



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
CRIMINAL CASE NO. 17 OF 2009

REPUBLIC.....PROSECUTOR

-VERSUS-

- 1. GODANA AKALE DHADHO**
- 2. MWANAHAMISI ABDALLAH**
- 3. AWADHI SALIM KIFA.....ACCUSED PERSONS**

JUDGEMENT

GODANA AKALE DHADHO(1st accused),**MWANAHAMISI ABDALLAH**(2nd accused)and **AWADHI SALIM KIFA**(3rd accused) are jointly charged with murder contrary to section 203 Penal Code as read with section 204 Penal Code that on 28th day of August 2009 at about 1900hours at **SEFU** village in **HONGWE** location within Lamu District of the Coast Province, murdered **AMANI ALI**. The accuseds denied the charge and were represented by **MR MAYAKA**, whilst at the initial stage **MR OGOTI** acted for the State. In the course of time,**MR OGOTI** was transferred from Malindi so **MR KEMO** took over the prosecution.

The deceased was a nephew to 1st accused who is a brother to his mother **LEAH AKALE DHADHO** (Pw 1). The 2nd accused is the wife to 1st accused. There had been strained relations between pw 1 and 1st and 2nd accused, such that on 28/08/09 when 2nd accused went to Pw 1`s farm to cut trees accompanied by one **AMINA**, Pw 1 ordered her to leave. 2nd accused insulted Pw 1, then she and **AMINA** left.

On the same date at about 10.00am, **MWANAJUMA ALI** (Pw 2) was at home with her mother and she witnessed the exchange between her mother (Pw 1) and 2nd accused . At 3.00Pm when Pw 2 went to the well to fetch water, she met accused 2 who asked her what her mother had said, then assaulted her. She reported the incident to her mother (Pw 1) who told her to leave the matter – the later went 1st Accused`s house to ask her why she had assaulted Pw 2 but 2nd accused said she was not even aware of the incident. After Pw 1 had returned to her home, her brother (1st Accused) arrived and asked her to go to his home. She went there accompanied by her children except **AMANI** who had gone to play football with his friends. On arrival at 1st accused home, she found him standing outside while 3rd accused was lying on a mat and 2nd accused was sorting some maize. Pw 1 announced her arrival saying;-

“I have come”,

1st accused responded “wait a little”, then suddenly grabbed her and begun beating her despite the fact that she had a little child strapped to her back. She screamed for help, and her son **AMANI** (aged 17 years) and his friend rushed to her aid. **AMANI** (now deceased) held accused 1 and told him ***“leave my mother”***

3rd accused suddenly sprung up and held **AMANI** against a wall while 1st accused called out “bring a knife, bring a panga”. 2nd accused rushed out with a panga and a knife. She handed over the large knife to 1st accused, who began stabbing the deceased while 3rd accused held him against the wall. Accused kept striking the deceased and moving back. Pw 1 watched as 1st accused stabbed deceased in the stomach, deceased did not scream. 3rd accused then sprung on Pw 1 and stabbed her just above the nape of her neck, behind the ear and on her head. Meanwhile 2nd accused kept striking Pw 1 and the deceased, using poles.

When they eventually let go of the deceased, he begun to run as Pw 1 urged him **“AMANI my child, lets run”**. However deceased fell and could not get up, so Pw 1 fled and rushed for help. She was then taken to hospital and while there, she received information that deceased had passed on. She identified a panga the accused 1 had – the same was produced as exhibit.

On cross-examination she confirmed that the incident which had occurred earlier in the day between her and 2nd accused involved a verbal exchange which almost got physical. Pw 1 denied suggestions by defence counsel, that at the time, the deceased had urged her to beat up 2nd accused. She confirmed that the relationship between her and 1st accused had not been very good as he resented her residing in Mpeketoni, saying she should move out and look for land elsewhere – they had never seen eye to eye and never visited each other. However when he called her to his home, she did not suspect any ill motive and thought there was a good reason for doing so. She also denied that she had planned any wicked thing against 1st accused .

