



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MALINDI**  
**CRIMINAL CASE NO. 14 OF 2008**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**SAMUEL KALU alias JATELO .....ACCUSED**

**JUDGMENT**

SAMUEL KALU alias JATELO (referred to as the accused) was charged with murder contrary to section 203 of the Penal Code as read with section 204 of the Penal code that on 20<sup>th</sup> May 2008 at VIBAO VIWILI village in Tana River District, within the Coast Province, he murdered Hussein Kazungu.

Accused denied the charge. He was represented by Mr. Kupalia while Mr. Ogoti appeared for the State and four witnesses testified. By 30<sup>th</sup> June 2010, Mr. Ogoti had been transferred from Malindi and Miss Waigera took over the prosecution of the case on 30<sup>th</sup> June 2010 – three witnesses were heard and by 27<sup>th</sup> September 2010, Miss Waigera had left the State Law Offices and joined the Judiciary, so Mr. Kemo took over prosecution at the stage when defence was submitting on no case to answer until its conclusion.

The prosecution case rested mainly on the evidence of PW6 CHENGO NDUME, who describes himself as a friend to the accused. His evidence was that on 14<sup>th</sup> April 2008, (although he was not sure of the date), he met the accused on the way and accused requested him to accompany him to a liquor den where they begun drinking from 3.00pm – they got rather merry and begun singing. Accused then ordered for food but was told there was no food. Accused then announced to PW6, “*put the water on fire, I am rushing to the shops to buy flour*”

By the time accused returned the sun was setting and PW6 said it was getting late and it would be dangerous to walk because of the buffaloes but accused told him not to worry. Accused sat down and drank some more liquor, then went into the kitchen and caused havoc there until the lady who was in there ran out naked. Accused followed while saying:

“*Where is the woman who has just left this room*”

To which PW6 responded:

“*Who are you asking, can't you see there are many people*”

However accused insisted that the woman had fled and if he found her, then it would be a matter between him and her, saying;

*“Itakuwa mimi na yeye nikimpata”*

Pw6 called to accused, urging him to join him and forget about the woman. Accused obliged, sat down next to PW6, and they continued drinking although he kept shaking his head and biting his finger, to signify anger. PW6 tried to inquire from accused as to what the woman had done to upset him so much and urged accused to calm down, to which accused replied *“its fine”*

PW6 told accused to calm down as there were children sleeping inside the rooms, and accused suddenly got up, picked a coal of fire and said”

*“I am burning down the building.”*

Accused appeared agitated, picked the coal of fire and set the door on fire but PW6 rushed and put it off. PW6 pleaded with the accused to stop misbehaving, cautioning him that if the building burnt down, he would end up in trouble. PW6 snatched away the coal of fire and returned it where accused had picked it from. Suddenly the accused pounced on PW6 and stabbed him on the side (the scar was shown to court) – the stab penetrated to the kidney, and as appellant begun to flee, PW6 raised an alarm. People begun running after the appellant who now begun stabbing indiscriminately at anyone he found on his way as he fled. Appellant stabbed Hussein (an uncle to PW6) and young man named Mwalimu, then he made his escape. All the injured persons were admitted in hospital but Hussein ended up dying.

On cross-examination PW6 said accused was his friend whom he had never disagreed with before and he had no idea why accused stabbed him. He also confirmed that they had been drinking from 3.00pm until 8.00pm, during which time, he did not see the accused quarrel with anyone, before the commotion begun. He didn't hear any conversation between accused and the naked woman and there was no other violence from the other people in the drinking den other than accused and the fleeing lady and incidentally Hussein was not even at the same drinking club with accused and PW6, he was in another club, which was about 500m away. According to PW6, Mwalimu had come from work, and had stopped his bicycle when he heard the screams and he encountered the accused.

