



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL CASE 91 OF 2003**

**1. ABOUD ROGO MOHAMED**

**2. MOHAMED KUBWA ..... ACCUSED**

**3. OMAR SAID OMAR**

**4. MOHAMED SALEH NABHAN**

**VERSUS**

**REPUBLIC.....PROSECUTOR**

**RULING**

The accused persons are charged in 15 counts with murder contrary to Section 203 as read with Section 204 of the Penal Code. In count one they are charged that on the 28th November 2002 at Paradise Hotel Kikambala in Kilifi District within Coast Province jointly with others not before court they murdered **SHADRACK TINDI MAINA**. In count two they are charged with the murder of **WILFRED OWUOR**. In count three they are charged with the murder of **AGNES CHARO KADZO**. In count four they are charged with the murder of **RIZIKI SALIM YAA**. In count five they are charged with the murder of **DEAVILLA AVRAHAM**. In count six they are charged with the murder of **DEVIR ALFER**. In count seven they are charged with the murder of **NOI ALFER**. In count eight they are charged with the murder of **REBECCA NYAMVULA TUKU**.

In count nine they are charged with the murder of **CHARO YAA MANGI**. In count ten, they are charged with the murder of **CHATHERINE MUTHONI**. In count eleven, they are charged with the murder of **IBRAHIM KATAMA**. In count twelve, they are charged with the murder of **KAFEDHA MASHA MRAMBA**. In count thirteen, they are charged with the murder of **NZAI LUGHO NZAI**. In count fourteen, they are charged with the murder of **SAFARI YAA BAYA** and in count fifteen, they charged with the murder of **JULIUS WEWA MUTISYA**.

On the morning of 28th November 2002 Paradise Hotel in Kikambala Kilifi District was bombed and as a result twelve Kenyans and three Israelis were killed and scores of others sustained serious injuries. It is not disputed that the attack was made by suicide bombers. Police gathered evidence from 89 witnesses which led to the arrest of the four accused persons. The evidence gathered showed that the accused belonged to a terrorist gang called AL QUAIDA which was involved in the preparation and plans and had common intention to attack Israel interests in Kenya. The evidence adduced by the prosecution show that

the accused were involved in the renting of houses in Mombasa where it was alleged the bomb which was used to attack the hotel was assembled in one of those houses.

Although the suicide bombers perished in the bomb blast, it is the prosecution case that the evidence gathered so far was sufficient to charge the accused with the murder of the fifteen deceased persons at Paradise Hotel. The facts so far as material are that Al Quaida, a gang of terrorists which forms part of the net work of terrorists causing havoc in most parts of the world exists in Kenya and it is the contention of the prosecution that the accused belong to that gang and are involved in terrorist activities in Kenya and that they had taken part in the killings at Paradise Hotel Kikambala.

There is no evidence direct or circumstantial which connects the accused to the **AL QAIDA** net work and their involvement in the preparation, planning and the bombing of Paradise Hotel which resulted in the killing of the 12 Kenyans and 3 Israelis.

The only evidence that connects the accused to the **Al Quaida** net-work and their involvement in the preparation, planning and bombing of the hotel resulting in the killings of the deceased persons is that there were cell phone communications between the mobile numbers of the accused and one **ABDI KARIM** who the prosecution alleges was the main player and the co-ordinator of Al Quaida activities in the country.

As I had said earlier, there is no evidence, direct or circumstantial connecting the accused to the killings at Paradise Hotel. Circumstantial evidence means evidence that tends to prove a fact indirectly by proving other events or circumstances which afford a basis for reasonable inference of the occurrence of the fact at issue. The circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but to the one proposed to be proved in this case that it were the accused who murdered the deceased. In other words there should be a chain of evidence so far complete as to any reasonable ground for the conclusion consistent with the innocence of the accused and it must be such as to show that within human probability the act must have been done by the accused.

