



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL CASE NO. 5 OF 2010

REPUBLIC.....PROS

-VERSUS-

SALIM GALGALO HUSSEIN.....ACCUSED

JUDGMENT

SALIM GALGALO HUSSEIN (the accused) is charged with murder contrary to section 203 of the Penal Code as read with section 204 of the same code. The particulars of the offence being that on 24th January 2010 at Maweni village in Malindi location within Malindi District, murdered **DANIEL MITZANSE BAYA**.

The accused who was represented by **MR GEKANANA**(advocate), denied the charge. The Prosecution case was conducted by **MISS WAIGERA**, who later left the State Law Offices to join Judiciary and prosecution was eventually concluded by **MR KEMO**. Prosecution called a total of nine witnesses to prove their case, whilst accused was the only defence witness.

RHODA ILA BAYA (Pw 2) is the mother of the deceased and it was her testimony that on 24th January 2010, the accused went to her compound, accompanied by his mother –in-law. He said he had problems as his house had been locked by the landlord, and he needed money. Pw 2 gave him Kshs.2000/- and told him to come for the balance at 6.00Pm. Accused had brought with him a cupboard which he had offered to Pw 2 to buy, and although it was in poor shape, Pw 2 sympathized with his plight and agreed to buy it – that is why she gave him Kshs.2000/- and he was to collect the balance at 6.00Pm. Accused returned at 5.00Pm demanding for the balance. Pw 2 called her tenant one **MAMA SARAH** and requested her to talk to accused as they had agreed on 6.00Pm and not 5.00Pm. Pw 2 also called her sister, **REBECCA**, who was to give her the money, but **REBECCA** said it would only be available at 6.00Pm. Accused insisted that he gets his money instantly or he would take back his cupboard **MAMA SARAH** told accused.

“If that is what you want, then take back the cupboard, or take the Kshs. 1200/- which I have here”

Accused declined the offer and said he would take back the cupboard. He began removing the utensils from the cupboard and in the process, he found a knife inside the cupboard which he held pointedly, threatening to stab Pw 2. Maina SARAH urged the accused that there was no need to threaten Pw 2 while at the same time telling Pw 2 to step out of the house.

Meanwhile, accused had removed everything from the cupboard which he then carried outside. As he began to leave, Pw 2 asked him to give her back the knife, but he declined – she identified the knife in court. Accused left, and just then the Deceased emerged, arriving home. He asked Pw 2 what was happening, whereupon Pw 2 narrated to him the saga. Deceased then called out to the accused saying;-

“Bro, si muelewana” (meaning brother why don`t you negotiate and agree)

Accused`s response was;-

“Fuck in, what you are saying”

Accused dropped the cupboard and began advancing towards the deceased while holding the knife. Deceased sensed danger and moved back. Accused aimed his knife at the deceased`s stabbing him under the arm, just near the wrist area, accused then stabbed Deceased on the left side of the chest, face, head and under the eye. Deceased fell down, and accused stabbed him repeatedly in the abdomen. Accused then placed the last knife stab on the abdomen and left it stuck there. He then walked away and went to buy liquor. Pw 2 began screaming and one Doctor **DULU** who lived, in the neighbourhood came and removed the knife. Deceased was rushed to hospital in a critical state and he died on the way. Pw 2 told this court she had never seen the accused before and her first encounter with him was when he was brought to her by his mother-in-law.

On cross-examination she explained that the knife had been inside the cupboard. Further that Deceased`s encounter with accused did not take long, as they did not even quarrel. She also explained to this Court, that the lady who brought accused to her, was known to her as a customer who regularly fetched water from her home.

LYDIA WACERA KAMAU(Pw 3) had been Pw 2`s tenant for 3½ years – so she knew **DANIEL**(the deceased). On the date in question, she saw the accused come to demand for his money or his cupboard. She explained that at the time, they were having prayers at Pw 2`s home. Pw 2 advised accused to go away and return later. When accused returned a second time, he began quarrelling with Pw 2. Since Pw 2 was alone inside the house, she called upon Pw 3 and explained to her what was happening. Pw 3 offered to give accused the money which she had, but accused rejected the offer and ignored all pleas to come back later. Accused became so incensed, and left saying he would come back. Pw 3 was so scared, she locked herself and her children inside the house. She told this court that as accused became more and more worked up, he kicked the door and got into Pw2`s house, heading straight for the cupboard. He began removing all the utensils and throwing them on the floor while pushing Pw 2. He slapped Pw 2 who then sat down even as Pw 3 urged accused not to beat up Pw 2, as she is an elderly lady. Pw 3 told accused,

“Take the cupboard and leave”

Accused found a knife inside the cupboard and he took it. He then took away the cupboard. Pw 2 told him.

