



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
CRIMINAL CASE NO.10 OF 2007

REPUBLIC.....PROSECUTOR

VRS-

F. M.....ACCUSED

JUDGEMENT

F. M. is charged with the offence of Murder contrary to section 203 Penal Code as read with section 204 Penal Code. The particulars of the charge read as follows;-

On the 16th day of April 2007 at Mbwa Jumwali village, Kizingitini division within Lamu District of the Coast Province murdered **ISSA MOHAMED ALI**.

The evidence of **OMAR MOHAMMED** (Pw 3) aged 17 years, is that on 16/4/07 at about 11.30am, he was playing draughts with friends at a shop in Mbwa Jumwali – among them was the deceased and **F.**. This is how the game proceeded after most of the players had been knocked out, deceased played with Pw 3, whom he knocked out, Pw 3 was replaced by the deceased and was also knocked out and **F.** requested to replace him (deceased) – however the deceased refused because **F.** had not done earlier booking in the game.

F. decided to spoil the game by scattering away all the gadgets used in the game, so that no one could play. Deceased got up and beat **F.**, using his fists. **F.** left, but returned shortly, now armed with a knife. The knife shown to Pw 3 in court was a small one which he said was not the one **F.** had, saying the one he saw was a big white knife. The game begun again, but **F.** spoilt it once again, this time deceased got wild the board used in the game and hit **F.** with it. **F.** and the deceased got hold of each other and begun wrestling, whereupon the deceased floored **F.** onto the ground. Pw 3 went to hold the deceased and raised him as he was on top of **F.**. The deceased had snatched the knife from **F.**. Deceased told Pw 3 to leave him alone and went to sit down to start playing draughts once again. Pw 3 noticed that deceased had

a stain of blood on his clothes.

On cross-examination by **MR MWADILO**, who represented **F.**, the witness stated that the deceased was older and much bigger in body structure than **F.**, he also stated that the draughts board was made of wood. He also confirmed that the **F.** had a sail cloth which he was taking to his brother, and that **F.**'s sister appeared at the scene, but he did not hear her say that **F.** had forgotten a knife which was to be used in repairing the sail.

He however recalls that after the subject's had spoilt the initial game, the sister advised them to go and play elsewhere because **F.** would spoil their game. He also explained that when the **F.** spoilt the game a second time, deceased was upset and hit him using the board.

He further stated;-

“...what I saw is the two wrestle and F. was floored over the ground. Deceased grabbed the knife from F. I held the deceased to remove from F.. I held the deceased while he had the knife in his hand. I cannot tell whether the deceased got injured while wrestling on the subject, or that he fell and accidentally fell on the knife”

This incident is confirmed by **ISLAM BAISHE** (PW 4) who was also a player in the draughts game. He had been beaten out of the game and left the scene shortly to go for lunch. After about 20-30 minutes, he heard noises and on coming out he saw the deceased holding a knife while **F.** was being held by another lady. Pw 4 tried to hold the deceased and grab the knife from him, so Pw 4 moved away and avoided him. Deceased fell on the board which the group had been using in the game, and Pw 4 heard a lady scream. Pw 4 noticed blood around the deceased's chest area of his clothes. He too described the knife he saw as a big white knife, and met the small knife shown to him in court. He stated on cross-examination that he did not understand what was going on, but after the incident, he heard people saying that the subject had stabbed the deceased.

Pw 5 **MOHAMMED ALI ASUMANI** (Pw 5) gave evidence corroborating what Pw 3 stated – he had been among the draughts players, the deceased was his cousin. His evidence confirmed that the incident arose as a result of disagreement between the subject and deceased, following disruption of the game by **F.**. His evidence confirmed that the two fought (wrestled each other and that **F.** had a knife, however he did not witness how the injury on deceased was sustained because when he saw the subject bring the knife, he raised an alarm then fled.

TIMA TELE (Pw 1), a resident of Kizingitini was walking along the road within Mbwa Jumwali area on 16/4/07 at about 10.30am when he heard noises and saw **F.** running homewards. He went inside the house and heard noises and on coming out, he found that the deceased had already been stabbed. He picked up the deceased and put him on a traditional stretcher and took him to hospital. Upon arrival, the victim was pronounced dead.

On cross-examination he clarified that when he came out of the house, he found the deceased seated on a bed (which is a traditional Swahili stretcher), while leaning on the wall. He was already dead, but still held a knife in his hand. He noticed that accused (although seated up and leaning against the wall had his eyes rolled heavenwards) – blood was oozing from the diaphragm just above the stomach, under the breast. He explained that **F.** and the deceased were his relatives as they all share one great grandmother.

A post mortem carried out on the deceased revealed that he had a stab wound on the right sternal edge, penetrating to the right pericardium. There was pressure of haemopneumothorax and the cause of death was stated as “penetrating chest injury to the right lung and heart with severe bleeding”. The Post mortem report was produced as exhibit. **SERGEANT JOSEPH KIMANI**(Pw 6) who was then attached to Kizingitini Police Post rushed to Mbwa Jumwali village where he met a crowd of people and recovered a knife and a draught board – according to him, the knife he recovered had a brown wooden handle and blood stains at the tip. Members of the public told him it was the murder weapon (which he recovered, ten

metres from the scene. However he too said it was not the knife shown to him in court. He inquired as to the whereabouts of the subject and found him in the next house, alone in bed, crying, so he arrested him.

