



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT MALINDI**

**CRIMINAL CASE NO. 2 OF 2009**

**REPUBLIC.....RESPONDENT**

**VERSUS**

**NASSIR MOHAMED HASSAN ..... ACCUSED**

**JUDGEMENT**

Nassir Mohamed Hassan (the accused) faces a charge of murder contrary to section 203 of the Penal Code as read with section 204 of the Penal Code that between the nights of 19<sup>th</sup> and 20<sup>th</sup> December 2008 at Matsangoni area within Kilifi, he murdered Kennedy Kyalo. The accused who was represented by Mr. Okuto, denied the charge.

The accused had hired motor vehicle registration no. KAE 6000 (lorry) to ferry mangoes for him from Hola to Mombasa. The lorry driver was Kennedy Kyalo (now deceased) – this was on 18-12-08. The lorry's turnboy was Abdulrahman Sobha (PW2). The lorry had mechanical problems which also affected the lighting system, so a mechanic Laurian Leondry (PW1) was sent to rectify the fault. The motor vehicle was repaired and proceeded with its journey at about 6.00pm. Apart from the lorry crew and the mechanic, there was accused, and six other persons. As darkness was falling, the lorry was driven slowly arriving in Marereni at 10.00pm.

They stopped for refreshments – all passengers plus driver alighted and drank *mnazi* (palm wine) but PW1 cautioned the deceased not to drink too much, because he was the driver.

They continued with their journey and got to Matsangoni at about 2.00am. There was a disco, so all alighted, had drinks, sampled the disco a bit, then decided to get back to the vehicle and proceed. After about 300 - 400 metres drive, PW1 noticed that accused was interfering with the driver, he kept touching the steering and struggling over it with the driver. PW1 cautioned the accused that his behavior could easily cause an accident but this was in vain. So PW1 told the driver:

***“This is too risky, we can’t travel with this kind of harassment, we are not moving further, park the motor vehicle here and we will sleep inside the motor vehicle.”***

So the driver parked the motor vehicle and PW1 took away the keys, ordered everyone to alight and look for a place to sleep or sleep inside the motor vehicle, he also declared that he would be the one to order the movement of the motor vehicle.

The driver alighted, removed a mattress from the motor vehicle and spread it outside the motor vehicle just under the motor vehicle. PW1 decided to go to the disco, leaving everyone else behind, he said he would return at 6.00 am when they would continue with their journey.

PW2 (the turnboy) got into the cabin of the lorry and slept while the accused's colleagues slept at the back of the lorry on top of the mangoes. The accused did not sleep and kept on walking around the motor vehicle. He wasn't talking despite the fact that those in his company spoke to him. Accused wanted the motor vehicle to be driven immediately to Mombasa, but the driver told him:

***"I am dozing, I can't drive now"***

While sleeping, PW2 heard the driver calling to him to open the motor vehicle door. PW2 who had a torch saw the driver standing up. PW2 opened the door, and the deceased requested him to direct his torch on his (deceased's) face to see whether he had any marks, because the accused had beaten him as he slept. PW2 inspected deceased's face but saw no marks. He could see the accused standing nearby holding a metal pipe in his hand. PW2 requested accused's colleagues who were at the back of the lorry, to try and calm him down; but they said that by nature once accused stirs trouble, he cannot be stopped. The deceased wondered why the accused should beat him, and he ran towards the accused, accused kept on striking the deceased with the pipe, at times hitting the body of the motor vehicle but his colleagues did nothing. So PW2 ran to the disco and informed PW1.

***"Nassir and Asumani have started a war and his colleagues say once he starts a fight, he can never be stopped, please run there while I go to call police because accused cannot be calmed down."***

So PW2 ran to the AP camp and was accompanied back to the scene by police. Meanwhile PW1 rushed to the scene and found an old man who had also hired the lorry. Upon asking for the driver, the old man replied:

***"The driver has already died, you have just passed him behind the motor vehicle."***

PW1 moved backwards and saw the driver lying on his back, he had bled heavily and his heart beat was on its last throbs. After a while the accused came accompanied by other mango dealers who had hired the lorry and PW1 asked all of them;

***"Why have you killed my driver? Why have you killed my friend?"***

As daylight broke in, people begun saying accused was the one who had killed the driver. The crowd became charged, begun shouting and accused ran towards the lorry to take his bag and flee, but the angry crowd ran after him, caught him and forced him to sit down. The mob beat him up and by the time APs arrived with PW2, accused lay on the ground unconscious with serious injuries, just next to the deceased.

It was the evidence of PW2, that accused and deceased were very good friends, but when accused consumed alcohol, he became unreasonable, insisting that his mangoes had to be delivered in Mombasa that night, even though the deceased insisted that he was dozing and would not drive at night.

