



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL CASE NO. 21 OF 2018**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**BAKARI MWANZIJE CHILOLWA.....1<sup>ST</sup> ACCUSED**

**NDEGWA CHILOLWA.....2<sup>ND</sup> ACCUSED**

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

1. The accused persons Bakari Mwanziye and Ndegwa Chilolwa were jointly Charged with the offence of murder contrary to Section 203 as read with Section 204 of the penal code.
2. Particulars were that the accused persons on the 16<sup>th</sup> day of April 2018 at 7.30pm at Kidzanya Village, Kinango Sub-County, Kwale County jointly murdered Tsuma Ruwa Buguta.
3. PW 1 the nephew of the deceased learnt of his death from Pastor Ibrahim Ngome of Sanctuary of Christ. He proceeded to the scene and found the body of the deceased had been collected by police. On 27<sup>th</sup> April 2018, PW 1 identified the body of the deceased for postmortem at Kinango subounty hospital. He said that the deceased disagreed with some people and was attacked outside the palm wine bar.
4. PW 2 Said Mwero Mumba, Village elder from Kidzaya village. He said accused persons are brothers and that the deceased was his uncle, a brother to his mother. He testified that on 26<sup>th</sup> April 2018 he left his shop at 9.30pm and went to Kidzaya Primary School and on return he found people gathered in groups and on enquiring he learnt that a fight started at a drinking place between Bakari Mwanjiye Chilolwa, Ndegwa Chilolwe Maumba and Tsuma Ruwa Buguta.
5. PW 2 said he saw Tsuma Ruwa Buguta lying on the ground at the shopping centre and that 1<sup>st</sup> accused used an axe to hit the deceased on the forehead. That Accused 1 told the 2<sup>nd</sup> accused "tushamaliza twende zetu". That accused persons left scene while holding their hands. PW 2 called Assistant Chief Chikophe Mwanza and reported what happened. Assistant Chief in-turn called police from Vigurungani and they went and collected the body. PW 2 said accused persons were drunk though not so much when the Accused 1 hit the deceased.
6. PW 2 said that he didn't see Tsuma Kitsao at the scene and that the deceased was being beaten by 2 people and that people were watching. PW 2 said that he didn't move close as a sharp object was being used. He said accused persons also used sticks to beat the deceased. PW 2 said nobody told him what caused the fight. He said that the palm wine den opens at 4.00pm. He said members of public at the scene were not willing to explain what happened or what they saw at the scene and when the Chief tried to make inquiries the members of public who were at scene vanished.
7. According to PW 2 Chief Chikophe Mwanza, told him that A1 had gone to his place with an injury on the head and that A2 had suffered an injury on his back and could not walk to his office. PW 3 Chikophe Mwanza Asst. Chief of Busa sublocation testified that he knew the accused persons who are brothers and he also knew the deceased who was commonly known as Tsungula.
8. He said the deceased was from Vigurungani Sublocation but was burning charcoal in PW 3's sublocation. PW 3 recorded murder report from PW 2 – Mwero Mumba the village elder of Kidzanya village. He was told the name of deceased and the accused persons as assailants. PW 3 called the OCS of Vigurungai Police Station who used motor vehicle from Kinango to collect the body of the deceased. He said that the deceased's left hand was broken and he had a cut wound on the forehead. PW 3 testified that on 27/04/2018 at 6.00am A1 went to his home and that he had an injury on the head and had a blood stained shirt. That the 1<sup>st</sup> Accused reported he had been beaten by Tsuma Ruwa the deceased and he wanted a letter to go to hospital. That PW 3 told A1 to accompany him to Vigurungai police station so he could get P3 form.

9. That A1 told him that A2 was badly injured on the leg and could not walk. That when PW 3 went to A1's home the wife said he had not reached home. PW 3 said he learnt that the deceased intervened in a fight between Ndegwa and Mwawato - A2 and Mwawato. That Mwawato who was related to the deceased ran away and left the deceased fighting with accused persons. The Asst. Chief also learnt that the deceased and accused person were in palm wine drinking den. He said that accused persons referred to the deceased as their uncle as he was a brother to their mother. PW 3 said A1 went to her and he took him to police. He said A1 had an injury on the leg and walked with support of a stick. He said he didn't follow Mwawato to know why he fought with accused person.

10. PW 4 Mawato Zamu testified that they were at palm wine club drinking on 26/09/2018 at 9.00pm with the deceased his father's brother together with the accused persons and one Tsuma Kidzao when A1 Shone Kidzao told on Tsuma Kidzao and when Tsuma complained A1 dared him to a fight and they started fighting. That PW 4 and the deceased intervened to separate them but they were attacked by accused persons. That A1 used a rungu to hit them. That A2 had an axe which he threw towards PW 4's shoulder but he missed.

11. That A2 cut the deceased on the forehead using the axe. That when we saw the deceased had been cut on the forehead he escaped. PW 4 said that accused persons were drunk and Tsuma was also drunk. He said A2 sustained injuries on the leg in the course of the fight. He said he didn't know why Tsuma quarreled with Bakari - A1.

12. PW 5 assisted to arrest A2 from his hideout in a bush after being led by his wife. PW 6 Dr. Gathendu produced postmortem report in which cause of death was established as severe head injury with brain injury.