PW6 confirmed that darkness had fallen, so he did not get to actually see accused stab Mwalimu but the chain of events was similar and the only fleeing person who was armed with a knife was the accused. He also did not see the accused stab Hussein but based on the same line of reasoning he says the culprit was the accused. This is fortified by the fact that he heard Hussein screaming almost immediately saying:

*“Nimedungwa na mimi pia”*

*(I have also been stabbed)*

Mwalimu Karisa (pw3) told this court that on 14<sup>th</sup> May 2008 at about 6.00pm, he was on his way home from work when he met his junior father (uncle) and they teamed up together homeward. On the way, they met another person who joined them, and as they walked, they heard screams of someone saying:

*“nimechinjwa”* (I have been slaughtered)

He realized there were two people, each one of them was crying out

*“nimechinjwa”*

Someone suddenly emerged brandishing a knife menacingly. PW3 tried to move away from the man's path, but the man advanced towards him and stabbed him. The man was not known to PW3 before. He stabbed PW3 on the right side of the chest (scar shown to court) and as PW3 fled, accused followed him

saying, “nitakumaliza kabisa” (I will finish you completely). PW3 fled and hid for about half an hour and when he felt safe to come out, he found that a crowd had gathered – so he told them he had been stabbed and showed them his injury. As they were being rushed to hospital, PW3 noticed that one of the victims had injuries on the stomach and was in a very critical condition – that particular victim succumbed to the injuries.

On cross-examination PW3 stated that he did not know the deceased before the incident, and he only got to know him after they had become victims of the stabbing. He further stated:

*“I did not know the person who stabbed me. I got to know the assailant later, when we came to court. There were no lights on that date of the incident so as to enable me see and identify the assailant.”*

He was only told by the other victims that accused was the assailant, but as for PW3, he did not get to see accused, because things happened so fast.

Kauchi Bajila (PW7) was one of the persons who testified that on 5<sup>th</sup> April 2008 while at home, he heard screams at about 7.00pm and he noticed people running. He ran towards the direction of the screams and heard that some people had injured themselves, but he did not know who they were. When he realized that there were people running towards him, he ran into the bushes.

Daniel Gitau Karisa (PW1) received a report about the incident from one young man and when he went out, he found three people lying on the road with stab wounds. The next day at day break he was on his way to make a report about the incident to police when he met the accused who accompanied him to Garsen Police Station and he (PW1) recorded his statement.

PW1 on cross-examination stated that accused had told him one of the victims had been in his company but he did not say that he had stabbed them. However it was pW1’s evidence that the accused’s conduct suggested he was the culprit because he wanted to accompany him to the police station. However he stated *“I have no proof that he was the culprit”*

Safari Karisa Kingura (PW2) a younger brother to Hussein Karisa (now deceased) confirms receiving information on 14<sup>th</sup> May 2008, that his brother had been stabbed while on the way. He proceeded along the road and found many people there, so he reported the matter to the headman Gitau(PW1).

He observed that deceased had an injury on his stomach near the belly button and died days later while undergoing treatment in hospital. He did not witness the stabbing nor does he know why the deceased was stabbed.

IP Augustine Obonyo (PW4) was at Garsen Police station on 18<sup>th</sup> May 2008 at about 12.00pm when he received a call from Cpl. Nyanyu that there was a suspect of an assault case who had been arrested at a roadblock with allegations that he had assaulted three people the previous night and the victims were admitted at Malindi District Hospital. It was the accused IP Obonyo carried out investigations and had the accused charged in court where he pleaded guilty to all the charges of assault. However the P3 form had not yet been filled, he could not be convicted, while awaiting filing of the P3 forms and for the victims to recover, IP Obonyo got information that one of the victims i.e Hussein Kazungu had died at Malindi District Hospital on 20<sup>th</sup> May 2008 and the accused was then charged with murder.

PW4 Investigations revealed that accused was drinking local brew at the home of one Habajilla when a fight ensued between and another person. The two victims ie. Chengo Ngonyo and another joined in the fight, unaware that accused was armed with a knife and that is when accused drew his knife and stabbed the two victims. As he was running away from the scene, he came across the third victim, Mwalimu Karisa whom he also stabbed before disappearing.

He resurfaced the next day, pretending to be unaware of the events of the previous night and even joined the villager whom he had met on the way to make a report to police at the road block – that is the place

accused was arrested.

On cross-examination PW4 stated that his investigations disclosed that the fight was between accused and a person whose name PW4 was not able to establish, and it was over a woman.

