ceiling of a home. He was also present when the 3rd accused was arrested at the company offices where he had taken him. They were all taken to Athi River Police Station.

PW.2, **Joseph Ndambuki**, on his part testified that he was a sewerage attendant at EPZ. On 22nd January, 2008 at about 11.30 a.m. whilst at his place of work, with PW.1, they heard noises from the camp where they lived. They decided to go and see what was happening. They found a man seriously beaten and bleeding profusely. He recognized the victim whom he had seen earlier walk past him. He tried to stop the assault but one, **Ismail** who had a panga and a knife tried to cut them. He was in the company of the accused. He knew the accused very well as they were employees of EPZ too, as security officers and used to live with them in the same camp. The four had a slasher and panga but he was not certain who had which weapon. All the four were beating the deceased but **Ismail** was incensed more than the others. The witness sought help by calling the Chief security officer who came. He then went back to close his office and when he came back to the scene about 20 minutes later, he found that the deceased had passed on. The relatives of the deceased invaded the camp and people in the camp ran into the forest nearby. The relatives cut trees and lit the forest with fire. They caught up with some employees and beat them up.

Cross-examined, he stated that PW.1 and him reached the scene at the same time. Much as the main actor who caused the death was **Ismael**, the accused helped him. He did not know what happened to the weapons but 1st accused was found with a panga in his house. He denied that the deceased was beaten by the mob. The 2nd accused cut the deceased with a slasher whereas the 3rd accused held the deceased by the leg.

PW.3, **Ernest Kemboi**, testified as follows: he was a casual at EPZ ponds. On 22nd January, 2008, he was at work with the 1st accused. At about 10.30 a.m. 1st accused was called on phone by his workmate, **Ismail**. He left immediately. The witness continued working until about 12 p.m., when he returned to the camp. On the way he met **Boniface Alubisia** and they proceeded together. They came across a group of people and the deceased who was sitting down but bleeding from the hand. He saw all the accused at the scene. Though he did not know the injured man, he heard **Ismail** asking him about the phone. **Ismail** then threatened to burn the deceased with petrol. He walked away. He returned later and was informed that the deceased had passed on. After a few minutes, the deceased's relatives attacked the camp and he ran away into the forest and hid there. They caught up with him and beat him up thoroughly. They forcefully returned him to the scene and was rescued by the local chief and police who

had come.

Cross-examined, he stated that though he knew PW.1 and PW.2, he did not see them at the scene. There were about 20 people at the scene and the police had not come. He never saw anyone hitting the deceased.

PW.4 **Mathew Oyiechi** testified that he was a supervisor at EPZ. On 22nd January, 2008 at about 3 p.m. he received a call from the 1st accused who claimed that the camp was under attack. He rushed with security personnel to the camp. On the way, they picked a local chief and 2 administration police officers. The information in his possession was that a person held at the camp had died. He proceeded there and saw the dead person. The nearby forest had been set ablaze by relatives of the deceased. He brokered a truce between the parties. Later the police came and took the body away.

PW.5, **Richard Ngetich** testified that he was the security field supervisor at EPZ ponds. On 22nd January, 2008 at 1 p.m., he received a call from the 1st accused stating that a man had been injured at the camp. He reported the matter to his immediate supervisor. The 1st accused stated that the man had been injured by **Ismail**.

PW.6, **C.I.P. Regina Mbithi** testified that on 22nd January, 2008 at about 2 p.m., she received a telephone call from the Assistant Chief Kenanis, who informed her that a body was lying at EPZ ponds camp. Together with **P.Cs Kasamba** and **Nthiwa**, they proceeded to the scene and found the deceased lying on the ground. He had injuries on the left chest and head. She interviewed those present and PW.2 gave her the names of the culprits and or suspects. The reason for the attack on the deceased was because **Ismail** had claimed that the deceased had robbed him of his phone and money. **Ismail** saw the deceased and called his colleagues to punish him. The suspects were not at the scene as they had fled from the hostile crowd that had formed after the incident. She laid an ambush and on the same night the 1st accused and 2nd accused were brought by **Mwanzia** who was in charge of security at EPZ. The next day the other suspect was brought. After recording statements, she charged them with the instant offence.

