



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT MALINDI**  
**CRIMINAL CASE NO. 17 OF 2008**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**IBRAHIM FONDO BIRYA .....1<sup>ST</sup> ACCUSED**  
**KAHINDI KITSAO .....2<sup>ND</sup> ACCUSED**  
**ANTHONY SULUBU .....3<sup>RD</sup> ACCUSED**

**JUDGMENT**

Ibrahim Fondo Biry, (the 1<sup>st</sup> accused), Kahindi Kitsao (the 2<sup>nd</sup> accused) and Anthony Sulubu (the 3<sup>rd</sup> accused) are jointly charged with murder contrary to section 203 of the Penal Code as read with section 204 of the Penal Code.

It is the prosecution's case that on 14<sup>th</sup> day of September 2008 between 6.00pm and 7.30pm at Kibokoni area within Malindi district of the Coast Province, they jointly with another not before court, murdered Emmanuel Ngumbao.

The accuseds who are minors denied the charge. They were represented by Mr. Gekanana while Mr. Ogoti appeared for the State, at the beginning of the trial on 2-2-09. However by April 2010, Mr. Ogoti was transferred from Malindi and Miss Waigera took over the prosecution of the matter and led the evidence of one prosecution witness and then saw the close of prosecution case. By 29<sup>th</sup> June when the matter proceeded to defence hearing, it had been taken over by Mr. Kemo, the Senior Principal Counsel.

The accuseds and the deceased had attended a funeral wake at Kibokoni on 5<sup>th</sup> September 2008. Among those at the gathering was Claudus Kombe Kazungu (PW1) in whose home that wake was, as the deceased person was his father. He knew the deceased because they had attended the same primary school i.e Kibokoni Primary School. He also knew the three accuseds – accused 1 and 2<sup>nd</sup> accused were residents of Kibokoni, and he used to see accused 3 attend Kibokoni Secondary School.

While at the funeral wake, PW1 saw a group of people running towards one direction. He went to find out what was going on and on arrival at the scene he found the deceased (Emmanuel) explaining to the gathered crowd, that some three young men wanted to beat him. Deceased explained that they were dancing when he accidentally stepped on the 1<sup>st</sup> accused and he apologized. However 1<sup>st</sup> accused could have none of it, claiming that deceased's action was deliberate and that he would teach the deceased a lesson. Deceased said he wanted to leave because he feared being beaten. 1<sup>st</sup> accused had been accompanied by Festus Nyonje and Anthony Sulubu. At that time, the alleged three young men were not at the scene – or at least PW1 did not see them.

On 14<sup>th</sup> September 2008 in the evening which PW3 (Marco Furaha Kenga) estimates to have been about 7.30pm, he was on his way to his home in Kibaoni. When he got near the Catholic Church, he found three

boys beating up Emmanuel. Upon seeing PW3, the boys ran away. PW3 recognized one as Kahindi Kitsao (accused 2). PW3 spoke to Emmanuel and took him away saying:

***“Lets go to the shops”***

Emmanuel followed him for a short distance, then said that he was feeling bad in the head and he wanted to sleep. Emmanuel said he had been assaulted by Kahindi Kitsao and he was feeling a lot of pain. However he did not disclose why his assailants beat him, and he did not walk again, saying he wanted to go back home. PW3 left him, to rush to the shops.

On cross-examination PW3 stated he was only able to see accused 2 at the scene – this is because it was dark, the other two had fled, but accused 2 was the last one to flee, by which time, PW3 was very close to him.

Then on 14<sup>th</sup> September 2008 at about 2.00pm Furaha Karisa Kadenge (PW2) who had accompanied the deceased to Serengeti shopping centre, returned to his home to return a bicycle and also eat his lunch, leaving the deceased at the shopping centre.

By 8.00pm of the same date as PW1 was from a funeral, heading home just near the Catholic Church, he met two boys who were standing and one boy was lying down. He greeted them and inquired as to what was the problem. They said that Emmanuel had been beaten by some boys. PW1 asked Emmanuel (now deceased who was the one lying down) why he had been beaten, and he said the same two boys he had disagreed with at the funeral wake, were the very ones who had assaulted him.

