



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MALINDI**  
**CRIMINAL CASE NO. 13 of 2007**

**REPUBLIC.....PROSECUTOR**

**-VERSUS-**

**WAMBUA KIOKO.....ACCUSED**

**JUDGMENT**

**WAMBUA KIOKO**(the accused) faces a charge of murder contrary to section 203 Penal Code as read with section 204 Penal Code that on 29<sup>th</sup> July 2007 at Sosoni Village in Malindi, he murdered **RANDU CHENGO NGALA**(the deceased).

The accused who was represented by **MR MATINI** during the trial, denied the charge. **MR NAULIKHA** appeared for the State. The evidence was that one **MUSYOKI** and one **MANGALE** had started fighting at the club, when **RANDU**(deceased) intervened in support of **MANGALE**, who was his friend, and so **MUSYOKI** got knocked down onto the floor. While **RANDU** and **MUSYOKI** were on the ground wrestling, it is the evidence of Pw 1, that accused picked a plank of wood and struck **RANDU** on the head thrice – the latter fell, while bleeding from the head, and accused ran away. PW 1 and others administered some first aid on the injured **RANDU**.

On cross-examination PW 1 stated that the incident occurred at 8.00Pm and although it was dark, there was a lamp in the club – that lamp had been placed at the door so as to illuminate both inside and outside the club. The reason for this, is that there were patrons both inside and outside the club. Pw 1 did not know what had caused the fight between **MUSYOKI** and **MWANGALE** and when the fight broke out, both accused and the deceased were seated outside the club. Incidentally the accused(**WAMBUA**) had arrived at the club at 6.00Pm, accompanied by **RANDU** and **MUSYOKI** and as far as PW 1 knows, all came from one area and were neighbours as well as good friends. Pw 1 also explained that the wooden plank which the accused used was just within the club, infact it is what he had been sitting on because patrons use plants of wood inside the club as seats. These wooden planks are described as flat, square shaped about the size of an A4 file.

PW 1 further stated on cross-examination that as the dueling parties pushed each other away from the illuminated area to a dark area, persons who were trying to separate them followed, and one patron requested that the lamp be moved away as it was irritating him. The lamp was thus moved further towards the place where the duelling parts had pushed each other, and infact Pw1`s husband (**KATANA**) who had joined in trying to separate the fighters, held the lamp in one hand. Pw 1 also explained that some of the wooden planks used as seats were immobile save for the one that accused sat on. After getting hit, the deceased asked **KATANA** for water to wash the blood on his face, but the request was not

granted. Deceased's relatives then came and took him away.

**TOM RUA UNDA**(Pw 2) who was at the mnazi club confirm that Pw 1 stated regarding the fight and how the accused struck the deceased on the head using a plank of wood – he witnessed the attack and infact went to the aid of the injured **RANDU** and walked with him for a short distance, then **RANDU** requested them to leave him, fell and stopped talking. He also confirmed that although it was at night there was a lamp.

The deceased's family was informed and he was taken to **SOSONI** dispensary PW 2 also identified the plank of wood accused had used to hit the deceased, saying;-

***“He held it and used the flat part to hit the back part of the deceased's head”***

On cross-examination he explained that he did not intervene in the scuffle which was going on because he did not even think that when accused got up, he had the intention of assaulting anyone. He described the lamp which was placed at the door as being a small tin lamp but bright and which illuminated a large area. Further that there was moonlight which would enable one to see. He also clarified that after the deceased went to intervene, other people joined to try and separate the fighting pair, but none of these other people was armed except for accused. **JUMWA HARE** (PW 4) was informed that her son(Deceased) had been assaulted and injured and that he could not walk. This report was given to her by **TOM UNDA**(Pw 2) she rushed and found him along the road, so she took him to Sosoni clinic, but was not treated as his injuries were so severe. She was joined by her other son **KOMBE UNDA**(Pw 3) and they looked for an ambulance to take the deceased to Malindi District Hospital. According to **KOMBE**, deceased was not bleeding much from the head, but he was not talking either. Pw 3 was informed that his brother had been assaulted by **WAMBUA KIOKO**.