On cross-examination PW1 confirmed that during the times they stopped or drinks, everyone was in a jovial mood and they even carried 5 litres of palm wine with them in the vehicle which everyone else except the driver, consumed, as the lorry moved along the journey. It was also PW1's evidence that the driver was not drunk, but accused appeared drunk, because apart from the palm wine, he was also drinking a 5mm bottle of whisky. Further that accused kept harassing the deceased, saying he was driving slowly and that his mangoes would get spoilt – which was why accused kept shifting the gears and fussing with the steering wheel. Prior to getting to Matsangoni, the accused had been calm, but at Matsangoni, he got drunk and got out of control.

PW1 was certain that although he did not witness the fight, it was definitely the accused who beat up the deceased and it seemed to him that what put the accused in a foul mood was the deceased's utterances when PW1 had gone to repair the motor vehicle in Kanagoni and deceased remarked;

***"The mangoes are not mine, even if they rot, that is not my problem"***

And according to PW1, accused did not take kindly to those remarks and he kept that in his heart and that this contributed to his aggression towards the deceased.

Accused's harassment of the driver was confirmed by PW1 in his evidence, as he had also sat in the front

cabin with the deceased, accused and PW1, said that it was accused's conduct, coupled with the driver's dozing that led to PW1 ordering a halt to the journey.

Although initially it seems accused had beaten the deceased in his sleep, by the time PW2 ran to call PW1, they were engaged in a full-fledged vicious fight and PW2 described both as being very angry but that it is the accused who was armed with a pipe, while the deceased had nothing – in PW2's words: ***“When I left the scene, accused and the driver were fighting – there was a pipe which accused had, and he kept striking the driver with it. The driver had nothing I told PW1, those people are fighting and they will kill each other... I am unable to stop them”***

Cpl. Titus Mutungi, who visited the scene confirmed that deceased's body lay next to the lorry and next to it lay the accused who had a lot of blood oozing from his head and he was unconscious. He collected a metal bar (Ex.1) from the scene, then took the body to Kilifi District mortuary for postmortem.

On cross-examination PW3 confirmed that he could not determine the level of alcohol in either accused or deceased, but he established that accused had become unruly, interfering with the control of the motor vehicle, leading to a halt in the journey. He also established that there was a fight between the two and that one was armed with a stick and another was armed with a metal bar. He does not recall collecting a stick from the scene, but it is significant that PW1 had mentioned on cross-examination that when he arrived at the scene, he saw a blood stained plank of wood. He too described the fight as very fierce and that it was the accused who started the fight.

Dr. Barbara Mambo (PW4) who produced the postmortem form (ex.2) on behalf of Dr. Gachui stated that deceased's clothing was stained in blood and soiled. Externally the body had two deep cuts on the head with an obvious fracture.

Internally there was a depressed skull fracture, and the cause of death was the head injury.

On suggestion by defence counsel that deceased could perhaps have died as a result of intoxication, Dr. Mambo was categorical that the injuries deceased had were fatal in nature as they involved a depressed fracture of the skull.

Accused in his unsworn defence confirmed being aboard the motor vehicle in question, and in the company of PW1, PW2 and the deceased. He and his colleagues had hired the motor vehicle to ferry mangoes from Hola to Mtwapa where they were to be delivered at Milly Fruit Processors. He also confirms that they consumed alcoholic drinks several times along the journey but a Matsangoni, he drunk so much liquor that he did not even know what was happening and when he came to his senses, he was at Kilifi District Hospital with severe head injuries and pains all over his body and he even thought that their motor vehicle had been involved in a road traffic accident, until he realized he was handcuffed.

Mr. Okuto submitted that the metal bar produced as the murder weapon, was not conclusive evidence, because the police officer (PW3) said the murder weapon could have been a stick or a metal bar and that the stick was misplaced at the police station. It is Mr. Okuto's contention that there was no witness to the murder, and it could not be established what had been used to kill the deceased and that the evidence was circumstantial.

It was also Mr. Okuto's submission that the prosecutor failed to call five other witnesses who were traveling together in the lorry on that fateful day and that it can only be assumed that if their evidence was called, it would be prejudicial to the prosecution case.

He urged the court to note that accused too was injured severely and to construe that the injuries were as a result of the fight, in which the accused's action should be deemed to have been in self defence. He poked holes at the doctor's finding in the postmortem report saying the same was not objective because the doctor ought to have examined the stomach contents of the deceased, to determine what he had consumed before he died.

In response, Mr. Kemo submitted that prosecution had established a prima facie case against the accused and that the circumstances pointed to the guilt of the accused, to the exclusion of anyone else as the inculpatory facts relied on are inconsistent with the accused's innocence.

He urged this court to pay regard to what PW2 witnessed and find that no other person could have inflicted the injuries which led to deceased's demise pointing out that accused's harassment all the way from Marereni, his quarrels, arming himself with the metal bar, the foul mood – refusing to speak though spoken to, - all these circumstances point to the guilt of the accused and no one else and it couldn't have been anything other than the accused who killed the deceased. As regards malice aforethought, Mr. Kemo points to the injuries observed by the doctor in the postmortem form and the fact that no one else had differences with the deceased other than the accused.