Cross-examined, she conceded that there were many cases of theft and burglaries in the area. She did not recover any of the weapons used in the attack. The deceased had injuries on the body. The injuries appeared as though they were inflicted by a sharp object. She maintained that the deceased was killed by the accused and **Ismail** who is still at large. She was categorical that the deceased was not killed by a mob.

PW7 **Benson Ndunda Muia** attended Machakos Hospital Mortuary on 28th January, 2008 and identified the body of the deceased to the doctor for purposes of post mortem.

The last witness for the prosecution to testify was PW.8, **Dr. John Mutunga**. It was his testimony that on 28th January, 2008, he received a request from Athi River Police Station to perform a post mortem

on the body of the deceased which was identified to him by **P.C. Eric Kasamba** and **Timothy Wambua**. Externally he noted the following injuries:

- **Traumatic amputation of the right arm**

- **Cut wounds anterior chest and back**

- **Swelling on the left side of the head.**

Internally, there was scalp haematoma as well as subdural haematoma.

He concluded that the cause of death was head injury coupled with chest injury due to assault. He signed the post mortem report which he tendered in evidence as an exhibit.

Cross-examined, he conceded that he could not tell how many persons inflicted the injuries on the deceased but there were multiple injuries probably caused by more than one person.

With that, the prosecution closed its case.

Following submissions on no case to answer, **Lenaola J.** on 26th October, 2009 ruled that the accused had a case to answer. Accordingly, he put them on their respective defences. By the time of the defence, though, **Lenaola J.** had left the station on transfer. The task of concluding the case therefore fell on his worthy successor, **Waweru J.** On 1st March, 2010, **Waweru J.** directed that the case being part-heard, the proceedings be typed to enable him proceed with further hearing. However, it was not until 17th January, 2011 that the typed proceedings were ready. He then fixed the defence hearing for 22nd June, 2011. Come the date and **Waweru J.** too had left the station on transfer. He had been replaced by **Kihara Kariuki J.** who directed that the case be heard on 2nd February, 2011. From here, the record is silent as to what happened until 2nd November, 2011 when the case came before me; **Kihara Kariuki J.** (as he then was) too having left the station on transfer.

Having taken over the case, it was mandatory that I comply with the provisions of section 200 as read with section 201 of the Criminal Procedure Code. Having explained to the accused the purport of the aforesaid provisions of the law, all the accused elected to have the case proceed from where **Lenaola J.** had stopped. They also opted not to have the witnesses who had already testified recalled and re-summoned. They all again opted to give unsworn statements of defence and called no witnesses.

1st accused testified thus; before his arrest, he was working for EPZ in the Security Department as

the in-charge EPZ Ponds Camp. He denied committing the offence. On 22nd January, 2008 he deployed 2nd accused to escort workers whereas he assigned the 3rd accused to guard the Water Pump. He then proceeded to the other water pump in the company of PW.3. He worked there until noon when he received a signal from **Ismail**, another security guard whom he had deployed in the compound camp that he should proceed there. On reaching, he saw a large crowd of people having surrounded a person who was on the ground, seriously injured. On making enquiries from the crowd, he came to know that it was **Ismail** who had injured the person. He called for assistance from the office.

Soon thereafter, the 3rd accused came and he told him the steps he had taken over the incident. They waited for the response from their supervisors. In no time, they were attacked by relatives of the deceased whilst armed with pangas and rungs. Fearing that they would be harmed, they hid. Later he was summoned by his superiors over the incident who requested him to record a statement as the person in charge. At the station he was informed that he would be detained until Ismail was found. When he was not found, he was then charged for the offence he knew nothing about. He described the evidence adduced against him as a pack of lies. He was never found in possession of a panga.

The 2nd accused testified in his defence that he used to work with EPZ as a security guard. On 22nd January, 2008 he reported on duty and was deployed to escort casual workers to plant trees by the 1st accused who was his superior. He did so and remained with them until 12.30 p.m. when he escorted them back. A few metres to the camp he saw a crowd of people and on reaching the scene he saw a person lying on the ground seriously injured. He learnt upon enquiry that **Ismail** had claimed that the person had stolen from him. Suddenly, people from the village armed with weapons approached them and they were forced to run away fearing their own security. He ran into a neighbour's house. Whilst there, **Mr. Were**, his boss sent a vehicle which took him to the office and later to Athi River Police Station. At the Police Station, he was detained on the allegation that he was part of the security which fatally assaulted the deceased which was not true. To him the case was a set up because of his work.