CORPORAL EZEKIEL MULEI (Pw 7) who had also visited the scene, told this court he attended the Post Mortem, and took a black blood stained T-shirt which had a cut in the chest area and which the deceased had worn. The same was produced as exhibit 2. He insisted that the knife produced in court as exhibit 1, is the same one which was recovered by Pw 6 and opined that the witnesses may have disowned it because it is a long time since the incident occurred. However he was certain that was the knife recovered at the scene because he was present when it was being handled over to the OCS. He then took the knife to the Government Analyst for examination along with the T-shirt. The report by R. **WAMBUGU**(Government Analyst) confirmed that deceased was of blood group A and the T-shirt had stains of blood group A. The subject was of blood group B. However the blood stains on the knife were too little to be examined. **SUPERINTENANT WAMBUA MUTISO**(Pw 8) had also visited the scene accompanied by Pc **MULEI** Pw 7). He found **SERGEANT KIMANI** (pw 6) at the scene and the **F.** was already under arrest – he was insistent the exhibit 1 is the knife which was recovered from scene.

F. gave unsworn testimony, at the time of his arrest he was a minor, but by the date of defence hearing, he had attained 18 years. He confirmed the evidence of Pw 3 regarding how the draughts game had fared but says that before he could take his turn to play, his sister called him and he left for home. At home, his brother sent him to get a knife and a sail from his house which was 50 metres away. He instructed **F.** to wait for him with the items, near **MOHAMED SAID`S** shop. **F.** obeyed and returned to find deceased and his other friends, still playing draughts. He confirms that deceased lost the game, when he requested to join – the deceased refused, saying,

“You will not play”

He confirms being angered by this, so he spoilt the game by pushing away all the gadgets used to play, and they all scattered away. The deceased got angry and picked a piece of timber which he used to stab **F.**, who fell. The deceased`s elder brother came, intending to beat **F.**, but the latter ran away with the deceased following him. When **F.** turned to look back, he stopped and fell, so the deceased fell on top of him. **F.** shouted for help and one **OMAR AHMED** came and pulled the deceased way. **F.** got up – at the time, deceased had a knife in his hand and people who had gathered around got hold of the deceased and held him while others escorted **F.** home. Five minutes later, he got information that deceased had been rushed to hospital and by 3.00Pm, police had arrested him. He denied committing the offence saying the deceased was his playmate and he had no ill will against him.

There is no dispute that a disagreement arose between deceased and **F.** – the sequence being that **F.** wanted to join in the draughts game, deceased objected and refused to let him play. In turn **F.** spoilt the game by scattering away all the gadgets used in the game. This action angered deceased who then begun fighting **F.**. It is also not disputed that at the time **F.** had a knife and that as they progressed in their confrontation, both fell, with the deceased lying on top of **F.**. At the end of the day, the deceased had a stab wound on his chest and which led to his death on the same day – infact moments after confrontation.

The point of departure, and therefore an issue for determination is this – who inflicted the injury on the deceased and why? Secondly what was the intention – was it to ensure his death? All the prosecution witnesses are consistent on this point, that after deceased refused to let the suspect to play, the latter went away briefly to his home and returned carrying a knife and a sail cloth. He then disrupted the game again – had he deliberately gone to his home to arm himself with a knife intending to use it against the deceased? If that was his intention then I wonder how one would explain his possession of the sail cloth, which Pw 3 confirmed he had. There is therefore the possibility that the explanation he gives that he had gone to get the knife and sail for his brother who told him to wait for him near the shops, might hold some credibility.

From his own admission and evidence of the prosecution, it is apparent **F.** was spoiling for some

confrontation, that is why he disrupted the game by scattering all the gadgets used to play. No one actually saw him stab the deceased, so this court must determine from the sequence of events, whether he stabbed the deceased or whether deceased fell on the knife accidentally. It is a common ground that deceased had overpowered **F.** and had pinned him on the ground, and was lying on him. It is also common ground that deceased was not only older than **F.**, but also had a larger body frame. My analysis of these events is that, **F.** now realizing that he had been overpowered, wrestled and reacted in self defence, and used whatever object he had in his hand to hit the accused so as to disengage from him – that is how he ended up using the knife to stab deceased. It is significant that he only stabbed the deceased once – and I am persuaded that deceased upon realizing and feeling the pain, then snatched the knife from the deceased- that is why he ended up being found in a death pose, with the knife in his hands.

I have no doubt that he died as a result of a stab wound inflicted by the said **F.** who was acting in self defence. The evidence does not establish a deliberate intention to cause the death of **ISSA MOHAMMED ALI** or knowledge that the action would result in his death. However in exercising self defence, **F.** used excessive and unwarranted force so that he ended up driving the blade of the knife into his lung and heart. I am convinced that the knife produced here is NOT the one **F.** used to inflict the injury, despite what PC **MULEI** says about the memory of witnesses – it is not just the colour of the blade that the witnesses say is different – they said the one in court was smaller and had a brown handle, yet the one **F.** had was much bigger and had a white handle. This however is not fatal – it is not a mandatory requirement that the murder weapon must always be recovered – suffice it to say that all the witnesses were consistent that there was a knife which featured in the struggle, no one else had a knife and the Doctor confirmed that the injury inflicted on the deceased was a stab wound (which would be consistent with infliction by knife). I hold that the departure in identification is not fatal.

The upshot is that the evidence does not prove a charge of murder, but is sufficient to prove a charge of unlawful killing as contemplated under section 202 (1) Penal Code. In compliance with provisions of section 179(a) Criminal Procedure Code I reduce the charge to one of Manslaughter contrary to section 202 (1) Penal Code and convict **F. MOHAMED** on the reduced charge.

Delivered and dated this 6th day of JUNE 2011 at Malindi

**H A OMONDI
JUDGE**