REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

Criminal Case 52 of 2009

REPUBLIC ..... PROSECUTION

=VERSUS=

ALI ABDALLA MWANZA ..... ACCUSED

JUDGEMENT

The accused **ALI ABDALLA MWANZA** faces a charge of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE**. The particulars of the charge were given as follows:

"On the 13th day of December, 2009 at Kwahola Estate in Changamwe District within Coast Province, murdered MUTIA KANO"

The accused who was represented by **MR. MWAKISHA** Advocate entered a plea of ***'Not Guilty'*** to the charge. The learned State Counsel who led the prosecution on behalf of the State called a total of four (4) witnesses in support of their case.

The brief facts of the prosecution case were that on 13th December 2009 at about7.00 p.m. **PW1 MUSYOKI KANO** was on the way home from a food kiosk. He came across a crowd and a lot of commotion. **PW1** moved closer to check. He found that his younger brother ***'Mutua'*** (the deceased herein) was the cause of the commotion. **PW1** said he saw the accused hit the deceased on the head with an iron rod, all the while claiming that the deceased had stolen a motor-cycle. **PW1** attempted to intervent to save his brother but the accused caught hold of him instead. **PW1** managed to free himself and ran to Changamwe Police Station to report the incident.

At this point the story is taken up by **PW2 AMBROSE JUMA KEYA**, a village elder. He told the court that upon being alerted that a mob was beating up a suspected thief he rushed to the scene near Nameless Bar. He found the deceased on the ground being beaten up by a mob of boda boda cyclists. **PW2** said that the accused who appeared to be the ring-leader hit the deceased on the head with an iron rod. **PW2** tried to intervene but the charged crowd paid him no heed. He then saw accused put the injured man on his motor cycle and ride off. The deceased was taken to a place in Kwahola where attempts were made to set him alight using a tyre. By this time police had been alerted about the incident. **PW3 CORPORAL DAVID KINGORI** a police officer attached to Changamwe Police Station went to the scene at Kwahola and rescued the deceased. He rushed him to Coast General Hospital where the deceased unfortunately died whilst undergoing treatment. **PW3** arrested the accused at the scene and took him to the police station. The accused was eventually charged with this offence of Murder.

At the close of the prosecution case the accused was ruled to have a case to answer and was placed

on his defence. The accused opted to make a sworn defence in which he denied any involvement in the death of the deceased. The accused told court that he just happened upon the scene where mob justice was being administered to a suspected thief and that the police arrested him for no reason. It is now the duty of this court to analyze the evidence on record and determine whether the charge of Murder has been proved beyond a reasonable doubt.

The charge of Murder is defined in S. 203 of the Penal Code as follows:

"any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of Murder"

The offence of Murder has three (3) key ingredients all of which must be proved beyond a reasonable doubt. These are:

1) The fact of death of the deceased person and the cause of that death

2) Proof that the death of the deceased was the direct result of an unlawful act or omission on the part of the accused – this constitutes the ***'actus reus'*** of the offence and lastly

3) That the said unlawful act or omission was done with malice aforethought – this constitutes the ***'mens rea'*** of the offence.

The first ingredient is quite straightforward and was readily proved. **PW2** a brother to the deceased identified the deceased as ***'Mutua Kano'***. **PW4 DR. K.N. MANDALIA** was the consultant pathologist who conducted the autopsy examination on the body of the deceased. He told the court that he noted fractures of the skull as well as bleeding over the brain. In his expert medical opinion the cause was ***'intracranial haemorage due to skull fractures due to head injury'***. This is expert testimony which has not been challenged by the defence. The evidence on cause of death is quite consistent with the evidence that the deceased was hit on the head with iron pipe. I find this unlawful act to have been the direct and proximate cause of the death of the deceased.

The next important question is whether there is sufficient proof that it was the accused who hit the deceased on the head with an iron rod. **PW1** and **PW2** were both eye witnesses to the incident. **PW1** told the court that when he went to investigate the cause of the commotion he found his brother (the deceased) being assaulted by the accused. In his evidence **PW1** says:

"Accused was holding an iron rod which he used to hit the deceased. I saw accused hit the deceased with the iron rod. He hit him on the forehead. The deceased fell down ..."

This evidence given by **PW1** is corroborated in all its material respects by the village elder **PW2** who upon being alerted of the incident also rushed to the scene. **PW2** stated:

"Accused had a metal rod in his hand. He was using it to beat the man"

The incident occurred at about 8.00 p.m. No doubt it was dark. However the two eyewitnesses both testified that there was sufficient visibility from lights nearby. **PW1** said there were electric streetlights about 20 feet away whilst **PW2** also spoke of electric street lights about 3 metres away. The fact that the two witnesses do not appear to agree on how far away these street lights were does not in any way negate the validity of their testimony. It could very well be that one or both of them is poor at estimating distances. However they both positively identified the accused as the man they saw hit the deceased on the head with an iron rod.