“Then give me back my money”, but Pw 3 urged Pw 2 to leave accused alone. Accused left, carrying the cupboard while in one hand he held a knife. It was then that **DANIEL** arrived and his mother (Pw 2) narrated to him what had happened. **DANIEL** (deceased) then called to accused saying;-

“Njoo tuelewane, wewe ni mume na mimi ni mume, hamna haja ya fujo” (i.e come let us reason, we are both men, there is no need for violence)

The accused turned to **DANIEL** and begun advancing menacingly while aiming the knife at her. She witnessed him stab **DANIEL** on the arm, head and abdomen, even as **DANIEL** raised his hand she watched the repeated stabbing, which ended with one last drive of the knife on deceased`s abdomen where accused left the knife stick. From the number of stab wounds, Pw 3 knew **DANIEL** would not make it. She too confirmed that one Doctor **DULU** arrived and removed the knife, then deceased was rushed to hospital, but he died on the way. And just like Pw 2, she too had not known accused before that incident. On cross-examination she confirmed that she had offered accused Kshs.1200/- but he rejected. She clarified that accused and deceased spoke outside the compound, the compound is fenced using makuti but she heard deceased urge accused to return so that they could reason together as men. However it was also her evidence on cross-examination that the makuti fence was not too high and she could see them and also that, the “conversation” between accused and deceased did not take too long – estimating it at about 5 minutes, and that it was not a quarrel **JACKSON RANDU HUNDA** (Pw 4) was Pw 2`s tenant. He had just arrived from school at about 6.00Pm on 24/01/10 when he found the accused pulling out a cupboard from Pw`s house, while holding a knife in one hand. Pw 4 met accused just as he was walking out of the gate and he too saw the deceased arriving and inquiring from Pw 2 as to what was happening. He also confirmed that deceased urged accused to go and reason with him, and to leave “the old lady” alone.

He corroborated the evidence of Pw 2 and Pw 3 that accused`s reaction was anger and he too watched as deceased moved backwards with his hands raised in self defence, but accused advanced and stabbed him several times. He identified the knife he saw accused using and that accused and deceased did not quarrel. He also clarified on cross-examination that although accused attacked deceased outside the compound, when the attack began he (pw 4) was standing at the gate watching the pair even as accused begun stabbing deceased.

JULIUS JILLO GUYO(Pw 5) is a retired medical officer and he received a report about the incident at about 6.00Pm. His help was sought so as to remove the knife which had been left stuck in deceased`s abdomen. He proceeded to the scene and found deceased in a critical condition with the knife stuck through his abdomen. It was his evidence that accused was bleeding a lot and died on arrival at the hospital. He identified the knife which he had found stuck in deceased`s abdomen.

On cross-examination he explained that he did not touch the knife, but when he turned deceased around, he breathed, and that movement caused the knife to fall off his abdomen. Pw 6 (**KIJANA MOHAMED ALI**) who was also Pw 2`s tenant gave evidence corroborating what Pw 2 – 4 stated regarding the incident. He also confirmed that Pw 4 was at the gate when the attack on Deceased begun, and was able to see what was happening. Pc **NOAH KIPLAGAT** received information about the incident and that accused had been rescued by AP`s after he had sought refuge in a neighbor`s home, hiding from a mob which was baying for his blood as a result of the incident. He rearrested the accused, then proceeded to Malindi District Hospital where deceased had been rushed in a serious condition. On arrival at the hospital, he met the clinical officer who informed him that deceased died while undergoing examination. Pc Kiplagat observed the body which had deep cuts on the left collar, down the throat, the stomach had a deep cut and some of the stomach that is intestines were protruding. The body was photographed by scenes of crime personnel and the photographs have been produced by PC **GABRIEL KOSGEI**(Pw 8) as exhibit and they confirm multiple injuries on deceased. The knife was also produced as exhibit.

Doctor **CHESIRON DANIEL KIPKOECH**(Pw 1) produced postmortem on behalf of Doctor **OMAR TAYARI** who performed Post mortem on the deceased – noted was a deep penetrating wound around the left shoulder, going into the chest cavity, a penetrating wound on the left lumbar region with cut

evisceration a penetrating wound around the right, hypochondrium with cut evisceration. Internally, there was a puncture of the left upper lobe of the lung and blood measuring about 2 litres filled the chest cavity. The cardiovascular system had a puncture and rupture of the left atrium.

In the digestive system, there was a fracture of the right lobe of the liver and as a result, the Doctor formed the opinion that cause of death was massive haemorrhage.

APC KENNEDY OCHOLA an AP at Malindi District Commissioner`s office confirmed that two elders from Maweni had informed him about the incident and that at the scene, he found a pool of blood, the victim having been removed from the scene. Accused was found inside his dwelling house seated at a corner, in total darkness while making a phone call. He was arrested and escorted to Malindi Police Station where he was charged.