PW1 then sent a message through Furaha (PW2) to Emmanuel’s parents. His testimony is that Emmanuel’s injuries were such that he was unable to walk, and PW1 had to carry him on his shoulders and eventually Emmanuel was put on a motorcycle which ferried him to Malindi District Hospital.

Furaha Karisa (PW2) confirms that while on his way back to Serengeti Shopping centre, he found Emmanuel seated on the ground with an injury on the head and Emmanuel said to him *“NIMEGONGWA”* (meaning I have been hit”) However Emmanuel did not say who had hit him. Deceased requested PW2 to go to Serengeti and get him some spirit to clean the wound. However on the way, Emmanuel got too weak and sat down and eventually he was carried and taken to Malindi District hospital. Deceased was referred to Galana Hospital for a head scan – PW1 observed that he had injuries on the back of his head and complained of pain just near the neck area and between the shoulders. He was bleeding from the back of the head. Deceased’s condition deteriorated and he was rushed to Mombasa, but he died in the evening while undergoing treatment.

PW1 on cross-examination stated:

***“on 14-9-08, I didn’t see any of the accuseds either during the day or at night”***

Furaha (PW2) confirms making a report to deceased’s relatives about his misfortune and it was his evidence on cross-examination that when he found the deceased seated with injuries on the head, deceased said he had been hit using a stick, but he did not name his assailant. However at the time when Kombe (PW1) asked deceased what had happened, PW2 had stepped aside, so he did not hear the content of their conversation, but later on PW1 told him that deceased had mentioned who his assailants were.

The incident was initially reported to the police as an assault as confirmed by the evidence of Pc Cythia Bore who had received of the report from an uncle of the deceased named Patrick. At the time that the report was being made, the deceased was at the Coast General Hospital, having been rushed there. When his condition got worse at Coast General Hospital, the deceased underwent surgery on 17<sup>th</sup> September 2008, but he passed on. From her investigations, she learnt that there was standing grudge which arose from the incident at the funeral wake when deceased stepped on one of them Festus Menza Fondo (still at large) and apparently the accuseds in turn wanted to show the deceased that they were real men. A postmortem carried out disclosed that the deceased had sustained injuries which included bruising of the skull on the left parietal slit and there was an 8 x 8 bone flap on the same area, there was also extrabulbar haematoma a blood clot, and due to this clot, the brain was completely compressed. The cause of death was increased intra cranial pressure due to the blood clot. The postmortem form was produced as exhibit 4.

Upon being put on their defence, each accused gave sworn testimony in which they all confirmed being known to each other as classmates at Kibaoni secondary school where they were students in form 1. They also knew the deceased although he was not in their school.

According to 1<sup>st</sup> accused, he had accompanied his co-accuseds along with Festus Menza to a funeral wake which was at a home near their school. While at the function, Festus Menza stepped on deceased and apologized but deceased refused to accept the apology and a quarrel begun between Festus and the deceased – so 1<sup>st</sup> accused fled. On 14<sup>th</sup> September 2008, (1<sup>st</sup> accused) was at his parents' home within Malindi Town. At 3.00pm, he left to go to Kibokoni area, arriving in Kibokoni at 5.00pm. He met his co-accuseds and Festus Menza on the way. He greeted them, then walked to his rented room. About ten minutes after entering his room he heard screams from the road. He came out to see neighbours running towards the direction of the screams – then after a short while he saw the neighbours running back. He ran into his room safely and he denies ever meeting the deceased on that day.

Later in the evening, he saw 2<sup>nd</sup> accused who had rented a room next to him. He (1<sup>st</sup> accused) shared a room with 3<sup>rd</sup> accused and Menza – Menza never returned.

While inside the room, a mob came at 8.00pm threatening to assault him, but he didn't even know why and it took the intervention of his landlord to get the mob off. The next day, he learnt from 2<sup>nd</sup> accused that the same person who had wanted to fight Menza at the funeral wake, had again wanted to start a fight with Menza on the roadside

On 16<sup>th</sup> September 2008, just after Accused 1 had arrived in his room from school, he found a mob waiting to assault him because they had received information that Emmanuel had passed away. However accused 1 fled to safety. He explains that by then he was aware that Emmanuel had sustained injuries BUT he did not know who had inflicted those injuries. He denies having disagreed with Emmanuel saying he had no reason to fight him, and all he knew was that Emmanuel had disagreed with Festus Menza.