I am further convinced on the reliability of this evidence on identification because each witness spent a fair amount of time at the scene and each spoke to the accused. **PW1** told the court that he spoke to accused and tried to intervene to save his brother. Instead the accused turned on **PW1** and held him and boxed him. **PW1** managed to escape and ran to the police station. On his part **PW2** stated:

"The leader of the group beating the man was accused. I spoke to accused and I pleaded with him to leave the man. He said the man was a thief"

It is clear therefore that both witnesses had ample opportunity to see and identify the accused as they spent a sufficient amount of time trying to persuade him to release the deceased.

Aside from this evidence of visual identification at the scene **PW1** and **PW2** both testified that the accused was a person who was well known to them. **PW1** in his evidence said:

"I knew the accused before this incident .... I knew the accused by name and the work he did"

On his part **PW2** stated:

"I knew the accused well. He is a fellow villager. His name is Ali"

Thus there is clear evidence of recognition. In the case of **ANJONONI & 4 OTHERS –VS- REPUBLIC [1980] KLR 59** the Court of Appeal held that:

"a case of recognition not identification of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other"

This applies in this case where both eyewitnesses knew the accused well before the incident. There is therefore in these circumstances remote possibility of a mistaken identity.

Both **PW1** and **PW2** gave graphic and consistent details of the role which the accused played. **PW2** told court that although there was a crowd (or a mob) present the accused appeared to be the ring-leader. **PW2** also told court that he saw the accused place the injured man on his motor-bike and ride off with him. The evidence of **PW1** and **PW2** is further corroborated by **PW3** the police officer who went to rescue the deceased. **PW3** rushed to the scene at Kwahola where he identified the accused whom he said he saw pushing a tyre towards the deceased – no doubt with the intention of setting him alight. **PW3** also named the accused as the ring-leader of the mob. From the evidence adduced in court I have no doubt that the deceased was the unfortunate victim of mob justice (or rather mob injustice) on suspicion of being a thief. However even though a mob may have been involved in assaulting the deceased, I am satisfied that clear evidence has been adduced to show that it was the accused who hit the deceased on the head with an iron rod. This is the unlawful action which led to the fracture of the deceased's skull which was the proximate cause of his death.

In his defence the accused denies any involvement in the assault on the deceased. He says he merely came across the scene of mob justice and police arrested him for no reason. Why would **PW3** want to frame the accused? What possible motive would he have? Similarly what possible motive would **PW1** and **PW2** the village elder have to frame the accused? There is no evidence of a pre-existing grudge between them. I was able to observe the witnesses as they gave evidence. In my view they were honest and truthful. Their evidence was consistent and all remained unshaken under cross-examination by defence counsel. I dismiss this defence as a mere denial. From the evidence on record I am satisfied that it has been proved beyond a reasonable doubt that it was the accused who hit the deceased on the head and thus caused his death.

The last ingredient requiring proof is that of malice aforethought. This is defined in Section 206 of the Penal Code as follows:

"Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances –

(a) .....

(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 harm is caused or not, or by a wish that it may not be caused.

(c) .....

(d) .....”

The accused being a person of sound mind **must** have known that his vicious attack on the deceased would lead to his death or at the very least would cause grievous harm to the deceased. Having no regard to these possibilities the accused went ahead to land the fatal blow on the deceased's head. I am satisfied that in the circumstances malice aforethought as defined by Section 206(b) has been proven.

Finally taken in its totality I am satisfied that this charge of Murder has been proved against the accused to the standard required in law which is beyond a reasonable doubt. I therefore convict the accused as charged.

Dated and Delivered in Mombasa this 11th day of July 2012.

M. ODERO
JUDGE

In the presence of:

Mr. Hamza holding brief for Mr. Mwakisha for Accused

Mr. Tanui for State

M. ODERO
JUDGE
11.7.2012

COURT: 18th July 2012 for mitigation and sentence.

M. ODERO
JUDGE
11.7.2012

18.7.2012
Before: Hon. Lady Justice M. Odero
Court Clerk – Mutisya
Mr. Tanui for State
Mr. Mwakisha for Accused

MR. MWAKISHA: We seek leniency. Accused is a father of 4 young children and is the sole bread-winner. I urge court not to impose the extreme penalty of death. I urge court to take into account the circumstances of this case. I urge court to take into account the Court of Appeal decision in **Godfrey Ngotho vs. Republic** where it was held that the death penalty is not a mandatory sentence for Murder.

COURT

Mitigation is noted. Due to the accused's reckless actions a human life has been lost. The offence of

Murder is a serious felony for which a deterrent sentence is merited. I hereby sentence the accused to serve forty (40) years imprisonment. He has a right to appeal within 14 days.

M. ODERO
JUDGE
18.7.2012