The Postmortem report produced by Doctor **DANIEL KIPKOECH CHEPSIRON**(Pw 5) indicates that the deceased had a cut wound on the left parietal region extending to the vortex. Internally the deep cut wound on the head extended to the vortex and frontal region. There was intracranial bleeding and cause of death was determined as head injury secondary to assault. The Post mortem report is produced as exhibit 2. **APC ALI MZARA**(Pw 6) was then attached to SOSONI AP Post and he received a phone call from the area District Officer regarding the incident, with instructions to go and arrest the assailant. The area chief told Pw 6 that four suspects were under arrest that is **WAMBUA KIOKO, CHARO MUBINI MUSYOKA, MWENDA KIOKO** and one other. He was given a plank of wood by a village elder who said that was the murder weapon.

So Pw 6 handed over the four suspects to and plank of wood to PC **PHILIP SITIENEI**. (Pw 7) and Pw 8 PC **SALIM OMAR KINYAMA**. PC **SALIM** was the investigating officer and he told this court that he placed the four suspects in cells then proceeded to Malindi District Hospital and viewed the deceased's body which had deep cuts on the left side of the head. He produced the plank of wood as exhibit 1. He explained that by the time the piece of wood was handed over to him it did not have any blood stains and had been handled by others with bare hands.

In his unsworn defence, the appellant told this court that on 9<sup>th</sup> July 2007, at 4.00Pm, he accompanied **OMARI CHARO** and **WENDO KIOKO** to **SAMBILI KATANA'S** drinking club to drink palm wine. Later on **MUSYOKI KIVAINI** and **RANDU CHENGO NGALA** came and joined them as they were friends. There were many people drinking at the club, but each group minded its own business. As darkness fell, a small tin lamp was placed at the doorway to illuminate both outside and inside the clubhouse because there were people sitting outside. The lamp's light could not reach where accused and his group sat. Suddenly a man who was not known to the accused came where they sat and kicked **MUSYOKI**(who was the accused's inlaw) for no apparent reason. He also poured out the palm wine **MUSYOKI** was drinking. **MUSYOKI** got angry and a fight ensued as **MUSYOKI** and his assailant pushed each other into the dark.

**MUSYOKI** screamed in the dark, calling for the accused's group to help him, so **RANDU** (deceased) and accused went to separate the fighting pair. However at that point accused was attacked from behind

and hit at the back. He could hear the deceased screaming, calling him to go and help as he had been cut. However accused sensed danger because now deceased was the second person getting cut, so accused ran away and reported the incident to the community policing leader one **KAINGU**. The next day when accused was on his way to work, he met a village elder **JULIUS ANGORE** who told him to go and record a statement with the AP's at **SOSONI** police station. However he was arrested on his way by a vigilante group and upon reaching **SOSONI**, he found that **OMAR CHARO, KIOKO, MUSYOKI** and **KIVAI** were already in custody. Later the others were released and he was detained and charged. His parting shot is:-

***“I did not beat or hit the deceased in any way – I had no reason to hit him”***

The prosecution submitted that its case had been adequately proved and that prosecution was able to establish malice aforethought as envisaged by provision of the penal code, because the accused's action of hitting the deceased thrice on the head and later fleeing clearly meant he intended to cause him grievous bodily harm.

The defence counsel on the other hand submitted that prosecution failed to show that accused had intended to kill the deceased saying it remains unclear as to why the accused would attack and kill someone who had gone to aid his close relative (i.e **MUSYOKI**) in the fight. It was **MR MATINI**'s contention (adopting the submission he had made at the stage whether there was answer, that the prosecution's evidence was scanty and sketchy and none of the eye witnesses were credible. He also pointed out that prosecution failed to call two very key witnesses who had been involved in the fight i.e **MUSYOKI** and **MANGALE**.

The defence counsel cast doubt regarding the murder weapon saying it was picked from amongst other similar pieces of wood and the villager who handed it over to the police officer was not even called to testify. **MR MATINI** wonders why DNA test was not done in the deceased to determine whether pieces of wood were found on him and the lighting conditions were also inconclusive as witness talked of different sources of light.