Later the deceased and Chengo joined to assist the fellow who was fighting the accused, unaware that deceased was armed. He further established that the person who started the fight with accused, ran away, leaving the two victims with the accused, and that he is why that person was not stabbed. Pw4 denied suggesting that it was that other person who stabbed the deceased and the other person later ran away.

Dr. Chepsiron Daniel (PW5) produced the postmortem report which was filled by Dr. Mambo and the external examination disclosed a cut on the right side of the abdomen measuring approximately 1cm long, and it had been sutured. An internal examination was not done, at the request of the family.

The cause of death was stated to be penetration secondary to the stab wound in the abdomen.

On cross-examination Dr. Chepsiron stated that for purposes of establishing the cause of death, the postmortem was incomplete because there was no internal examination carried out, at the request of the relatives who did not want the abdomen opened. The doctor explained that a 1cm depth depends on the depth of the wound and whether it has affected major vessels and to ascertain that depth, then it was necessary to open up the body.

However, the doctor stated that there are other ways of ascertaining the cause of death and in this case, peritonitis means, there is something leaking into the abdomen leading to inflammation of the abdominal contents.

Accused in his unsworn defence told this court that he was at his place of work on 15<sup>th</sup> April 2008 at about 9.00am when police officers arrived and arrested him on allegations that he was among those who had caused a scene of violence and killed people at Baha Kanda Club in Vibao Viwili village. He denied ever meeting the deceased on that day, or anyone else to go for a drink and he even denied being involved in a fight. It was his testimony that he had no grudge against the deceased or his family. All he can confirm is that he entered into the club at 5.00pm and consumed some palm wine, but left for home by 6.30pm. The news about the violence at the club reached him the next day at 6.00am while he was on his way to work. He visited the scene and saw that it was littered with broken glass and human blood. He insists that despite what the investigating officer and PW6, say, the incident was not at a palm wine club, but at the home of Mzee Japheth Kazungu.

He is utterly shocked to be associated with such an incident and says this is a case of mistaken identity.

The defence counsel adopted the submissions he had made at the stage of no case to answer. This was to the effect that no one witnessed the accused stabbing the deceased and that the evidence of PW6 lacked corroboration. He expressed surprise that none of the other revellers at the local drinking den were called as witnesses, and no one identified the accused as the assailant.

Further that accused's inquiry from the village elder regarding rumours he had heard about the previous night's violence should not be construed as a sign of guilt. It was also his submissions that the cause of death was not established because no internal examination was done and no one would ever know the cause of death.

He also claimed that accused was held beyond the period recognized by the Constitution, which at the time provided that for one facing a capital charge, the maximum period he would be held in police custody would be 14 days, yet in this instance it was not until 10<sup>th</sup> July when accused was brought to court for the charge to be read. In response, Mr. Kemo submitted that PW6 who was the star witness, narrated how the accused stabbed him, PW3 and the deceased, and that they were all victims of the accused.

As regards violation of his Constitutional rights, Mr. Kemo pointed out that actually accused had been presented for by an apprehension report of 18<sup>th</sup> May 2008, and that action discharged the burden on the part of prosecution, so there was no need for a further explanation. It is true that no one witnessed the accused stabbing the deceased, and that an internal examination of the body was not carried out.

The burden lies on the prosecution to prove that

(a) The deceased died as a result of an act or omission by the accused.

(b) The accused intended to kill the deceased (i.e had the necessary *mens rea* or malice aforethought..

I have no doubt in my mind from the evidence of all the prosecution witnesses, that a person by the name HUSSEIN KAZUNGU is dead, and that he died on 20<sup>th</sup> May 2008. I also have no doubt, from the evidence of PW2, (SAFARI KARISA), Pw3 (MWALIMU KARISA), PW6 (CHENGO NDUME) and PW5 (DR. CHEPSIRON) that the said Hassan had a stab wound on his abdomen.

Accused does not deny being at a local brew den on the date in question, but he limits the time spent there to just about 1½ hours, after which he left. That is contrary to what his friend (PW6) says that they had spent the better part of the afternoon imbibing alcohol and generally making merry.

