



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Criminal Case 196 of 2003**

**REPUBLIC ::::::::::::::::::::::::::::::::::::::: PROSECUTOR.**

**VERSUS**

**ABDULHAKIM MOHAMED HASSAN HUSSEIN::::::::::::: ACCUSED.**

**J U D G M E N T.**

The accused herein, *Abdulkhik Mohamed Hassan Hussein*, is charged with the offence of murder contrary to Section 203 as read together with Section 204 of the Penal Code.

The particulars are that on the 1<sup>st</sup> day of April, 2003 at Ushirika Estate Nairobi within Nairobi Area murdered one Francis Warao (hereinafter referred to as the deceased and Frank interchangeably).

The prosecution called PW6 in support of its case.

*Evans Mwangi Munganga (PW1)*, was running a kiosk as at 1<sup>st</sup> April, 2003. At 8.00 p.m. three (3) people came to buy cigarettes. He only knew one as Hakim. He told the three that he does not sell cigarettes. Hakim then challenged him to a duel. The two companions of Hakim separated them and they went away. Twenty or so minutes later he heard Hakim shouting “Mwizi, mwizi” meaning in English “thief, thief”. He walked out of his kiosk and stood by an electric pole. At that point in time, he saw the deceased, Frank, running away at a fast speed. Frank was stopped and apprehended by some people of Somali origin. He (Frank) told them he was not a thief. He pleaded with someone who was bent on assaulting him. He pleaded that his captors take him along to ascertain the fact that he was not a thief. Hakim then shouted something in Somali language. The group then dispersed and left Hakim with the deceased. The two then fought. An old man separated them. An Asian occupant of House No. 257 in Ushirika is the one who gave shelter to the deceased. A while later, the Asian announced to PW1 that the deceased was lying unconscious. Some two friends of deceased summoned a taxi which took the deceased to Kenyatta National Hospital. The following day, he heard that the deceased had died while undergoing treatment.

*Sophia Wangechi (PW2)*, was at home at Pangani on 1<sup>st</sup> April, 2003 while Ben and somebody brought the deceased while unconscious. The good Samaritans explained that the deceased had been beaten at Ushirika Estate by Abdul. He facilitated the taking of the deceased to City Park Hospital and later to Kenyatta National Hospital where he was treated and discharged. On 2<sup>nd</sup> April, 2003 he took Frank back to the hospital where the doctor asked for a second x-ray. In the process the deceased passed on.

*Jackline Maweje (PW3)*, was the father to the deceased. On 1<sup>st</sup> April, 2003 he was at his house. A group of about five boys brought his unconscious son. They explained that the deceased had been beaten by Hakim among others. Examination of the deceased body revealed injury to the mouth and head. He was taken to the hospital in the company of his daughter, Sofia. The deceased then passed away on 2<sup>nd</sup> April, 2003. He wrote a statement at Pangani Police Station. The same day, he attended postmortem of his son at the City Mortuary. The body was interred on 12<sup>th</sup> April, 2003.

*No. 29779 P.C. Julius Marete (PW4)*, attached to Pangani Police Station was on duty at the said station

on 10<sup>th</sup> April, 2003. Two relatives of the deceased sought his assistance for removal of body for burial. He accompanied them to Kenyatta National Hospital. On 11<sup>th</sup> April, 2003 postmortem was performed after the mother identified the body. He then handed over the body to the family for burial.

*No. 666494 PC Michael Temor (PW5)*, was at Pangani Police Station on 15<sup>th</sup> April, 2003 in company of Senior Sergeant Oromo and PC Chapta Kahan. The relatives of the deceased requested for assistance to arrest the accused. In company of PC Cheptuk they arrested the accused at Pangani city council Estate.

*Dr. Jane Wasike Simiyu (PW6)*, a pathologist working with national Public Health Laboratories deployed to the City Mortuary, performed a postmortem on the body of the deceased. She concluded that the deceased had died as a result of head injury due to blunt trauma. She filled and signed the postmortem report on 11<sup>th</sup> April, 2003 which she produced as an Exhibit I

In his defence, the accused, recalled that on 1<sup>st</sup> April, 2003 at about 8.00 p.m. he was at Ushirika Estate in the company of the deceased and Ben. The deceased demanded his hat from him. He did not have the hat, deceased then took a stone and threw at him. The deceased then started running with the accused, and two others aforesaid, hotly on his heels. He heard deceased telling a crowd that had gathered, and were beating him, that he was not a thief. He added his voice to that of deceased and the deceased was released. The deceased then sat on a bench in front of a shop. Later he heard that the deceased had passed on. He was then arrested on 3<sup>rd</sup> April, 2003 on allegations of murder of the deceased. He was arraigned in court on 16<sup>th</sup> October, 2008 and denied the charge.

Against that backdrop of evidence it is clear to me that the accused is not denying participating in the events that eventually led to the demise of the deceased. His only defence is that the deceased was the victim of mob justice.

In my judgment, the evidence adduced by the prosecution is to the effect that there were two incidences one, involved confrontation of the accused by a mob. The accused saved him when he told the mob that he was not a thief. The mob then dispersed. Two, involved a physical fight between the accused and the deceased. An Asian occupant of House No. 257 Ushirika gave shelter to the fleeing deceased. The deceased became unconscious. Two friends of the deceased summoned a taxi which took the deceased to the hospital. The deceased eventually passed on. Against that background, I am persuaded that the deceased died of injuries inflicted in the court of a fight with the accused.

In the result, I am persuaded that the prosecution has proved its case beyond reasonable doubt that the accused beat the deceased for about 20 minutes. His intention, in law, must be deemed to be that of causing death or grievous harm. Accused had knowledge or must be deemed to have knowledge that, his acts would cause death or grievous harm, but was indifferent whether death would be occasioned.

In the circumstances malice aforethought was proved. Actus-reus was equally proved. Both mens-rea and actus-reus was thus proved. The offence disclosed is thus murder contrary to section 203 as read with section 204 of the Penal Code.

Although all the assessors returned a verdict of NOT GUILTY, I have the misfortune of disagreeing with them. It appears to me that they failed to comprehend the actions of the accused in relation to the concept of malice aforethought as defined in Section 206 of the Penal Code and explained to them during the summing up.

In the result, I find that the prosecution has proved its case against the accused beyond reasonable doubt. Accordingly, I convict the accused as charged. I sentence the accused to suffer death as provided by the law. Right of Appeal within 14 days.

Dated and delivered at Nairobi this 26<sup>th</sup> day of March, 2008.

**N.R.O. OMBIJA.**

**JUDGE.**