On cross-examination he stated he did not know PW1 nor had he ever seen him in Kibaoni.

The 2<sup>nd</sup> accused in his defence confirms about the altercation between the deceased and Festus at the funeral wake. He also confirms that on 14-9-08 at 8.00pm, he was in the company of accused 3 and Festus and that accused 1 was not with them. They met the deceased who was alone and it is his evidence that deceased spoke to Menza saying:

***“aren't you the one who stepped on me at the funeral?”***

Menza replied:-

***“Its me, but the matter ended”***

Deceased then caught Menza's cap and Menza resisted. A quarrel begun, then people suddenly appeared from the surroundings armed with sticks and begun beating them so each fled from them.

On 15<sup>th</sup> and 16<sup>th</sup>, accused 2 went to school then in the evening, he heard screams and claims that Emmanuel had been beaten by Festus. Later in the evening, friends of the deceased went to accused 2's residence intending to beat him up, but neighbours intervened.

Accused 2 got scared so he went to his parents home in Marereni. He denies seeing 3<sup>rd</sup> accused beating the deceased. He denies seeing (whom PW1 knew well on 14<sup>th</sup> September 2008 at the scene where deceased was beaten and says he had no reason to waylay the deceased as he had not disagreed with him.

On cross-examination he says, that after deceased grabbed Menza's hat, the latter resisted, and they begun to fight. He then says:

***“I know Kombe, he probably thought I was involved in the fight because he had seen me at the scene.”***

3<sup>rd</sup> Accused too confirms that on 14<sup>th</sup> September 2008 at 8.00pm, he was in the company of 2<sup>nd</sup> accused and Festus when they met the deceased and that it is the deceased who confronted Festus, and the two ended up fighting. It is his testimony that they (I suppose he and 2<sup>nd</sup> accused) moved towards the fighting pair to try and separate them, but four young men suddenly emerged and picked sticks from a nearby fence by the roadside, and begun whipping them, so each one of them fled for safety. As he was fleeing, he hit Marco (PW3) who was running after him. He too says he does know who assaulted the deceased although on cross-examination he says:-

***“When we met Emmanuel, there was a scuffle between Festus and deceased...”***

There is no dispute that Emmanuel suffered injuries from which he died. The issue for determination is who inflicted the injuries and why. Counsel for the State, Mr. Kemo submitted at the close of the entire hearing, that prosecution had discharged the burden of proof against all the three accuseds and also proved all the constitutional elements of murder as defined. He pointed out that death was proved by production of postmortem form, by the doctor which outlines the injuries inflicted on the deceased and which led to his death and that the cause of death was a large blood clot below the wound on the head, causing pressure on the brain and its this increased intracranial pressured which led to the death of the deceased. That is pretty straight forward and is not contested by anyone. Indeed I concur with Mr. Kemo on this point that evidence clearly proves the deceased did not die of natural causes.

It is also instructive that the defence counsel did not make any submissions at the close of the case.

So who inflicted these injuries? Mr. Kemo submits that prosecution has proved accuseds were the culprits giving a background to the incident as witnessed by PW3 (an eye witness) and PW2, who spoke to the deceased. He invites this court to consider that the whole matter was a culmination of what had began as a simple altercation at funeral wake between the deceased and the three accuseds plus one who is still at large, known as Festus Menza. He points out that the altercation at the funeral wake on 5-9-08 was confirmed by PW1's whose evidence pointed out to the three accuseds as the individuals. Deceased said had disagreed with them and that accuseds were so angered by the incident at the funeral wake, they wanted to beat up the deceased, but were calmed down by elders. That incident is confirmed by the accuseds only that according to them deceased was the aggressor. It is his submission that this incident is what provided motive for the later attack on 14<sup>th</sup> September.

