



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL CASE NO. 5 OF 2005

REPUBLIC STATE COUNSEL

VERSUS

ABDI KARIM MUSTAFA *alias* KALULU 1ST ACCUSED
HUSSEIN ABDI ALI 2ND ACCUSED
MOHAMED ABDI ALI *alias* KALIKABE 3RD ACCUSED

SUMMING UP

I now address you the assessors in this case. The two accused persons that is, Abdi Karim Mustafa and Mohammed Abdi Ali *alias* Kalikabe are before you charged with the offence of murder of Khalifa Abdi. When this case begun there were three accused persons. When the prosecution closed its case the learned judge who was hearing this case acquitted the first accused without naming that accused person. Due to the wrong title being assigned in this court file and in that ruling, Hussein Abdi Alimohammed was set free. The correct person who was the 1st accused is Abdi Karim Mustafa *alias* Kalulu. When I took over the trial of this case, at the defence hearing, it was realized by me that the wrong person might have been released. On an application being made that I do acquit Abdi Karim Mustafa, I declined. I reserved my comments to when I will deliver my judgment. Those circumstances however should be borne in mind by you as you retire to consider your opinion which each one of you should give me. The evidence of the prosecution was adduced by the six witnesses. As I go through that evidence, it is important to bear in mind that when this matter was first brought before this court only two persons were charged. The information, in other words, the charge sheet reflected Abdi Karim Mustafa *alias* Kalulu as the 1st accused and Hussein Abdi Ali as the 2nd accused. By another information dated 18th January but without indication of the year, the accused was Mohammed Abdi Ali *alias* Kalikabe as the only accused person. By another information dated 26th January 2006 it indicated Abdi Karim Mustafa *alias* Kalulu as the 1st accused. Hussein Abdi Ali as the 2nd accused. Mohamed Abdi Ali *alias* Kalikabe was the 3rd accused. Bear that in mind as you consider the evidence adduced. PW1 was a young child of standard five in primary school. He said that the deceased was his father. He identified before court all the accused persons and said that they were all his uncles and that they were brothers to his late father. He narrated what he saw occur, on 22nd August 2004 at 4pm. He stated that the accused persons attacked the deceased with stones. He further stated that it was the 1st accused who begun to throw the stones. As they did so, they were demanding money from his deceased father. This is money which had been collected from tenants of houses belonging to the accused and the deceased. He said that he saw the

1st accused throwing stones to the deceased and the other accused joined in. The deceased was taken to hospital. On being cross examined, this witness said that the deceased had earlier on that day fought with another person. The deceased was however not injured. Further that the 1st accused hit the deceased with a stone on the head and also threw more stones. He said that he saw the 2nd accused hit the deceased with his fists. He said that he saw Irene Kagendo PW2 at the scene. PW2 stated that the 1st accused was his cousin whilst the 2nd and 3rd accused were his brothers. On 22nd August 2004 at 3pm, he separated the 2nd and 3rd accused and the deceased. They were fighting. That it was the deceased who was fighting the 2nd and 3rd accused persons. When he separated them, the fighting ended. On cross examination, this witness said that he did not see the 2nd fight which occurred later. PW3 Rebecca Kajuju wife of the deceased was told by PW1 that the accused persons fought with the deceased. She did not witness the fight. The deceased was taken to hospital the following day. He died 4 to 5 days later. PW4 a police officer received a report from the 1st accused that the deceased had been attacked by 2nd and 3rd accused. When he did further investigations, he arrested 1st and 3rd accused persons who were charged with assaulting the deceased. That charge was dropped when the deceased died. PW5 was an 18 year old girl who was a neighbour of the accused. On 22nd August 2004, at about 5pm, she saw Ali and Mohamed Abdi standing with stones next to the deceased. When the 1st accused arrived, he began to protect the deceased from those accused persons. She said that they were fighting over rental collections. She however stated under cross examination that she did not witness the fight. The doctor who performed the post mortem stated that the cause of death was brain injury due to trauma. Abdi Karim Mustafa *alias* Kalulu in his defence stated that on the day in question at 5pm, he left the Vitimbi bar to go home. Before he reached home he heard screams coming from their homestead. He found on going there that the deceased was fighting with Hussein. Hussein was the accused person who was found to have no case to answer and was released. He got involved in trying to separate them because the deceased was crying saying Hussein should leave him alone. When he managed to separate them, Hussein picked a stone and tried to hit him but he ducked. On ducking, the stone hit the deceased on the head. This accused reported the matter to the police. He was however arrested and both he and Hussein were charged with assault. After the death of the deceased the assault case was withdrawn and the charge of murder was preferred. He denied that he was involved in beating the deceased. Mohammed Abdi Ali *alias* Kalikabe was out of his home on 22nd August 2005. When he returned, he found the fight between Hussein and the deceased. He too tried to separate them. He saw Hussein pick a stone and hit the deceased on the head. The deceased was taken to hospital the following day and by then he had gone on a long journey because he was a long distance lorry driver. He too denied the offence. As you retire to consider that evidence, I again wish to remind you that there was confusion in the order in which the accused persons were placed even before court. It is therefore not clear when the witnesses of the prosecution stated that they saw either the 1st, 2nd or 3rd accused hit the deceased, which person in particular they were referring to in view of that confusion. You also need to remember that the only person who stated that he saw the fight between the accused persons and the deceased is a standard five primary school student. He was the son of the deceased. You need to consider whether his evidence was corroborated by any other evidence. This is a requirement in law. You need also to consider what role, if any, the two accused persons before you played in assaulting the deceased. I do remind you that the prosecution has a burden to prove its case as against both the accused persons beyond reasonable doubt. You may now retire and I expect that each one of you will give me your opinion when you resume.

Dated, signed and delivered at Meru this 26th day of May 2011.

MARY KASANGO
JUDGE