



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL CASE NUMBER 18 OF 2009

REPUBLIC.....PROSECUTOR

-VERSUS-

HASSAN BAUSI JUMA.....ACCUSED

JUDGEMENT

HASSAN BAUSI (the accused) faces a charge of Murder contrary to section 203 Penal Code as read with section 204 Penal Code, that on 14th September 2009 at Kizingitini village, Lamu, East District of the Coast Province, unlawfully murdered Muhammed Bwana Ali. Accused denied the charge. He was represented by Mr Okuto while Mr Kemo appeared for the state.

On 14/09/09, Ishmael Sheikh Ali (Pw 1) accompanied the deceased Muhammed Bwana Ali to a shop in Kizingitini as the deceased wanted to buy clothes – this was the Idd festive season. They went to Omar Saidi`s shop where there were many people, so the deceased suggested that they wait for the crowd to ease before entering the shop. As the pair stood waiting outside, Hassan Bausi (the accused) whom Pw 1 knew very well, arrived and pushed the accused. The deceased asked him “why are you pushing me?” and the accused`s response was “shoga”(meaning Gay). Deceased asked, “Shoga ni nani”(who is gay?) and in response, the accused struck the deceased using a stick which he was carrying. Deceased saw a young man who was carrying a stick, he snatched the stick from that young man, and the deceased and accused began fighting using sticks. Deceased slipped and fell down, and its at that point that accused removed a knife which he had lodged at his trouser waist and he stabbed the deceased on the chest on the left hand side. Accused then fled. Pw 1 and others, rushed the deceased to hospital at Kizingitini but was pronounced dead on arrival.

It was Pw 1`s evidence that accused and deceased had not quarreled before although on cross examination he states that he would not know whether there were existing grudges between accused and deceased. He was however categorical that it was the accused who started the fight by pushing an insulting the accused, and that it is the accused who produced the knife after deceased had slipped and fallen. During the attack Pw 1 tried to pull away the Deceased but that was when he was struck by accused with a stick and deceased hit the accuse in retaliation. Among the people he saw outside was one Zuberi.

Zuberi Kale(Pw 7) a fisherman at Kizingitini, was at the shop belonging to Mbongo waiting to buy a dress for his child as a gift for idd. There were many shoppers inside the shop, so Zuberi stood outside at the door. Shortly, he heard a commotion and rushed to see what was going on. He had been knifed although Pw 7 did not witness the actual stabbing. He saw the accused standing next to the deceased while holding a knife as deceased held to his chest while bending, almost falling down. Pw 7, held the deceased together with others, rushed Deceased to hospital. The accused just stood by watching.

On Cross-examination Pw 7 explained that he only went to the place of commotion when he heard deceased shout “*Amenipiga kisu*” (he has knifed me) and found the accused standing holding a knife while deceased clutched to his chest. He however does not know who started the fight or whether it was the Deceased who was armed with a knife initially. However it was his evidence that there were bright lights outside the shop although between him and the fighting pair were many people, so he could not see the actual wrestling. His concern was to assist the injured, so he did not bother to find out the cause of the fighting. Omar Said (Pw 5) who operates a shop known as Bongolan was inside his shop on 14/09/09 at 8.30Pm, which was filled with customers. While inside the shop he heard a commotion outside the shop but continued selling. Then he heard that a young man had been stabbed and rushed to hospital and after a short while he learnt that the victim had died. He confirmed that the incident occurred during the Idd festivities when there were many shoppers inside and outside his shop.

Munira Fadhil Lali (Pw 2) a cousin to the deceased, was at her home in Kizingitini when she heard some commotion and upon inquiring what was going on, she learnt that Deceased had been stabbed and rushed to hospital. She rushed to hospital but found the deceased had already died from what the Doctor described as loss of a lot of blood.

Omar Hassan Bwanamkuu, a fisherman in Kizingitini was on his way home from the mosque at about 8.00Pm, when he found the accused outside her house. Accused said he needed security for himself as he had fought someone who had died as a result of the fight. So he took accused into his house and got to hear that the deceased’s relatives were looking for the accused. So he rang Kizingitini Police who came and collected the accused.

On cross-examination Pw 3 stated;-

“The accused came to me at about 8.30Pm, said he had disagreed with the deceased, and they had fought using sticks. Accused said there were many people at the shop and in the process of jostling he elbowed the deceased who got upset, so they started fighting”

According to Pw3’s evidence, accused’s version was that as they fought, he pulled out a knife from the Deceased’s and stabbed the deceased on the left side though he did not say that it was deceased who produced the knife intending to stab him. Pw 3 observed that accused had facial injuries and that accused’s version was that he was the one who pulled out the knife from the Deceased’s trouser waist. Pw 6 Salim Bwanamkuu a village elder confirms finding the accused in his home where he had sought refuge and his son Omar Hassan informed him of the accused’s desire to surrender to police and that indeed police came and collected the accused from his home.

Corporal John Ngeiywa (Pw8) confirms receiving a report on 14/9/09 from Munira Mohammed that the accused had been stabbed using a knife, by the accused. He led a group of officers to go and look for the accused in Kengewani area of Kizingitini – his name had already been given to the police as Hassan Baiso Juma while at the village, he received a call from Omar Hassan Juma, that the accused was inside their house, so he proceeded there and found the accused whom he then arrested.

