



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

CRIMINAL CASE NO. 17 OF 2003

REPUBLIC PROSECUTOR

Versus

ABDI DEKO KHALIF ACCUSED

J U D G M E N T

Abdi Deko Khalif, (the Accused), in this case is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on the 24th day of April 2004 at about 4.00 p.m. at Roka area in Hindi Division within Lamu District of Coast Province the Accused murdered Hassan Salat Maalim (the Deceased). The prosecution case was that the Accused and the deceased had had a running boundary dispute for some time. On the material date each was on his farm with his family planting maize. The Deceased moved close to the boundary and asked the Accused why he had encroached onto his farm. They argued over the matter but did not reach any agreement and each went his home. Shortly thereafter the Accused went to the Deceased home and ambushing him the Accused struck him with a jembe on the head thereby inflicting serious injuries on him from which he died later.

Grace Ali Abaroni, P.W.1, is the widow of the deceased. She testified that previous to the 24th April 2003 the Accused and the Deceased had had a boundary dispute. Elders were called who marked the boundary between their shambas. On the 24th April 2003 while she was on their shamba with the deceased and other people planting she saw the Accused and his family also on their shamba planting. The Deceased moved to the boundary and asked the Accused why he had encroached onto his shamba and planted maize thereon. She testified that in response to that Accused answered that he had done that and that they could see. Deceased did not understand what that meant. Both families retired to their respective homes. She further testified that while the Deceased was standing outside their house the Accused went there and springing from behind the Deceased he hit the deceased with a jembe on the head. Accused then threw the jembe down and ran to his home and returned with a panga. A neighbour by the name Mama Toto ran and held the Accused and disarmed him. The witness then took the jembe that the Accused had used to hit the deceased and kept it to give to the elders. She said that when the deceased was hit he had nothing in his hands.

Harun Salat Maalim is a younger brother of the deceased. On the material day he was with the deceased, P.W.1 and others on the deceased's farm planting. He testified that the deceased and the accused quarreled over the boundary and each said to the other "tutaonyeshana" and then both families went to their respective homes. The deceased stood near the door to his house and the witness and P.W.1 went and sat on the other side of the house. From there they could not see the Accused's home. While seated

there they heard a bang and rushed to where the deceased was. They found him lying on the ground bleeding profusely and the Accused standing nearby with a jembe. Then P.W.1 immediately sent him to go and tell the deceased's mother what had happened. According to this witness he went away leaving the Accused still standing near the deceased.

Esther Kagendo Bosco, P.W.3, is a neighbour of both the Accused and the deceased. She testified that on the material date and time while she was at her home she heard P.W.1 screaming. She rushed to P.W.1's home to find out what was happening. On arrival she found Accused being held by his mother and wife. She calmed the Accused down and took him to her house. Leaving him there she rushed to where P.W.1 was. She said P.W.1 told her that Accused had hit the deceased with a jembe and she showed her the jembe. According to her she could not remember if Accused had anything when she first saw him. In cross-examination she said P.W.1 had told her that the deceased and Accused had fought. She identified the jembe that Accused was said to have used to hit the deceased.

P.W.4 Omar Wako Galole got information while on his way home from a nearby shopping center that the deceased and Accused had fought. He went to the deceased's home and found him lying down bleeding. He was shown by P.W.1 the jembe that the Accused used to hit the deceased with which he later handed to the police.

Zainabu Salat Abshiri is the mother of the deceased. She said that when she got information from P.W.2 about her son having been attacked she sought assistance from Mokowa GSU Camp. The Commanding Officer authorized the use of the GSU landrover to go and take the deceased to hospital. She went and found the deceased at Hindi Dispensary where he had been given first aid. She took him to Lamu Hospital where they arrived at about 1.00 a.m. At that time the deceased was not talking. He was only saying "mama" "mama". She observed that the deceased had a deep cut wound on the head. He died at about 3.00 a.m. of the 25th April 2003.

P.C. Charles Kariuki of Lamu Police Station was the investigating officer. He testified that the Accused was handed over to him by Roka Police Post and that he witnessed the post mortem examination by Dr. Bwana on the body of the deceased. In cross-examination he said he saw two jembes at Lamu Police Station one of which was said to have been with the deceased but only the one alleged to have been used by the Accused to hit the deceased was produced.

The last prosecution witness was Dr. Kombo Mohamed Bwana, P.W.8. He performed the post mortem examination on the body of the deceased after it had been identified to him by P.W.6, Abass Salat Abshiri, the deceased's brother. He observed about 6cm cut wound on the head of the deceased which in his opinion had been caused by a sharp object. After examination he formed the opinion that the cause of death was the head injury which had led to excessive haemorrhage. He said the injury was so severe that the deceased could not have survived even if he had been taken to the best hospital immediately.