With regard to what precipitated the fight, Pw 1 AND PW 2 were consistent that initially it was **MUSYOKI** and **MANGALE** who were fighting. It now turns out that **MUSYOKI** was accused's relative. When it appeared as though **MUSYOKI** was losing the fight the deceased intervened with the aim of assisting **MANGALE** who was his friend. This is what cause the accused to react by rushing to **MUSYOKI**'s aid.

So with the greatest of respect to **MR MATINI**, it is not correct that deceased intervened so as to help **MUSYOKI**, infact his intention was quite the converse. When accused intervened, those who were present that is Pw 1 and Pw 2, says he picked the plank of wood he had been using as a seat and struck deceased twice in the head, it was adequately explained by Pw 2 that it was only the plank used by accused which was movable, the others were stuck to the ground and could not move. It was also Pw 2's evidence that at that point, he did not even think that accused intended to assault anyone.

Both prosecution witnesses and accused confirm the presence of a lamp which had been placed at the door and was illuminating the place. It is also not disputed that a scuffle did indeed ensue and that both accused and deceased intervened. There is no evidence to suggest that the lamp was blown off by the wind or that it was so weak as not to offer adequate light, in any event, the presence of the accused at the scene, and his involvement in the scuffle is confirmed by none other than himself and the issue regarding the lighting conditions is not a major one as relates to identification.

The prosecution witnesses are consistent that accused assaulted the deceased and the reason was because he appeared to be supporting his in-law's aggressor. While it is true that other persons who had been at the scene were not called as witnesses, it is important to note that these persons had initially been arrested and placed in custody as suspects. Secondly defence counsel has not pointed out what significant departure of evidence the said witness would have given, since the prosecution and defence case as to the chain of events is similar to that of prosecution, the only point of departure is who struck the deceased. The

findings in **BUKENYA & OTHERS v UGANDA CR APP. NO. 68 OF 1972 EACA at pg 549** cannot be imported whole into the present situation. Pw 8 explained that the wooden plank had been handled by other persons, and I take Judicial notice that even if it were to be taken to the Government chemist for analysis, no significant findings would have been made due to that multiple handling. The issue of DNA test was not raised in cross-examination of Pw 8 or the Doctor and I think it is rather belated for counsel to now introduce it in the submissions.

Certainly the chronology of event establishes a motive for the attack – the accused`s desire to protect his brother-in-law who was under siege by **MANGALE** and the deceased. Had he intended to kill the deceased by his act of hitting the deceased thrice on the head? Section 206 of the Penal Code provides inter alia that;-

“Malice aforethought shall be deemed to be established by evidence proving anyone or more of the following circumstances”

**(a) an intention to cause the death of or to do greivous harm to do greivous harm to any person.....**

**(b) Knowledge that the act or omission causing death will probably cause the death or greivous harm to some person.....**

Would the accused`s actions fit into this category? I do not think so, from the evidence, accused`s reaction was on the spur of the moment, without giving much thought to the consequences or effect of his action, I doubt that he intended to snuff out the deceased`s life – rather his intention was to disable him so as to rescue his kinsman from further onslaught. The action was not propelled by an intention to cause death, and little wonder then that even as he stood up to join the duel, Pw 2 only watched because, he did not even think that at that point accused intended to assault anyone.

I have no doubt that accused struck deceased in the head, and the impact of his action resulted in his death – however I doubt that this death was the intended/desired result. My finding is that the evidence proves a lesser charge as contemplated by section 202 of the Penal Code i.e manslaughter. Consequently in compliance with the provisions of section 179 (2) of the Criminal Procedure Code I reduce this charge to one of manslaughter contrary to section 202 Penal Code and convict accused on this reduced charge.

**Delivered and dated this 25<sup>th</sup> day of July 2011 at Malindi**

**H A OMONDI  
JUDGE**

Mr Naulikha for state

Mr Matini for accused  
Accused present  
c/c Randu-Eng/Swahili