



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

Criminal Appeal 13 of 2010

REPUBLIC.....PROSECUTOR

VERSUS

LEONARD MWANGALA MWAKALE.....ACCUSED

JUDGMENT

1. The accused was charged with the murder of CHENGO KARABU MWANDORO at Kaloleni Township on the 27th May, 2010. He denied the charges and was represented by Mr. Mwabodza. The prosecution lined up eight witnesses while the accused gave a sworn statement and did not call a witness.
2. From the narrative of the prosecution witnesses and the defence, a general outline of the material episode from which the case arose can be sketched. The deceased worked as a driver on a lorry KAX 471C and together with this turn boy Joseph Baraka Kenga (PW2), on the afternoon of 27th May, 2010 had lunch at Kaloleni Trading Centre and later continued to enjoy alcoholic drinks. Eventually they were joined by two women one being Njeri, the other Saumu Abdalla Babu (PW2). The party moved to several bars in the township.
3. About midnight it was agreed that the party changes venue to a bar called Abakulutu. The foursome began walking there. Meanwhile the accused and his friend known as Frank who were also on their way home from their own revelry in a different club at the centre caught up. They had a motor cycle. The two women (Njeri & Saumu) wanted a ride on the motor cycle which they insisted was a “boda boda” taxi. Presently an argument arose between the women and soon involved all the men as insults were hurled back and forth. Soon a fist fight broke out between the men and before long stones were being pelted. A nearby watchman Abdalla Jefwa (PW6) blew a whistle after one of the vehicles he guarded was struck by a stone.
4. In the melee, the deceased sustained a fracture of the cervical spine to which he succumbed within hours even though he had managed to run away from the scene to a bar called Umoja. According to the postmortem form completed by Dr. K. N. Mandanya, death was due to intra cranial hemorrhage due to cervical spine fracture.
5. The accused's defence agrees with the narration up to the point where fighting broke out. However he claims that he had an injury that made him limp and that he did not participate in the fight because he left

the scene to seek help, once he realized that their opponents wanted to take their motor cycle from them. As he ran to seek help he heard a whistle being blown and people running to the scene. On return however, he found only the motor cycle. The combatants had left the scene.

6. While there can be no dispute that the deceased met his death through injuries sustained in the admitted fracas on the material night, the main issue in dispute is whether the accused participated in the fight, and ultimately whether he is liable for the murder of the deceased.

7. It is the prosecution's evidence through PW1 and 2 that the accused was involved in the fight and in particular paired off to fight the deceased while his companion (Frank) squared off with PW1. However, because of the inconsistent evidence between PW1 and PW2 as to the source of light (electricity or carter vehicle headlights) it is difficult to ascertain the precise actions of the combatants in the fight. What is clear though, is that four men were involved. PW1, the deceased on the one hand and the accused and his friend on the other. By his own admission, the accused left the scene before the whistle, presumably by PW6, was blown. The whistle came after the stones were thrown smashing one vehicle. That, according to him is when people armed with crude weapons rushed to the scene. Also he said a group rushed from Apex bar towards the scene.

8. The watchman (PW6) stated that after two women passed by shouting insults he saw two men throwing stones presumably after them and saying "piki piki yangu" etc (my motor bike). A flying stone damaged one of the vehicles he guarded and he went off to inform the owner. At that point, he did not mention a crowd. From the sequence of events and the general evidence only two people could have been interested in the motor cycle namely, the accused and his friend. So that even if the PW6 did not identify the two men he saw after the women, then the two stone-throwing men must be the accused and his friend. In his evidence, the accused introduced the presence of another man called Sande, who is apparently his brother. From his narration of the evening, there was no mention of Sande or another person being in his company and that of Frank. Despite the evidence of PW1, PW2 and PW6 about the number of combatants. The accused counsel did not suggest the presence of the 5th man (Sande) during cross-examination of the witnesses.