Upon being put on his defence the Accused testified on oath but did not call any witnesses. He said that after he had finished planting maize on the 24th April 2003 his wife and children went to fetch water and he remained behind listening to his radio. The Deceased then went to where the Accused was and asked him why he had encroached about 10 paces into his farm. Accused then told him that if he had indeed encroached then the elders would resolve the matter. The deceased could not hear of that. He said the Accused was fond of calling elders but this time around he was going to teach him a lesson and went away to his home. The Accused also decided to go to his home but before he could get there the deceased returned with a jembe, knife and a stick and challenged him to a dwell in the forest. Before he could answer the deceased started beating him with a stick and when the stick broke he attempted to hit him with a jembe. In self defence he deflected the attack with the jembe and that is how the deceased got injured. He denied hitting the deceased. In cross-examination, however, he said they fought and that is how the deceased ended up being injured.

That is the evidence adduced by both the prosecution and the defence in this case. After summing up the case to the assessors they were of the unanimous opinion that the Accused is guilty of the lesser offence of manslaughter. They accepted the Accused's testimony that the deceased challenged him to a fight and

that as the two fought the Accused hit the deceased on the head inflicting a serious injury on him.

It is common ground that the deceased and the Accused had a running boundary dispute. The matter had been referred to the elders before who marked the boundary line. We are not told if anything permanent like beacon were used to mark the boundary.

It is also common ground that on the 14th April 2003 when the Accused and the deceased and their respective families were planting maize on their respective farms, the deceased asked the Accused why the Accused had encroached onto his farm. They exchanged some words to the effect that they would see who would win. The matter was not resolved and no agreement was reached. Both families retired to their respective homes. According to the widow of the deceased, P.W.1, the deceased stood near the door to their house. She went with P.W.2 to the other side of the house. She further testified that while seated on the other side of the house she saw Accused spring from behind the deceased and hit him with a jembe on the head. She said that at that time the deceased did not have anything in his hands. I do not think that that testimony is correct. This is because P.W.2 who was with her on the other side of the house gave a different version. He said that where they were both seated on the other side of the house they could not see the deceased. They only heard a bang and rushed to where the deceased was and found him lying down having been hit by the deceased. According to P.W.2 he left the Accused still standing near the deceased and rushed, as instructed by P.W.1, to go and inform the deceased's mother of what had happened. P.W.1 on her part said that immediately after hitting the deceased and felling him the Accused ran to his home and returned with a panga but was restrained from doing anything further by a neighbour, Mama Toto, who held him and took him to her house. Mama Toto is P.W.3. She never said anything about the deceased having a panga. P.W.1 further stated that when she rushed to where the deceased was lying after being hit, the deceased told her "Abdi has killed me". In my view that statement could have not been necessary if the witness had seen the Accused hit the deceased. This view is supported by her own answers to questions put to her in cross-examination. In those answers she agreed with P.W.2 that where they were seated on the other side of the house they could not see the Accused's house. She also said that she did not see the Accused approach the deceased. She only heard a bang and rushed to where the deceased was only to find him lying down bleeding profusely.

From the testimony of P.W.1 and P.W.2 it is clear that nobody witnessed what actually transpired between the deceased and the Accused immediately before the deceased was hit. The two went to the scene and found the deceased lying down. P.W.3 also went to the scene after she heard screams from P.W.1.

The Accused denied hitting the deceased and said that he, in self defence, deflected an attack on him by the deceased and that is how perhaps the deceased got injured. I do not believe him on that. A deflection could not have inflicted such serious injury to the deceased. I have no doubt in my mind that the Accused struck the deceased with a jembe and inflicted the fatal injury.

The investigating officer P.W.7 said that Mokowe Police Post handed over to him two jembes one of which he was told was with the deceased. With that piece of evidence, and in the absence of any evidence as to what transpired just before the deceased was hit, I agree with the assessors and also accept the Accused's evidence that the Accused and the deceased fought. What is not clear is who started the fight. During that fight the Accused inflicted a fatal injury on the deceased. The injury was so serious that even if the deceased had been taken to the best hospital in the country his life could not have been saved. I do not agree that the Accused acted in self defence and if he did I find that he applied more than necessary force. He should have used the jembe stick and struck the deceased on any other part except the head if he was trying to disarm him. In the circumstances I agree with the assessors that the Accused and the deceased fought. There is no evidence of malice aforethought as defined by section 206 of the Penal Code. Consequently I find the Accused guilty of the lesser offence of manslaughter and convict him accordingly.

DATED this 28th day of July 2004.

D.K. Maraga

Ag. JUDGE