Finally, the 3rd accused testified that he used similarly to work as a security guard with EPZ. On the material day he reported for duty as usual and was assigned by the 1st accused to go and guard a water pump located in a forest. He worked there until 1 p.m. and returned to the camp for lunch. As he approached the camp, he saw a crowd of people. He went there and saw a person on the ground injured. On making enquiries, one, **Oduor** who was in the crowd told him to ask their security team. In the crowd there was 1st accused as well who told him that **Ismail** had accused the person for being a thief. He proceeded to his house for lunch. Immediately thereafter, hell broke loose. The crowd started pelting windows of the buildings in the camp. He was called by his senior supervisor, **Mathew Were** and instructed to go and record a statement with Athi River Police Station. After he had recorded the statement, he was detained and later charged for an offence he knew nothing about. He maintained that the witnesses who testified against him told lies to court.

That then marked the close of the defence case. Both **Mr. Konya** and **Mrs. Gakobo** learned senior state counsel, agreed to file and exchange final written submissions. This was subsequently done. I have carefully read and considered them.

So what are the issues for determination in this suit? To my mind, there are basically two: whether the deceased was murdered and if so, whether he was so murdered by the accused.

Dealing with the 1st issue, we ought to appreciate that murder is committed where a person causes the death of another with malice aforethought and by unlawful act or omission. Malice aforethought is essentially the *mens rea* in a murder case. Malice aforethought is defined in section 206 of the Penal Code in these terms:

“206. 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 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 whether death or grievous bodily harm is caused or not, or 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 custody of any person who has committed or attempted to commit a felony.”

There is no doubt at all in my mind that the deceased passed on. Indeed all the prosecution witnesses called and who somehow came in contact with the deceased attested to this fact. PW.1 found the deceased seriously injured on the head and hands. He tried to intervene and stop the beating to no avail. He was nearly beaten as well for the effort and or endeavour. He contacted the officer-in-charge of security as well as the police. When they came they found that the deceased had passed on. PW.2 too came to the scene with PW.1. He found the deceased seriously injured and bleeding. He also tried to intervene and stop the assault on the deceased but was repulsed with threats of being assaulted as well. He sought help by calling the office and his manager. He returned to close his office and when he came back to the scene after about 20 minutes, he found the person dead. The same story was repeated by PW.3. He came to the scene and saw the deceased sitting down but bleeding on the hand, surrounded by a group of people. One **Ismail** was threatening to burn the deceased with petrol. He walked away and when he returned the deceased had passed on. PW.4 too rushed to the scene and was met with a body of dead person – the deceased. Then there was the evidence of PW.6, **Chief Inspector Regina Mbithi**, the Investigating Officer of the case. She received a call from the Assister Chief, Kenanis, informing her that a body was lying at EPZ Ponds camp. She visited the scene and found a body of a male adult lying on the ground. She noticed that it had injuries on the left chest and head. PW.7 identified the body of the deceased for purposes of post mortem. Finally, there was the evidence of PW.8, the doctor who performed the post mortem. As a result of his examination, he formed the opinion that the cause of death was head injury coupled with chest injury as a result of assault. The totality of all these is that indeed the deceased passed on.

However, was the passing on of the deceased natural, accidental or was it as a result of a deliberate act or omission of another person(s)? On the basis of the evidence on record, there is no way that the deceased could have passed on due to natural causes. According to PW.8, there was traumatic amputation of the right arm, wounds on the chest and back and swelling on the left side of the head. There was a sculp and subdural haematoma. He concluded that those injuries were as a of assault. There is no way that those injuries could have resulted in a natural death nor were they self inflicted as to bring in the element of suicide. They must have been inflicted by another person(s). Indeed there is evidence by PW.1, PW.2 and PW.3 that the deceased was assaulted by panga and slasher. The amputation of the right arm attested to by PW.8 could only have been inflicted by a sharp object such as a panga, slasher or simi. The deceased did not inflict those injuries on himself.

What was the intention of whoever inflicted those injuries on the deceased? Did he or they set out to deliberately kill the deceased, in which event, the case may be treated as murder, or were the injuries inflicted accidentally, in which case, the death may be treated as manslaughter.

