



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

Criminal Case 94 of 2003

REPUBLIC.....PROSECUTOR

V E R S U S

ADAN LIBAN HUKA.....)ACCUSED

HALAKE WAKO.....)

R U L I N G

The accused herein are charged with the offence of murder contrary to section 203 as read together with Section 204 of the Penal Code (Cap 63, Laws of Kenya).

The particulars of the offence are that the accused Adan Liban Huka alias Abukio and Halake Wako Halake on the 23rd day of June 2003 at Township Location in Moyale District within Eastern Province jointly with others not before the court murdered Wako Jattani Diba.

At the opening of the trial Mr. Muteti learned State Counsel for the Republic in his opening statement told the court that the evidence to be adduced would show that the accused acted with a common intention that their action was actuated by malice aforethought that medical evidence would show that the accused were at the time of their deed, in sound mental health capable of making reasonable judgment. In the event the prosecution called eight (8) witnesses none of whom was a medical doctor.

What emerged from the evidence is that there was an explosion at a hotel and lodging called Liban Hotel. The deceased together with Saar **Gababo Boye (P.W.1)** and **Balafu Abdul Boye** (cousin of P.W.1) were setting by a corridor of the lodging room of one Shuke Gababo Boye (sister to P.W.1) when they heard a loud sound on the roof of the house. P.W.1 testified that he found himself on the ground bleeding and having hard breathing problems. He could not recall where the deceased Wario Jattani Diba and his cousin were. He ran out of the house, fell down and lost consciousness. He recovered at Moyale District Hospital.

P.W. 2 Hussein Gababo Chibiza was a shoeshine boy. He had seen the 2nd accused as the young man who had passed by him, the night of 23.6.2003 at about 8.30 p.m., the young man who had stopped and talked to a lady selling miraa (khat) and a little while later he heard a loud sound by the corner of the mosque towards where the young man had walked. He heard the young man had been arrested, and saw him at the Moyale Police Station on 24.06.2003 he identified the 2nd Accused in Court.

P.W.3, Hassan Wako was a watchman employed by Kusi Jirma to guard the hotel called Liban Hotel. He had, upon reporting for duty on 23.06.2003 found the first accused and he pointed him (at the dock) outside the hotel. He had not seen or known him before that date. The first accused was seated outside the hotel “**doing nothing**” while he went to see his employer, he heard an “**explosion of bomb**” in the lodge, in the room of the deceased whose name he (P.W.3) did not know. He went to the room where the explosion had occurred, the roof was shattered. He went out and found one Anoor Kusi, his brother standing with and asking the first accused what he was doing, where he had come from and who had switched off the lights. He heard the 1st accused say that the lights had been switched off by the woman who had been selling miraa and who had ran away. When crossed – examined by Mr. Anampiu learned counsel for both accused, P.W.3 testified that he had never seen the 1st accused until that day.

P.W.4 Shuke Gababo Boye was a nurse at Moyale District Hospital. The deceased Wario Jatani Diba had escorted him to his place of work on that date. He had left the deceased together with his sister in his house.

P. W .5 Hajj Kusi Jirma was the owner and operator of the Liban Hotel and Lodge. He was a retired a Police Officer. He testified that he heard an explosion, that the explosion was caused by a hand grenade, lights had gone off upon the explosion. He found one young man who had been detained by his son Ali Noor Kusi. The young man, he found out later was called Haleke Wako Halake and he had not known him before. He handed him over to the Police. He identified him in court. He testified that he could not say who had caused the blast.

P.W.6 was No. 76821 P.C. Ali Noor Kusi. He testified but he was going home from a friend’s shop when upon reaching the Liban Hotel he saw a person hiding in a Video show-room which was in front of the Liban Hotel, that person came out of hiding proceeded to walk ahead of him, towards Acacia Tree Hotel. The person ran away and stood near a dark place. As he entered the Liban Hotel, he saw a person peeping through the window of P.W.1, he heard something landing on the roof, and the person who was standing outside ran away and then he heard an explosion. He ran after the person, arrested him and handed him over to the Police. He identified that person as the 2nd accused. He identified both accused at the Identification Parade organized by **P.W.7 I.P. Lee Kenneth Kabiru** of Moyale Police Station at the time.

P.W.8 escorted the Accused on 2nd July 2003 to Meru to take a plea where the accused appeared before court on 4th July 2003.

From that survey of evidence, there is no direct evidence connecting either of the accused to the detonating or of throwing of a grenade at the house or room of P.W.1 where the deceased was sitting causing him fatal injuries from which he died. The only near direct evidence is that of P.W.6 that he had seen the 2nd accused with a hand grenade and a pistol, and had feared approaching him as he was alone and the 2nd accused looked suspicious and dangerous. Otherwise the rest of the evidence against the accused is purely circumstantial.

Circumstantial evidence is evidence based on inference and not on personal knowledge. It is evidence of some collateral fact from which the existence or non-existence of some fact in question may be inferred as a probable consequence.

It is a fact that there was an explosion, as a result of the explosion there were several severe injuries and one fatal injury. The circumstances established are that the accused were the only strangers at the material time. They behaved in a manner that the people who saw them described as **doing nothing, loitering, suspicious**. After the major event, the explosion, the 2nd accused tried to escape but he was caught by P.W.6. Why was he running away and not staying to sympathize with the injured? Where was he from, where was he going, had he accomplished his mission? Those are issues the accused need to explain to the court.

When the prosecution abruptly stated that they had closed their case Mr. Anampiu submitted that he

would leave it to the court to determine whether on evidence on the adduced there was a case for the accused to answer. It is said that failure to comply with the requirements of Section 210 and 211 of the Criminal Procedure Code is incurably fatal, **WANJIKU VS REPUBLIC [2002] K.L.R 828**

Section 210 and 211 state:-

s.210. If at the close of evidence in support of a charge, and after hearing and summing up submissions or arguments as the prosecutor and the accused person or his advocate may wish to put forward it appears to the court that a case is not made out against the accused sufficiently to require him to make a defence, the court shall dismiss the case and shall forthwith acquit him.”

s.211(1) At the close of the evidence in support of the charge, and after hearing such summing up, the submission or argument as may be put forward if it appears to the court that a case is made against the accused person sufficiently to require him to make a defence the court shall again explain the substance of the charge to the accused, and shall inform him that he has a right to give evidence on oath from the witness box that if it does so, he will be liable to cross – examination or to make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence (if any).”

In this matter as I have attempted to explain above, there is strong circumstantial evidence for the conclusion that the accused have a case to answer and therefore an explanation of their presence and connection with the principal fact, namely the explosion whether of a grenade or other explosive device on the material date 23.06.2003, which caused the death of the deceased Wario Jatani Diba.

There shall therefore, be an order that the accused have a case to answer and may give their evidence or defence in either of the manner prescribed under Section 211 of the Criminal Procedure Code.

Dated and delivered at Meru this 25th day of July 2008

M. J. Anyara Emukule

Judge.