He noted that accused had a stab wound on the right thumb and a bruise on the left cheek, and he issued the accused with a P3 form. The police officer also noted that the deceased had a stab wound on his chest. The Post mortem report was produced by Corporal Ngeiywa with the consent of the defence counsel. This is because the only Doctor that is Doctor Bijuma who had been stationed in Lamu, had left the country to pursue further studies in China, and currently the entire Lamu District has no Doctor. The Postmortem report observed a cut wound on the left side of the deceased’s chest at the 5th intercostals region – midclavicle measuring 4cm long. The wound penetrated the pericardium to the left ventricular and the cause of death is recorded as severe haemorrhage.

In his unsworn defence, the accused told this court that on 14/9/09, while on his way home, he used the road which went past Mbongo’s shop where there were many people both inside and outside. He was not

interested in them and proceeded to his destination – just then, he tripped on his shoe lace and in the process he stepped on the deceased's foot. Deceased turned to him in anger and the accused apologized saying "forgive me, I am sorry". The deceased got worked up and grabbed a stick from a bystander, which he used to hit the accused on the cheek bone. Accused apologized again, and but the deceased struck him on the head. People tried to restrain the deceased in vain, and the deceased produced a knife – so those who were restraining him fled. The deceased stabbed the accused's right thumb and the duo begun to wrestle over the knife. The deceased held the accused's right wrist, and accused also held deceased's right wrist which was holding the knife – they eventually both fell down, with accused falling on his back and the deceased landing on the accused's chest. Accused got up and heard deceased calling for help saying he was injured. The accused sympathized and helped to raise the deceased and that is when he realized that the knife had stabbed the deceased. Accused was among those who helped put the deceased onto a makeshift stretcher and rushed to hospital but he died while undergoing treatment. The accused says he felt very sad and cried, then rushed to a village elder and narrated to him what had happened and that is when the village elder called police. Accused maintains that he had no intention of killing the deceased as he had no grudge or ill-will against him.

There is no dispute that the accused and the deceased had altercation as a result of the accused having either stepped on the deceased by mistake or deliberately pushed him. The altercation degenerated into a fight where the pair used sticks to assault each other. By the end of the fight, the deceased had sustained a fatal stab wound on his left side of the chest while the accused had some injuries on his face and hand. There is also no dispute that a knife featured during the physical confrontation. The issue for determination is who inflicted the fatal stab wound. Has the prosecution established who inflicted the fatal wound on the deceased. Did the accused have the necessary *mens rea* to constitute the offence of murder? Section 203 Penal Code provides that;-

“Any person who of malice aforethought causes death of another person by unlawful act or omission is guilty of murder”

Mr Okuto has submitted that the circumstances under which the offence was committed are not clear from prosecution and that there was a possibility that accused was armed with a knife. Further that during the tussle, accused was also injured and there was no malice aforethought. Mr Okuto urges this court that if it reaches any finding then the charge should be reduced to manslaughter. Mr Okuto's submission is that Pw 1 who had accompanied the deceased, was an unreliable witness because although he said there were not many people outside the shop, this was contradicted by the evidence of Pw 3, Pw 7 and Pw 8. He argues that based on this, then even Pw1's evidence that accused used a knife to stab the deceased, should be taken with a pinch of salt. Mr Okuto also draws from the evidence of Pw8 (the police officer) who said that there were rumours of a fight between the accused and the deceased but he was unable to get the actual evidence. Further that the police officer said it was in the tussle to get the knife from the deceased accused acted in excess and stabbed the deceased, but he should not be held entirely to blame.

Mr. Kemo for the State submitted that a prima facie case had been established by the prosecution as Pw 1 who was outside the shops witnesses the incident from the very beginning. It is his contention that accused was the aggressor and deceased simply reacted in self defence and this cannot be described as a fight, saying only those who arrived at the scene after the confrontation had begun, would get the impression that it was a fight. As regards claims that deceased was armed with a knife Mr Kemo submits that the same is incorrect because it is the accused who removed a knife from his waist and stabbed the deceased who had fallen onto the ground and the intention could not have been anything but to kill the deceased.

Further that the conduct of the accused after the incident is quite telling and the post mortem report is not contentious so all the ingredients of murder have been proved as there is no doubt that deceased died from the injuries inflicted by the accused. According to Pw 1, it is the accused who whipped out a knife from his trouser waist and stabbed the deceased as he lay fallen on the ground. Pw 7 who was attracted by the commotion confirms seeing the accused standing next to the deceased with a knife in his hand, and deceased holding on to his chest saying, he had been knifed. This is then completed with the accused's

own conduct of going to seek safety from a village elder's home saying he had been involved in a fatal fight.

I have no doubt in my mind for the evidence presented, that it is the accused who stabbed the deceased. Accused's defence only strengthens this. It is also very clear that this was an incident which arose over a minor misunderstanding when the deceased reacted to certain motions (whether intentional or not) by the accused, and it quickly degenerated into a fight which proved fatal. Yes deceased may have acted in self defence at the initial touch but thereafter each armed himself with a stick and exchanged blows as is evident by the injuries sustained by the accused. However accused acted in excess by using the knife, whether he whipped it from his trouser, or whether he snatched it from the deceased – I think this was now a reaction in the heat of passion and I do not think malice afterthought can be inferred for this – emotions were raging and each wanted to prove his superiority. My finding then is that accused's action does not fit with what is contemplated by section 203 Penal Code. What is demonstrated falls within the offence described by section 202 (1) Penal Code that his act, was unlawful and caused the deceased's demise. Consequently in compliance with the provisions of section 179 (2) Criminal Procedure Code, I reduce the charge to manslaughter contrary to section 202 (1) Penal Code and convict him on the reduced charge.

Delivered and dated this 9th day of March 2011 at Malindi

H A OMONDI
JUDGE

Mr. Mushelle holding brief for Okuto for accused.
Mr. Kemo for State.