The evidence of PW3 regarding who he saw at the scene is that he was able to clearly identify 2<sup>nd</sup> accused because he was close to him. 2<sup>nd</sup> Accused confirmed being in the company of 3<sup>rd</sup> accused and one Festus Menza on 14<sup>th</sup> September 2008, and that indeed they met the deceased, and there was a fight involving deceased and at least one of those who was in their company. From their defence, it is clear that indeed the reason for that confrontation, was still a carryover from what had taken place on 5<sup>th</sup> September 2008 at he funeral wake – so Mr. Kemo is right to say that the motive for the attack was that incident. The only departure, is that accuseds 2 and 3 insist 1<sup>st</sup> accused was not with them, and indeed PW2 did not see accused at the scene. The other point of departure once again is that 2<sup>nd</sup> accused and 3 maintain that even on 14<sup>th</sup> September 2008, deceased was still the aggressor. I have no doubt in my mind that on 14<sup>th</sup> September 2008 , the 2<sup>nd</sup> and 3<sup>rd</sup> accused met the deceased and were present when he was being beaten.

1<sup>st</sup> Accused's role becomes questionable, not only from what he states in his evidence, but also from the evidence of PW3 who says he only saw accused 2 but the other two fled. This is then weighed against the evidence of the accuseds, which does confirm PW3's evidence that there were three boys (indeed accused 2 and accused 3) confirm they were in company of three but the third one was Menza not 1<sup>st</sup> accused.

According to PW1 (Claudius) when he spoke to the deceased he said he had been assaulted by the same TWO boys he had disagreed with at the funeral wake.

This is also considered in the light of the evidence of PW3 on cross-examination where he says:-

***“Emmanuel said he was assaulted by Kahindi Kitsao”***

So were 2<sup>nd</sup> and 3<sup>rd</sup> accused mere spectators watching as deceased fought their friend? If that was the case, then why did they run when PW3 appeared at the scene? They claim many villagers appeared and attacked them, but I doubt this, in the light of the evidence of PW1, PW2 and PW3 who appeared at the scene and have made no reference to anyone charging at the company of the accuseds with intention of beating them.

Was this incident premeditated?

Was there malice aforethought?

Mr. Kemo submits that malice aforethought has been established saying the actions by the accuseds were intended to cause grievous harm to the deceased and the injuries were so severe that whoever occasioned them intended to do grievous bodily injury which would result in death. He draws this court's attention to the incident, saying that at the time the assailants were spotted by PW3, the deceased was lying on the ground, overpowered by his attackers who continued beating him and their intention was to cause grievous harm. He supports this position by referring to the definition of malice aforethought in

**Halsbury's Laws of England 4<sup>th</sup> Edition 1976** which states that:

***"The element of murder, traditionally called malice aforethought may take any of the following forms***

***(1) intention to kill***

***(2) an intention to cause grievous bodily harm or (3) an intention to do an act, knowing it to be lightly probably that the act will cause death or grievous bodily harm."***

I am clear in my mind – that whether it is the deceased who first attacked Menza, or whether Menza was the first to attack, they ended up in a physical confrontation. I am also convinced that 2<sup>nd</sup> accused and 3<sup>rd</sup> accused did not just stand by watching, rather they joined in to help their colleague. But this doesn't seem to have been a premeditated action, its an opportunity which presented itself and so they set upon the deceased, to teach him a lesson for offending one of their own. That is why Pc Bore had initially preferred a charge of manslaughter against them – there is nothing to suggest that accuseds were on the prowl planning an attack on the deceased. There is also nothing to suggest that their action was intended to grievously injure deceased or snuff out his life. However they used such excessive injuries – their intention was not to kill the deceased.

My finding then is that the evidence adduced points to the 2<sup>nd</sup> accused and 3<sup>rd</sup> accused as having attacked the deceased in a bid to discipline him for offending their colleague Menza.

The evidence does not prove murder, but does adequately demonstrates actions which led to the deceased's demise – and this proves a charge of manslaughter.

Consequently, in compliance with the provisions of section 179 (2) Criminal Procedure Code, the charge is reduced to manslaughter contrary to section 202 (1) Penal Code and the 2<sup>nd</sup> accused and 3<sup>rd</sup> accused are convicted on the reduced charge.

From the evidence led, the role of accused 1 on the 14<sup>th</sup> September 2008 is not clear. It seems he was mentioned only because he was with them on 5<sup>th</sup> September and he is given the benefit of doubt and acquitted of the charge.

Delivered and dated this **18<sup>th</sup> October 2010** at Malindi.

**H. A. Omondi**  
**JUDGE**