It was her evidence on cross-examination that when accused begun assaulting her, she called out. ***“mwanangu, mwanangu, njoo unisaidie, unishikie motto asije akaanguka”***(***my child, my child, come help me hold the baby lest it falls***)

At that point, deceased arrived accompanied by **FUNDI** and a neighbor – according to Pw 1, deceased was unarmed and did not inflict any injuries on the 1st accused. On being asked about scars on the 1st accused forehead, Pw 1 said she did not know what could have caused them.

MWANAJUMA(Pw 2) who accompanied Pw 1 to 1st accused`s homestead described how upon getting to the home, 1st Accused attacked her mother who screamed for help, and she took away the child who had been strapped on her mother`s back. She also witnessed her deceased brother arrive accompanied by one **FUNDI** and that 3rd accused held deceased and pushed his hands to the back while 1st accused called out to 2nd accused to bring him a panga – her evidence concerning how 1st accused stabbed deceased in the stomach and how 2nd accused struck the deceased several times, is similar to what Pw 1 described. She also confirms seeing 3rd accused hit her mother on the nape and arm, and she saw Deceased running away while clutching to his stomach before falling down. It was her evidence that 1st accused followed her with a spear and she ran to a neighbours`s home for safety, leaving the deceased at the scene, then shortly she heard deceased calling to her saying, ***“See how uncle has injured me”*** deceased then requested her for milk, which she brought to him and he drank. Thereafter the deceased did not utter another word, and as people gathered and police came, she showed them where the deceased lay.

On cross-examination Pw 2 confirmed that there indeed was an altercation between her mother and accused that morning but she denies that her mother vowed to teach accused 2 a lesson. She further stated that when 1st accused hit her mother with the first blow, 2nd accused who was bending collecting maize

which had been spread out on the ground stood up and asked;-

“What has she come to do?” and Pw 1 replied;-

“Its my brother who has called me”

She too states that as 1st accused beat up her mother, the latter screamed for help and that is when her deceased brother and **FUNDI** arrived. It was her evidence that darkness had begun falling, but there was a bright moon shining, so visibility was good and she could see clearly. She was insistent that while third accused held deceased to the wall, second accused would strike him on and off using a knife.

The relevance of **AMINA ATHMAN`S** (Pw 3) evidence is only to confirm that there had been a verbal exchange between Pw 1 and 2nd accused that morning, as she did not witness events leading to the deceased`s demise. The next morning 2nd accused went to her house and said they had been attacked by thugs and that deceased had been killed at her home. She also confirmed that when Pw 1 and 2nd accused were having the verbal exchange, the deceased was standing at a distance, she called him to help her separate the two fighting women and it was her evidence on cross-examination that at that time the deceased was standing at a distance, she called him to her separate the two finding women and it was her evidence on cross-examination that deceased all what did was to tell his mother (Pw 1)”let`s go” – she also told this court that the deceased never told Pw 1 to teach 2nd accused a lesson or to beat her up.

After Pw 3 returned home, 1st accused and 2nd accused went to her house as 1st accused wanted to know what had happened between Pw 1 and his wife 2nd accused. Later on Pw 1 also went to see Pw 3 to ask her whether 2nd accused had beaten her daughter. Although on cross-examination she had said 2nd accused never disclosed to her who the alleged thugs were, she corrected this on re-examination saying 2nd accused infact mentioned that the deceased and his mother were among the attackers and that deceased had come carrying a spear intending to stab 1st accused and in the process he stabbed himself with the spear.

JAMES NJERU FUNDI(Pw 7) was in the company of the deceased whom he describes as his friend at school. He had known 1st accused and 2nd accused as his neighbours in Mpeketoni for the last three years, but he only got to see 3rd accused on the date of the incident in question. It was his testimony that on 28/08/09 at about 7.00Pm, he was in the company of the deceased whom he had visited at their home and was in the process of escorting him when they heard someone scream from 1st accused`s homestead. They rushed there and found 1st accused holding the deceased`s mother, so deceased (who was ahead) went to pull his mother away. 1st accused turned onto the deceased and pushed him against a wall of the house. A struggle ensued, and although it was dark, Pw 7 saw 2nd accused rush into the house – so he fled and hid in the maize plantation. He later saw the deceased running towards the back of the house groaning. Pw 7 called out to him, then approached him and deceased said to him.