I do not for a moment think that, from the evidence on record whoever inflicted those injuries did not intend to kill the deceased. To my mind, whoever inflicted the injuries had the necessary malice aforethought. The slicing off, of the deceased's right arm is an act of a grievous harm as well as commission a felony. In terms of section 206 of the Penal Code therefore, malice aforethought is established in that by inflicting the aforesaid injury, the culprit(s) intended to cause the death of or to do grievous harm to the deceased. Further by the very act, the culprit(s) intended to commit a felony. Those acts perse therefore, take the case out of the realm of manslaughter and or unintentional killing. In other words, this then, is a case of murder as opposed to death by natural causes or accidental death such that, it may point to manslaughter.

Who then committed this murder? According to the prosecution, it is the accused and one, **Ismail** who remains at large to date. However, the accused on their part deny involvement in the crime. They all claim that they came to the scene only to find the deceased having been fatally assaulted. The all blamed the assault on **Ismail**.

Is there evidence that connects the accused to the crime? It is common ground that the deceased died on 22nd January, 2008 out of cardiopulmonary arrest secondary to head and chest injuries as a result of an assault. It is also common ground that the assault was committed in broad day light, at about 10.30 a.m.to be precise. It is also common ground that the assault was within the EPZ premises. It is also common ground that all the accused are employees of EPZ and in one way or another were somehow at the scene of crime. It is also common ground that the injuries sustained by the deceased were caused by sharp objects. Indeed the deceased's right arm was severed.

The evidence linking the accused to the crime was provided by PW.1, PW.2 and PW.3. These are people who knew the accused very well as they were all employees of EPZ and lived in the same camp. They all testified as to coming to the scene only to see the accused and one, **Ismail** assault the deceased with slasher, panga and/or simi. They all denied that the deceased had been a victim of mob justice, or is it injustice. They tried to intervene and stop the assault on the deceased to no avail. In fact, some of them were threatened with retribution by the accused. The accused and **Ismail** were armed with a panga, slasher and or a simi. They all testified as to the genesis of the assault. It was alleged that the deceased had stolen a mobile phone and money belonging to **Ismail**. In their immediate reports to the police, PW.1

and PW.2 mentioned the accused and **Ismail** as the culprits. It was on the basis of such reports that the accused were arrested. However, **Ismail** managed to escape and he is still at large. According to PW.1 the 1st accused was arrested from a ceiling of a house where he had hidden. If at all the 1st accused was innocent of the crime, why would he then hide in a ceiling of a house. Again, according to PW.1, **Ismael** started the attack on the deceased and then called upon the accused to join in which the accused willingly did so. According to PW.2, the 1st accused when arrested had a panga. Could this have been the panga used in assaulting the deceased?

According to PW.2, again the 2nd accused cut the deceased with a slasher and the 3rd accused was holding the deceased by the leg. To my mind, the evidence of these witnesses is so detailed and corroborative so that the possibility of the case against the accused being a frame up is a long shot. What these witnesses saw, observed and testified upon must be true. There is no evidence of any bad blood between these witnesses and the accused as would have spurred them to gang up and falsely testify against the accused. In other words, there is no evidence of any grudge between the accused and the witnesses to justify their implication of the accused with such a serious crime.

The accused have sought to discredit the evidence of these witnesses on account of contradictions in their testimonies with regard to the time they arrived at the scene, weapons used in the attack and who, among the accused had what weapon, the number of persons at the scene and the time of death of the deceased. To my mind these are minor discrepancies that do not go to the root of the prosecution case. They can be ignored. After all, people observe things differently. I cannot accept the submission by counsel for the accused that because of those discrepancies, then the said witnesses were dishonest, not candid and not worthy of belief by the court. It will be expecting too much of the witnesses who were merely approximating time to be exact. After all there was no evidence that each accused had a watch and immediately they arrived at the scene they checked their watches for the exact time they arrived at the scene. There is evidence that these witnesses did not arrive at the scene at the same time. Depending on the time of arrival, the crowd could have been reduced or had swelled.

It also matters not with regard to the weapons used in the attack, whether slasher, panga, simi and or knife. It also does not matter which weapon was used on the deceased and by whom among the accused. What is of paramount importance is that, and which comes out clearly in the evidence, the accused and the run away fugitive with common intention caused the death of the deceased.