9. He said that the other (two) men had declared their intentions to take his friend's motor bike just before he (accused) left the scene. There had already been a physical confrontation and he left to get help on realizing the situation was worsening. Thereafter, he heard the whistle. It is the evidence of PW1 and PW2 that when the fight broke out, stones were thrown, injuring the deceased before a whistle was blown and shortly after the motor cycle men shouted that they were being robbed of the motor cycle. The whistle caused PW1, PW2 and deceased to flee from the scene so that on return to the scene, the accused did not find anyone. That sequence of events, even as partly admitted by the accused himself strongly suggests that the accused did participate in the fight. Indeed his alleged conduct, namely that he left the fight scene to return to the bar to seek help is not believable. Because already, he and his friend had realized their two adversaries wanted to take their motor cycle.

10. Besides PW1, PW2 and PW6 say that the motor cycle duo had already shouted about the motorcycle words to the effect that they were being robbed; as they threw stones. This was obviously a call for help from members of public. It is the evidence of PW1 and PW2, confirmed by the Umoja barmaid Teresia Mueni (PW4) that the deceased's party fled the scene, the deceased going ahead of his group after the whistle and on seeing people coming in response. The deceased having arrived first at the bar had ordered a drink but his state had suddenly changed as PW1, 2 and Njeri arrived. The deceased leaned backwards on a seat and showed signs of being in great pain. The group had to leave immediately in search of help for their friend. From this evidence there was no opportunity, nor is there evidence that the deceased was beaten by any mob responding – to the watchman's whistle.

11. Secondly, the injuries reflected in the postmortem report in my view are not consistent with those of a man assaulted by a mob, as the accused attempted to insinuate. The deceased had bruises on the face and the fatal cervical fracture, the latter which resulted from trauma - the fist fight or stone in my view could have caused such trauma.

12. The accused has suggested that his knee injury, actually abrasions as per the treatment chit, which he had previously suffered in an accident limited his movements and possibly involvement in the fight. However, his activities on the material night involved late carousing, walking relatively long distances from the bar to the scene and back and then proceeding home seem to indicate that the accused was not necessarily incapacitated. At any rate, the fight involved stone throwing and fisticuffs.

13. Reviewing all the evidence tendered before me, I am satisfied beyond reasonable doubt that the accused and his friend engaged PW1 and the deceased in a combat involving physical contact as well as missiles, namely, stones and that the deceased sustained fatal injuries in the course of the said combat. The accused and his friend formed a common intention to engage in a brawl – an unlawful act – in the course of which the deceased was fatally injured.

Section 21 of the Penal Code states:

“When two or more persons form a common purpose in conjunction with one another, and in the prosecution of such a purpose an offense is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offense.”

14. In the case of **Francis Mwangi Njarumi vs R Cr. Appl. No. 39 of 2000**, the Court of Appeal stated:

“The learned judge was sensitive to the provisions of Section 21 of the Penal Code. In that it was not incumbent upon the prosecution to prove which of the accused struck the fatal blow on the head of the deceased. The essential ingredient of the charge was that all the attackers must have formed a common intention to cause grievous harm to the deceased.”

or as in this case to beat and subdue the deceased and his companions. What is lacking in my view is the element of malice aforethought as defined in Section 206 of the Penal Code.

15. From the evidence, the combatants on both sides had been out carousing in the township late into the night and the fight was sparked off by insulting words exchanged first, between the women accompanying the deceased on the one part, and the accused and his friend on the other. Soon the deceased and the PW1 joined in and the situation degenerated into a full fledged fight, the women stepping aside.

I find that the prosecution evidence establishes a charge of Manslaughter contrary to Section 202 of the Penal code against the accused. I find him guilty and convict him accordingly.

Delivered, signed and dated at Malindi on this **17th** day of **September, 2012** in the presence of: the accused Mr. Mwabodza for him.

Miss Mathangani for the State.
Court clerk – Leah/Evans

C. W. Meoli
JUDGE

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MISS MATHANGANI-
Treat as a first offender.

MR. MWABODZA

The accused has never engaged in criminal activity. He is currently volunteering in a hospital in Mombasa. We ask for leniency so he can continue to do volunteer work in the community. He is unmarried and was looking forward to get married. He is remorseful for the events that occurred. He

should be given a non-custodial sentence.

C. W. Meoli

JUDGE

COURT -

Let the Probation Officer's Report in respect of the accused be tendered on 11th October, 2012. Bond extended.

C. W. Meoli

JUDGE