In this case it is conceded that the killings were caused by suicide bombers who also perished in the blast. There is evidence by **PW 20 ZACHARIA OMAIYO, PW 23 KARISA TUKU, PW 26 JUSTIN MUNDU,** and **PW 31 HAMISI DECHE** who were at the scene of the murder and who told the court that on the material date they were at the hotel when they saw a Pajero car which drove at high speed towards the hotel and exploded at the reception area of the hotel. The said Pajero car had about 2 or 3 occupants who were of Arab origin and who perished in the blast. There were no survivors.

The question which arises here is: Could other people who were not at the scene be charged with murder when there is clear evidence that the murder was committed by suicide bombers who also perished in the blast?

The prosecution applied the doctrine of common intention as prescribed under Section 21 of the penal Code to charge the accused.

Section 21 of the act provides:-

**“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such a purpose an offence is committed of such a nature that its commission was a probable consequences of the prosecution of such purpose each of them is deemed to have committed the offence”.**

Proof that all the four accused were members of the gang of terrorists known as Al Quaida and that they were present when the hotel was bombed causing the deaths of the 12 Kenyans and 3 Israelis by itself is sufficient having regard to Section 21 to render them all guilty of murder. It is the contention of the prosecution that the mere presence of the gang of terrorists known as Al Quaida is at the present Kenya prejudicial to safety and maintenance of public order and it is indeed common knowledge that the purpose

of the gang of Al Quaida is to kill their perceived enemies, and in which though it is common knowledge that Kenya is not one of those perceived enemies of that terrorist group, several Kenyans have fallen victim of such attacks. One of such incidents is the 1998 bomb attack in Nairobi in which though the same was targeted at the Americans for their stand on the conflict of the Middle East, about 280 Kenyans perished and scores injured. And in the instant case the target was the Israelis but nonetheless 12 Kenyans perished and several others injured.

There is no doubt that murder is a probable consequences of the prosecution of the unlawful acts of Al Quaida terrorists. It is therefore clear that when a murder is committed by Al Quaida terrorists all members of the gang present at the killing are guilty of murder unless they have dissociated themselves from it.

I accept the contention by the state that a mere existence of the gang of Al Quaida terrorists is at the present Kenya and any other country for that matter where the gang exists, prejudicial to public safety and maintenance of public order and that any person consorting with and actively assisting the gang in its activities in any manner is contravening the law. In other words I accept the proposition that anybody who voluntarily associates with and assists a gang of terrorists can be taken for purpose of presumption to share with the other members of the gang a general common intention to commit unlawful acts. Not only can every person consorting with a gang be held to participate in the general unlawful purpose but also he can be deemed to have committed any offence which is committed in the prosecution of such a general unlawful purpose without proof of any specific unlawful act provided that the offence committed was a probable consequence of the prosecution of the general purpose and provided further that he is present when the offence is committed and does not dissociate from it. Common "intention" generally implies a pre-arranged plan but this does not rule out the possibility of a common intention developing in the course of events though it might not have been present to start with.

In the instant case the evidence shows that there was no pre-arranged plan between the accused and those suicide bombers to murder the deceased persons at Paradise Hotel nor any pre-arranged plan to prosecute any specific unlawful purpose which might have as a probable consequence the killing of the deceased persons i.e a preplanned attack of the hotel. The only common intention of those Al Quaida terrorists had was that of generally pursuing unlawful purposes.

In order for the common intention to be implied there must be a pre-arranged plan and their presence at the killing. For instant if two people who live in Nairobi meet and plan to kill somebody who lives in Mombasa but when they go to book a plane to fly them to Mombasa they find an aircraft scheduled for Mombasa at 11.00 has only one seat left. One of them books that seat and the other one books one which is due to leave at 4 p.m. The 4 p.m. plane develops a mechanical problem and does not take off. The one who flew at 11 a.m. arrives at Mombasa safely and carries out the mission and shoots that perceived enemy dead. He accomplishes their common intention. Although the two had a common intention to kill their victim, and they had pre-arranged the plan to kill but will the other person whose plane failed to take off be charged jointly with the murder. The answer is "NO" because one of the two things might have happened.