To this then, Mr. Okuto proposes that the court considers the accused's defence and take note that the whole group was on a drinking spree and the accused was temporarily incapacitated due to too much alcohol so he should not be found guilty of murder but the charge should be reduced to manslaughter because accused did not even know what was going on.

Whilst acknowledging that accused had been drinking, Mr. Kemo argues that accused did not just become troublesome after they got to Matsangoni, but that evidence discloses he had harassed the driver all the way and even after the driver stopped the motor vehicle and lay down under the lorry, accused followed him and assaulted him, inflicting fatal injuries and that accused simply decided to behave irresponsibly and was the architect of what he now finds himself in, so he cannot now say he was too drunk to know what was happening, and his defence does not dislodge prosecution's evidence.

From the evidence so far presented it is not disputed that accused was in the company of the deceased, PW1 and PW2. It is also not in dispute that they broke their journey at Matsangoni – according to prosecution witnesses, this was on account of

- (a) Accused's interference with the safety of the motor vehicle as he kept shifting gears and struggling with the steering, complaining that deceased was driving slowly yet he wanted his mangoes delivered to Mtwapa that very night
- (b) The deceased complained of dozing and was not willing to drive further
- (c) PW1 had in any event confiscated the vehicle keys as a measure of ensuring that no one drove the motor vehicle that night.

It is also apparent that accused had become agitated because his intention was for his mangoes to reach their destination that very evening and his object of ire became the deceased driver who

- a) Had made unsavoury remarks about the mangoes.
- b) Was the one to drive the motor vehicle.

I have no doubt from this flow of events and from what PW2 described that even at Matsangoni, the accused was the aggressor, he attacked deceased as he slept under the motor vehicle – not just with bare hands, but while armed a metal bar, several times. He was not acting in self defence, he was spoiling for a fight – he provoked the deceased to the extent that deceased then reacted in retaliation, and that is what degenerated into a violent confrontation. Can it really be that accused was so drunk as not to know what he was doing yet his fellow mango dealers had told PW2 that it was accused's nature that once he stirred up trouble, no one could stop him. Had the drink diminished accused's faculties or it was just an excuse to set him in the proper mood – it was simply an excuse for what he had harboured from the moment deceased expressed less concern as to whether the mangoes rotted due to late delivery?

Is that what irked the accused, and became so significant to him to the extent that he was now willing to risk even his own safety by interfering with the safe driving of the motor vehicle in a bid to hasten the journey?

I have no doubt from what the prosecution witnesses state that accused is the one who engaged deceased in a fight and resulted in his inflicting fatal injuries on the deceased. While it is true that no one saw the ending of the fight yet the chain of events, the circumstances, especially what PW2 witnessed at the

beginning of the fierce fight, and the doctor's findings, leads to only one irresistible conclusion that it is the accused who inflicted the fatal injuries on the deceased. Accused may have had some injuries from the fight but to the extent of him losing conscious – that was mob justice.

So had accused formed the *mens rea* to kill deceased or did the inebriating fluids he had been consuming affect his mind?

From the evidence, undoubtedly, the accused had taken one too many – and not just at one sitting. He had been sipping his whisky along the journey, while also downing some palm wine at every stop of their journey. And as his drinking and the journey progressed, so did his aggression and this is borne out by the evidence of PW2 who stated:

***“Accused and deceased were very good friends BUT, the moment accused touched liquor, he became unreasonable, insisting that his mangoes must be delivered in Mombasa that night and deceased insisting that he was dozing and would not drive at night.”***

My considered view is that what had been a genuine state of anxiety for urgent delivery of his perishable goods now became a consuming drive whose significance was altered by the effects of the whisky – *mnazi* cocktail accused had indulged in. This is why he could no longer even think of the danger he created for himself and his fellow passengers when he began interfering with the safe driving of the motor vehicle, fighting over control of the steering and shifting gears while the motor vehicle was in motion. His sense of reasoning had become blurred, worsened by his naturally aggressive nature which his fellow mango traders had said that once he stirs trouble, there can be no stopping him. I doubt that in his normal state of mind he would have intended to do such grievous harm to the deceased or to even snuff out his life and this situation fits in with what is contemplated by section 13(2) Penal Code to the effect that: ***“intoxication shall be a defence to any criminal charge if by reason thereof, the person charged at the time of the act or omission complained or did not know that such act or omission was wrong or did not know what he was doing”***

My finding then is that although the accused's act is what indeed led to the death of the deceased, he did not have the necessary *mens rea* which would constitute the offence of murder as his faculties had been diminished by the effects of the alcohol he had consumed. To this extent I find, and do concur with the defence counsel Mr. Okuto that the offence disclosed by the evidence is not murder but manslaughter as contemplated by section 202 of the Penal Code.

Consequently, in compliance with provisions of section 179 (2) of the Criminal Procedure Code, I reduce the offence to one of manslaughter and convict him on the reduced charge.

Delivered and dated this 15<sup>th</sup> day of **February 2011** at Malindi.

**H. A. OMONDI**  
**JUDGE**