“Fundi, I have been stabbed by Sodhe(meaning 1st accused)”

Pw 7 left to go and look for the deceased`s mother to tell her about the deceased`s injury. On cross-examination Pw 7 denied suggestions by defence counsel that he had colluded with pw 1 and deceased, to attack the accused`s at their home. He explained that upon arrival at the scene deceased on seeing 1st accused holding his mother rushed to separate them and he hit 1st accused using a bicycle chain, so accused let go of his mother. He also clarified that although darkness was beginning to fall, one could see a person or object which was close by. He also denied suggestions that the accused`s were acting in self defence saying when they arrived, they found the accuseds attacking Pw 1 and pw1 then fled the scene – which is why he went to look for her so as to inform her about Deceased`s state.

Meanwhile Pw 5(**ALI HUSSEIN SUDI**) the father of the deceased received news about the incident

which indicated to him that his son had been killed and his wife injured. The information was relayed to him by his brother **HUSSEIN SUDI**(Pw 4) and his daughter **MWANAJUMA**(Pw 2). He proceeded to Mpeketoni mortuary and identified the body to the Doctor who performed post mortem. He also confirmed on cross-examination that Pw 1 (his wife) had sour relations with 1st accused concerning land which she occupied and that the differences involved 1st accused, 2nd accused, Pw 1 and the deceased. Pw 6 **PETER NJUGUNA KAMAU**(Pw 6) told this court that on 28/08/09 at about 8.00Pm while asleep in his house, he heard noises from 1st accused and 2nd accused`s homestead with 1st accused shouting.

“Jirani, Jirani nimevamuwa na wakora”

(neighbor, neighbor I`ve been attacked by thugs)

1st accused then went to Pw 6`s house with bleeding injury on his head and said he had been attacked by thugs and requested Pw 6 to accompany him to collect another neighbour to help but Pw 6 declined and advised him to inform police – which they did by placing a phone call. While at Pw 6`s home some women arrived to say that deceased`s body had been found at the scene. 3rd accused came and joined them and they proceeded to the scene where deceased lay.

SERGEANT SAMUEL NDIRANGU(Pw 9) of Mpeketoni Police Station received a phone call at about 10.00Pm that there was a case of serious assault at **SEFU** area. He proceeded to the area and got one of the deceased`s sisters in a neighbours`s home. She narrated to him what had happened, then led him to where the body lay. He informed a Kenya Police Reserve (KPR) one **JORAM**, to look out for the accuseds while he escorted the body to hospital and after the Doctor confirmed that **AMANI** was dead, body was taken to the mortuary for preservation. He observed a stab wound on the chest and a cut on the head of deceased. He confirmed that as he was proceeding to the scene, he met the deceased`s mother who had an injury on the hand and neck, sustained from the same fight. He later got a report that accuseds had been arrested and a panga, chair and T-shirt alleged to belong to the deceased were recovered – the same were produced as exhibit.

He confirmed hearing Pw 6`s version of events but concluded that 1st accused was only seeking for sympathy so that Njuguna(Pw 6) would not think that he had done any wrong. He also disputed the suggestion that accuseds killed deceased out of self defence, saying when 1st accused demanded for a panga, they actually got hold of the deceased and 2nd accused brought the panga – meaning this was a prearranged thing. The panga was found buried in the soil inside a shamba, whilst the bicycle chain lay near the deceased`s body. He also confirmed that 1st accused had an injury on his head.