There is nothing to suggest that PW6 had any ill will towards the accused. It is apparent from his evidence that the accused was greatly incensed by the naked woman, and whom by all accounts, I suspect to be the named Habajillah – whether he found her naked, in a situation which greatly upset him, or whether he is the one who stripped her naked is not clear, but his foul mood had its genesis from that female being. And so incensed was he, that he kept shaking his head and biting his finger and he made several threats of how he vent out his anger and when PW6 then tried to intervene in his chosen path of destruction, he turned his full wrath on him and stabbed him. From the evidence in chief of PW6 and on cross-examination, there is nothing to suggest that there were other people inside the club apart from accused, PW6, and the lady who owns the den, and who fled from accused's advances or wrath, so the issue of why other witnesses were not called to testify would not arise, since no evidence was led to suggest other witnesses were present. As a matter of fact it is significant to note that Hussein (who most likely heard PW6's shout for help and rushed out to help), had not been with the pair in the *mnazi* den, he was actually in another nearby den, which was about 500m away. The evidence is largely circumstantial and I am guided by the age old decisions of **Kipkering Arap Koskei v R** regarding circumstantial evidence – that the inculpatory facts must be such that one would reach the irresistible conclusion that accused is the culprit, and that the circumstances are completely incompatible with his claim to innocence.

The circumstances are set out here and they are in a very close chain and series of events.

Accused gets up to ask the lady owner of the drinking den for food and he is told there is no flour, there is nothing to suggest that this was a bar and restaurant. In fact when he was told there was no food, he said “*put water in the fire, I am going to bring flour and he left*”. That action alone communicates volumes about what relationship he had with the lady of the “den”.

He then returns, then after a while he goes to the kitchen and creates havoc. The question is what did he find going on in the kitchen. It appears something that really fired him up, resulting in the lady running out naked – with accused hot behind her heels, demanding to know where she had gone to and swearing. Surely if there were other witnesses, and if that lady was not the accused's object of interest or significant other, then that action alone would have drawn a reaction from other patrons. Yet nothing happened until the point where accused decided to set the door on fire, then the chain moved in quick succession, he suddenly turned on PW6, stabbed him, ran off, and as PW6 screamed for help, the deceased was stabbed, and now it was the assailant's survival, anyone on his path became an object to be cleared. This is how PW3 got stabbed as he stood by to see what the racket was all about as there were shouts of “*nimehcinjwa, nimechinjwa and ana kisu* “

That quick succession of events persuades me that the person who stabbed PW6, is the same one who stabbed the deceased, who unfortunately died. I don't think this was a premeditated action, it was a reaction propelled by some very charged emotions caused by the fleeing naked woman. The malice aforethought was not formed in these actions, accused was now just reacting violently to a situation which put him in a rage.

Could the deceased have died from some other causes? Whereas it is correct that Dr. Chepsiron said the postmortem to establish cause of death was not complete, he also confirmed that from the external examination, the doctor was able to determine the cause of death – which was basically the stab wound in the abdomen. Again now from the evidence of PW3, what he observed was that the man who had a wound in his abdomen appeared critical and was not talking. There is nothing to suggest that deceased could have died of other natural causes, the events and circumstances point to the deceased succumbing to the injury inflicted on him on that night.

I warn myself of the danger of convicting on the evidence of a single witness, but my observation of PW6 even as he testified in court is that he was honest, and genuinely appeared amazed as to what came over his friend on that night, when he got wild and stabbed him. I find him a reliable witness and it is safe to believe his evidence.

Accused's own defence in fact places him at the scene where the chain of events begun, and his claims that by the time the commotion begun he was away from the scene are not persuasive – it is rejected. However as noted, from the evidence presented, are the ingredients of murder as contemplated by section 203 of the Penal Code and section 206 of the Penal Code proved? The evidence proves that accused's act of stabbing the deceased was unlawful and resulted in the deceased's death a few days later – this fits in with what is contemplated under section 202 of the Penal Code – the offence known as manslaughter consequently in compliance with the provisions of section 79 (2) of the Criminal Procedure Code I reduce this charge to manslaughter contrary to section 202 of the Penal Code and convict him on the reduced charge.

Delivered and dated this **29<sup>th</sup>** day of **March 2011** at Malindi.

**H. A. Omondi**

**JUDGE**