His intention to kill was frustrated by the plane failing to take off or he could have changed his mind and decided to dissociate himself from the killing.

In order for the doctrine of common intention to apply there must be a prearranged plan and both of them must be present at the scene during the killing so that even if only one pulls the trigger and shots dead the victim, both of them are deemed guilty of the murder.

It is clear from the evidence adduced by the prosecution that none of the accused had a hand in the killing of the 15 deceased persons at Paradise Hotel and I think it is not sufficient to justify the application of Section 21 of the Act to show that they shared with the 2 suicide bombers who perished at the scene of murder, a general common intention to carry out certain unlawful purposes even if those purposes might include or lead to murder. I think that in order to make the section applicable it must be shown that the accused had shared with the actual perpetrators of the crime the two suicide bombers a common intention

to pursue a specific unlawful purpose which led to the commission of the offence charged.

It is a general principle of criminal law that a person may not be convicted of a crime unless the prosecution have proved beyond any reasonable doubt both:-

**(a) that he had caused a certain event or that responsibility is to be attributed to him for the existence of certain state of affairs which is forbidden by criminal law; and**

**(b) that he had a definite state of mind in relation to the causing of the event or the existence of the state of affairs.**

The event of state of affairs is called the actus reus and the state of mind the mens rea of the crime. Much more often the actus reus requires proof of an act or an omission (conduct). Usually it must be proved that the conduct had a particular result.

In a charge of murder it must be shown that accused's conduct caused the death.

This burden is always with the prosecution to prove that the accused caused the death and that there was malice aforethought. The mens rea of murder is traditionally called malice aforethought. This is a technical term and it has a technical meaning quite different from the ordinary popular meaning of the two words. The meaning of term is of utmost importance, for it is in the presence or absence of malice aforethought which determines whether an unlawful killing is murder or slaughter. Murder is unlawful killing with malice aforethought.

On 28th November 2002 as the evidence shows, about 2 to 3 terrorists drove a Pajero vehicle registration number KAA 853N and detonated a bomb at Paradise Hotel and the blast caused the deaths of 12 Kenyans and 3 Israelis and injured scores of others. All those suicide bombers perished in the attack. There was no survivor. There is no evidence that any of the 4 accused had known those suicide bombers before nor is there any evidence that they had met and pre-arranged a plan to prosecute any common unlawful purpose. Where is the evidence that connects the accused to the murder of the deceased persons at Paradise Hotel? None, none at all. As I have stated earlier in order for the doctrine of common intention under the provisions of Section 21 of the Penal Code to apply the accused and suicide bombers ought to have met and pre-arranged the plan to prosecute the unlawful purpose i.e. the bombing of Paradise Hotel and the killing of the 15 deceased persons and that they were present at the scene of the killing to be deemed to have committed the offence.

The prosecution have not established that the 4 accused persons were at the scene of the murder nor that they had met the 2 suicide bombers and that there was a pre arranged plan between them and the suicide bombers and had formed a common intention to prosecute an unlawful purpose and in the prosecution of such purpose the killing was committed which was a probable consequence of the prosecution of such a purpose. Since there is no such evidence and the suicide bomber having perished during the attack there is no evidence whatsoever to connect the accused to the murder of the deceased persons. The accused ought not to have been charged with murder.

The prosecution have not established a prima facie case against the accused persons as required in criminal law to require the court to put them on their defence. I make a finding of not guilty under Section 306 of the Criminal Procedure Code and acquit them.

You are free, you may walk out of this court to your freedom. Your sweet freedom as guaranteed in the constitution of this Republic.

Dated and delivered at Nairobi this 9th day of June 2005.

**J.L.A. OSIEMO**

**JUDGE**