Section 20 of the Penal Code talks of principle offenders. It provides inter alia:

“20. (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;

The actions of the accused with regard to the deceased fits completely hand and glove in any of the above scenarios. Therefore, it does not matter that some witnesses could not tell which accused had which weapon and which accused did what with the deceased using the weapon. What is important again, is that they were seen assaulting the accused with a panga, slasher, simi and or knife. As a result of the assault, the deceased was killed. In any event there is evidence by PW.1 that he found the accused beating the deceased. That **Ismail** started the attack on the deceased and then called upon the accused to join him. They did so willingly. The evidence of PW.2 is to the effect that the 2nd accused cut the deceased with a slasher and also saw the 3rd accused holding the deceased's leg. Simply put, the accused aided and abetted, **Ismail** if at all, in the commission of the offence. They are all principle offenders as **Ismail**, if at all.

Then there is the element of common intention. In my view and on the evidence on record, it is easy to find that by their actions the accused and **Ismail** acted in concert with intent to kill the deceased. Indeed common intention may be inferred from presence, actions and omissions and or failure to dissociate oneself from the actions of the others. The accused and **Ismail** participated in a common unlawful purpose with fatal consequences and they must be held to account.

As already stated, the accused and the three main prosecution witnesses were workmates and lived in the same quarters. The offence was committed at about 10.30 a.m. in broad daylight when conditions were favourable for positive recognition. The accused were at the scene. They did not discount this fact. Indeed, they readily admitted. However, they denied involvement. They apportioned the blame to **Ismail** and the mob. However, PW.1, PW.2 and PW.6 were categorical that the accused and not the mob assaulted the deceased. I see no reason why I should not believe the evidence of PW.1 and PW.2 on this issue of recognition as well as their participation in the crime. It was also the testimony of PW.1 and PW.2 that they were the ones who gave the names of the accused to the police as the prime suspects in the murder of the deceased when they arrived on the scene. Thereafter they were all arrested in the presence of PW.1. He even took the 3rd accused to the company offices whereat he was arrested. Accordingly, the accused cannot be victims of mistaken identity and or recognition.

To my mind, the defences advanced by the accused cannot hold water. They are mere denials that do not challenge the prosecution. Water-tight evidence linking the accused to the commission of the offence. They have hipped the blame on **Ismail** knowing very well that he is at large. The defences are themselves self-serving and aimed at exonerating themselves from the callous offence they committed, so that **Ismail** can take the bullet on their behalf. This will not do. The accused were all placed at the scene of crime by PW.1, PW.2 and PW.3.

As correctly submitted, by the learned State Counsel, PW.3 testified that at 10.30 a.m., 1st accused was called on phone by his workmate, **Ismail** and he left immediately. This then gives 1st accused opportunity to be at the scene of crime at the material time. Again according to PW.5 1st accused called him at about 1 p.m. and told him that the man who had injured **Ismail** had been apprehended. But as it turns out, it was the man who had been fatally injured and not **Ismail**. 1st accused also called PW.4 at 3 p.m. alleging an

attack on the camp. Between 10.30 a.m. and 3 p.m., what was 1st accused doing at the scene. What was of such great importance to the 1st accused with regard to the call by **Ismail** that compelled him to leave his work station, proceed to the scene and remain there all that time. The 1st accused defence is clearly an afterthought which must be rejected.

The 2nd and 3rd accused's defences are similar save that the 2nd accused alleges that he was framed with the case because of his strictness at work. Again, all the defences are afterthoughts. 2nd accused did not even raise the issue of his strictness at place of work to the witnesses who testified, in particular, PW.1, PW.2 and PW.3.

The totality of the evidence on record point to the accused as the perpetrators of the crime. They jointly assaulted the deceased inflicting on him fatal injuries to which he subsequently succumbed. I am therefore satisfied that the prosecution has proved its case against the accused beyond reasonable doubt. Accordingly, I now enter a conviction against each accused for offence of murder contrary to section 203 as read with section 204 of the penal code.

Ruling dated, signed and delivered at Machakos this 15th day of February, 2012.

ASIKE-MAKHANDIA

JUDGE