PC EMMANUEL WAMAI(Pw 8) who collected the accuseds from the scene after their arrests say he found 1st accused and 3rd accused surrounded by members of the public who were angry and they were being protected by KPR. The recovery of the chain and panga was made by Pw 8 who confirms what Pw 9 stated in that regard. The post mortem was performed by **DOCTOR TUNOI** at Mpeketoni Hospital, he has however left the jurisdiction of this court, so the post mortem report was produced by **DOCTOR MAURICE BUNI** as exhibit 4 and it showed that the cause of death was due to cardio pulmonary failure due to haemorrhagic shock following penetrating abdominal stab wounds.

In his unsworn defence, the 1st appellant told this court that on the date in question, his wife (2nd accused) and **AMINA** went to collect firewood, leaving him at home. Shortly 2nd accused returned crying with claims that his sister **LEAH AKALE DHADHO**(Pw 1) had attacked her, spoiling for a fight but **AMINA** intervened saying it was **RAMADHAN** period and there should not be any violence. He did not believe 2nd accused because Leah is his sister. At 4.00Pm, 2nd accused served him food and they were joined by 3rd accused in the meal. Later on Pw 1 arrived and begun hurling insults at 1st accused, then she

physically attacked him saying she would show him who was the man and declaring:-

“If it is you who lies down and your wife lies on top of you I will show you that I have four testicles”

1st accused ordered Pw 1 to leave his home. Suddenly Pw 1 picked a panga and cut him - , then **FUNDI** hit him on the head with a panga, so 1st accused shouted for help as 3rd accused fled to safety, and 2nd accused also took off on her heels. 1st accused was overwhelmed as Pw 1 and her group attacked him and his face was covered with blood flowing from an injury on his head. **FUNDI** had a panga, while Leah`s son **AMANI**(deceased) had a bicycle chain which he used to assault 1st accused. 1st accused eventually grabbed the panga from **FUNDI** and used it to defend himself. By then one of his attackers had collapsed and as 1st accused fled, someone aimed a spear at him, but missed. 1st accused ran on, still holding the panga until he got to Peter`s (Pw 6) home and told him about the incident. Later 3rd accused joined him at Peter`s home but they were arrested while planning to go to the police. Unlike what prosecution witnesses state, 1st accused maintains that he had no grudge with Pw 1 and they had never disagreed before. All he knows is that Pw 1 had expressed an interest to own a portion of land but he had told her that was not possible and even offered her a small portion which she was unable to cultivate, and she ended up harvesting his crop with the help of her deceased son, despite receiving caution from 1st accused. Anyway that issue was resolved by the District Officer who marked the boundaries and thereafter he lived in peace with Pw 1.

2nd accused in her unsworn testimony stated that on 28/08/09 in the evening, 1st accused and 3rd accused had shared a meal and she was busy seeing maize, when 1st accused was attacked by three people at about 9.00Pm. She fled for safety and did not recognize the attackers. She went to make a report to the area village elder/area chief. Upon return she went to Pw 6`s house where she found 1st accused with a bleeding injury on his head. She proceeded to the house and found that one person lay dead there but she did not see the body. She was charged for the offence, yet she was not involved in the fight.

3rd accused in his unsworn testimony confirmed that he had visited 1st accused and 2nd accused and shared a meal with them when they were approached by a group of people who attacked 1st accused. He fled for safety and ended up at Peter`s (Pw 6) home as he waited to see how 1st accused was faring. When police arrived, he was arrested on grounds that he was at the scene yet he knew nothing about the killing.

From the evidence presented both by the prosecution witnesses and even 1st accused, it is apparent that there have been strained relations between 1st accused and his sister over issues to do with land ownership in Mpeketoni – that much is clear despite the claims by 1st accused that he had no problems with Pw1 – as a matter of fact it was due to those land related differences that they ended up having the matter referred to the District Officer to resolve. It is also clear to me that Pw 1 and 2nd accused also had strained relationship and had even engaged in a verbal exchange that morning – this is confirmed by none other than Pw 3(a friend to accused 2) who witnessed the feud and even separated them. There is also no dispute that on the date in question, there was a violent incident at 1st accused home which ended up with the deceased suffering fatal injuries. Was the deceased the assailant or the victim?