Accused in his unsworn defence told this court that he was a teacher at **FRANKLIN CHIPANDE** Primary School in Matsangoni. On 24/1/10, he travelled to VOK Mombasa to visit a sick friend named **REHEMA JAJI**. He travelled back to Malindi, arriving at 1.00Pm and entered a shop to photocopy some documents, then proceeded to his wife`s house in MAWENI. His wife served him breakfast, then they left together for the market and returned home. His wife THEN accompanied him to the beach where they remained until 4.00Pm. It was his evidence that his mother-in-law was not with them. When they returned home, he found two police officers who asked him his name and whether he knew **DANIEL BAYA**. He denied. He was arrested and taken to a place where there were people making noise and who on seeing him with police, begun stoning them. The officers said there was a knife at the scene – they collected the knife, under a hail of stones, so along the way, they sought refuge at the Juvenile Remand Home. Eventually he was collected from there and taken to the police station and he was forced to sign a statement under a lot of threats. He denied murdering **DANIEL BAYA**, saying he did not even know him nor had he ever seen Pw 2 before her appearance in court. He denied selling to Pw 2 any cupboard saying she did not produce any receipt and that he never received any money from her. He insists that this was a case of mistaken identity with Pw 2 mistaking him for the person who had attacked her son. His parting shot is this;-

“I am a teacher and receive my salary, why would I borrow my money”

No submissions were made either by the State or the defence counsel. All prosecution witnesses were united in one thing – that the deceased died as a result of multiple stab wounds. The evidence of those who were at the scene was that the object used to inflict the injuries was a knife and that the person who inflicted the injuries was the accused. From the evidence, it seems the accused and the deceased did not quarrel, and that accused appeared drunk, which could be deciphered from his gait, manner of speech and smell. When he first came to seek financial aid from Pw 2, there is no evidence suggesting that he had been combative then, and it is not possible to tell whether at the time he was drunk. However upon return, he seemed to be in a very combative and unreasonable mood, insisting on being given the balance of the money immediately, taking away the cupboard (without giving back the money he had received) and all witnesses indicate that he seemed to derive pleasure in brandishing he knife menacingly to instill fear in those around him. None of the prosecution witnesses had ever seen the accused before, but they were certain he was the person who stabbed the accused. It is to be noted that the incident took place in broad daylight, accused had drawn attention from the other tenants because of his combative conduct and threats and the incident was not just a quick fleeting moment – from the time he begun harassing Pw 2 to the time deceased spoke to him and the stabbing process begun and ended, at least Pw 6 gave an estimate of about 10 (Ten) minutes.

All witnesses are also consistent that accused`s aggressive mood became heightened when deceased urged him to go back so that they could reason together as men – there is nothing to suggest that what deceased said to him or the tone used could be inferred to be an act of provocation or a challenge to a fight – it appears to me that this was just an excuse for accused to finally use the knife he had all along been brandishing. There is no doubt in my mind that the same knife he took away from the cupboard, is

the same one he used to stab the deceased – as it was properly identified by all the witnesses who were at the scene, including Pw 5 who helped to dislodge it, and the police officers Pw 7 who collected it from the scene. The Doctor's findings support what witnesses describe about the multiple stabbing and the final stab which thrust the knife into the abdomen and resulted in the intestines partially protruding.

Accused says ***“it wasn't me, it's a mistake”***. That denial is irreconcilable with the evidence presented – taking into consideration that Pw 2 did not just encounter accused once on that day – but twice, and as earlier observed there was ample opportunity for all the witnesses to see accused clearly as it was daytime and the incident lasted about 10 minutes. Indeed Pw 3 even tried to reason with the accused and made an offer which he turned down, I have no doubt in my mind that the person they saw and identified is the accused. As to whether there is proof or none that he sold the cupboard, does not take away his presence from the scene, and his aggressive conduct as described by the witnesses. Now then from all these observations is the charge of murder proved?

The main element in such a charge is that malice aforethought must be established by evidence proving one or more of the following circumstances as listed in section 206 of the Penal Code inter alia;-

(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not.

(b) Knowledge that the act or omission causing death, will probably cause the death or grievous harm.

From the two above, my finding is that the multiple stabs on various body parts of the deceased especially on the chest which houses the lungs and heart, and the abdomen which is home to the liver, targeted such vital organs that I have no doubt in my mind that accused intended not only to do grievous harm to the deceased, but to certainly end his life. The viciousness of the attack is demonstrated not only by the multiplicity of the wounds, but the depth and extent of those wound which the Doctor described as ***“deep penetrating”, “asseverating”*** and the intention is not made any less by the last thrust of the knife deep into the abdomen, infact so deep that the knife remained embedded in the abdomen – even from the ordinary human being or even an amend, such action cannot be intended to simply express indignation, and to use a knife (whose lethal effect when so used, is common knowledge to any reasonable human being) constitutes knowledge by the accused as to what is actions would result in. The photographs clearly support what is said about the injuries. Had the accused for instance raised the defence of intoxication, I would have considered this as perhaps a mitigating factor, but the court cannot offer him such defence, when he has denied ever being at the scene at all, and in any case there was no medical evidence to establish the alcohol content in his body or whether that may have interfered with his reasoning abilities.

His defence is rather disjointed, by 1.00pm he had returned to Malindi, done so much then had breakfast and by 4.00Pm he was at the beach and that police went to his house and found him with his wife – this is shaken by the evidence of the police officers. Pw 7 and Pw 9, who say infact accused's reaction indicated fear as they found him seated alone at a corner of his house, in darkness. If he was not hiding, then why sit at the corner in darkness? I therefore reject his defence in totality and find that prosecution has proved its case beyond reasonable doubt and accused is convicted as charged.

Delivered and dated this 31st day of May 2011 at Malindi

**H A OMONDI
JUDGE**