Prosecution witnesses have given a background as to what had led to the strained relations between the siblings – this line of reason is consistent throughout all the prosecution witness evidence. An individual whom I consider an independent or fair witness is **AMINA**, who infact was 2nd accused good friend. Apart from witnessing the altercation between Pw 1 and 2nd accused, she confirmed that later in the day, 1st and 2nd went to her home because 1st accused wanted to establish what had transpired between Pw 1 and his wife (2nd accused). She also confirmed that Pw 1 also went to her house to establish whether she had witnessed 2nd accused assault her child. I am persuaded that these two events are what precipitated 1st accused to summon Pw 1 to his home – he wanted to set things right concerning how his sister was treating his wife, who had gone back home weeping on account of her bad encounter with Pw 1.

The attack was witnessed by Pw 2 and Pw 7, their descriptions of what took place regarding the attack on deceased by the accuseds is consistent and corroborate one another. The Doctor`s evidence confirms the prosecution witnesses evidence that 1st accused stabbed the deceased through the stomach. What seems to have angered 1st accused more can be deciphered from the evidence of Pw 7 – that when the deceased went to rescue his mother, he struck the 1st accused on the head using a bicycle chain. This is consistent with evidence of Pw 8 and Pw 9 that a bicycle chain was recovered at the scene, and they also observed that 1st accused had some injury on his head. My perception is that deceased reacted in the most expected manner under the circumstances – he heard his mother screaming, got to the scene only to find her under siege by the three accused, the only way he could get to rescue her was to disable the 1st accused who was holding her, by striking him – I note that the force he used to achieve this was not unreasonably excessive as 1st accused survived the impact. But did the accuseds act in self defence, were they attacked by Pw 1, her son and Pw 7 as presented by 1st accused and Pw 6? The answer is found in the response of Pw 9, that the moment deceased attempted to rescue his mother, 1st accused called out to 2nd to bring him a knife and a panga which he used to inflict a deep penetrating injury on the stomach and on the head. To achieve this 3rd pinned deceased to the wall, while 2nd accused also assaulted the deceased intermittently stabbing any human being with such force in the stomach and head cannot be said to be an act where one cannot foresee the results. A knife or a panga is a lethal weapon especially when used to stab. Pinning the deceased to the wall, as was done by 3rd accused was intended to completely immobilise him and assist 1st accused in achieving maximum effect of his objective.

My finding is that the action by the three accuseds was intended to cause grievous harm to him and I have no doubt that in calling for the weapons, in availing the weapons and in immobilizing the deceased, the accuseds knew that their action would cause death or grievous harm to the deceased. The claim that they were attacked is dented by the evidence of Pw 3, their close friend whose evidence clearly shows that despite what 2nd accused says in her defence that she had not seen their attackers, she had tried to spin a web entangling the deceased as the attacker who had set upon her hapless husband (1st accused) with a spear and that he ended up stabbing himself – yet in court she wishes court to believe that she did not even know how deceased met his death. Despite her claims that she was the first one to pass through Peter`s (pw 6) house to report to him about the incident, Peter makes no such reference and says 1st accused was the one who reported to him about the incident. I am persuaded by the inference drawn by Pw 9 and from the chronology of events, that what 1st accused went to tell Pw 6 was simply intended to hoodwink him into believing that it was the deceased who had attacked him. From the moment 1st accused called for the weapons to use against the deceased, then the question of it being a reaction on the spur of the moment changed, he was able to think and call for lethal items and did not pick the nearest object within his reach, as for instance perhaps a stone at the scene, to strike the deceased. I therefore reject each one of their defences and each accused is convicted as charged.

Delivered and dated this 26th July day of at Malindi

H A OMONDI

JUDGE

Mr Kemo for State
Mr Mayaka present and holding brief for Mr Okuto
All accuseds presents
c/c-Randu Swa- Eng