13. PW 7 Inspector Osman Hassan formally of Vigurungani Police Station testified that on 26/04/2018 he received report of murder at 10.00pm from village elder of Kidzaya said Mumba. He proceeded to scene in company of other officers & collect the body which had a cut on the face. He established accused persons who are brothers were the assailants. The matter was then handed over to DCI Kinango for investigations. PW 7 said weapon was not recovered. He said the weapon used was an axe and not a panga.

14. PW 8 P.C. Daniel Mwangi testified that he together with Sergeant Adan Roba conducted investigations into the murder but Adan went on transfer. He said they took over investigations from police officers from Vigurungani police station and processed post mortem report and recorded statements. PW 8 said in cross examination that incident happened at palm wine club-mangwe. He said owner of the club didn't record a statement. He said a scuffle ensued at the palm wine den among patrons who were drinking. He said Tsuma Kidzao was involved in the fight. That he was fighting with accused persons. He said Tsuma Kidzao didn't record a statement. He said other witnesses declined to record statements and there was only one eye witness. He said accused persons surrendered themselves and they had injuries and were taken to hospital by police.

15. PW 8 said he was not aware of grudge between accused and the deceased. When placed on defence A1 gave sworn statement and said that he was at the palm wine club and when he went to close his shop he heard commotion outside. As he had left his brother A2 at the club he ran out to go and see what had happened and he found his brother fighting with Mwawato outside the club. That when he approached Mwawato ran away. That he went to the shop to buy somethings and saw Mwawato and Tsuma Ruwa come back again and that Ruwa was armed with an axe and he decided to run away and Tsuma pelted him with stones which hit his ankle joint and he fell.

16. That when he stood to run away he saw Tsuma following his brother and he decided to follow as he saw him cut his brother on the head. That when the deceased wanted to hit A2 again he hit him with his fist on the neck and he fell down. He said his brother was cut on the left side of the head. He said that when the deceased fell A2 took the axe and cut him. He said his brother was also bleeding profusely.

17. He said they left the deceased at the scene and went home. He said the fight was between A2 and Mwawato and the 2<sup>nd</sup> fight was between the deceased, himself and his brother A2. He said the many people at the scene didn't intervene. He said they started drinking at 4.00pm and by 8.00pm they were drunk. He said when they went home he got to A2's home and because his leg was painful he could not walk anymore and he told A2 to go and report the incident to the Chief.

18. A1 said he learnt from his son that the person they fought with had died and police had collected the body. He said that on 19/04/2018 when he escorted his brother, A2 to Chiefs Office he was arrested and taken to police station although he had difficulties walking. He said court ordered that he should be detained as investigations were being carried out and on 10/05/2018 when X-ray was done on his leg it was found the ankle had a crack. A1 said the deceased and Mwawato had not differed with him. He said that the deceased cut A2 with an axe & that he intervened to restrain the deceased from cutting A2 again. He said incident was influenced by drunkardness.

19. A2 Ndegwa Chilolwa also gave sworn statement. He said Mwawato took his drink when he went for a short call and that Mwawato refused to buy for him a drink to replace what he had taken. That Mwawato slapped him and he returned the slap and they started punching each other and Mwawato ran away. That after Mwawato had run away the deceased came with an axe and raised it to cut him and he was cut on the right side of the head above the ear. That when deceased cut him he fell and bled. That other people saw the deceased with an axe and scattered and it is only A1 who went to restrain the deceased from cutting him again. That when A1 restrained him and he fell and the axe also fell but he still wanted to take it, A2 reached out for it and used it to hit the deceased and he fell at the scene.

20. A2 said the axe belonged to the deceased. That when he had hit the deceased, he left and followed his brother, A1 who was walking with a limp. That he left, the deceased seated on the ground and crying and they went to his house. He said he was bleeding profusely and felt dizzy. That when they got to his house A1 was unable to walk and he left him at home as he went to report to Chief and the Chief took him to police the next morning and to hospital using his motorbike.

21. He said it is police who told him that Tsuma had died. He said the deceased was from his mother's clan and they had not differed. He said he had also not differed with Mwawato. He said he had been at the palm wine den from 4.00pm upto 8.00pm and he was drunk. He said he reached for the axe and used it to hit the deceased atleast twice in self defence. He said he was angry when Mwawato insulted him that he was a prostitute and coupled with drunkardness led to fracas.

22. Having considered the prosecution witnesses evidence and the defence evidence the issue is whether prosecution has established beyond all reasonable doubt that the accused persons murdered the deceased. Elements required to be proved on in an offence of murder are:-

**i. Fact of death**

**ii. Cause of death**

**iii. That death occurred as a result of an unlawful act and/or omission**

**iv. That the unlawful act and/or omission was as a result of malice aforethought by the accused person.**

23. It is not disputed that Tsuma Ruwa Buguta died on the 26<sup>th</sup> day of April 2018. All the prosecution witnesses and the accused persons have confirmed this fact and EXP1-Post Mortem Form filled by Dr. Gathendu Edwin confirms that the deceased died due to severe head injury with primary brain injury to the frontal lobe due to trauma by a sharp object.

24. It is also not in dispute that the injury was caused by unlawful act. The injuries were sustained following a brawl and/or scuffle that arose at a palm wine den and both parties sustained injuries but the deceased sustained fatal injuries. PW 1 learnt of the death from a pastor and he proceeded to scene where he found the body had been collected. PW 2 said he saw A1 hit the deceased with an axe but his evidence is challenged by the consistent defence of accused persons that it is the deceased who first cut A2 with an axe and when he wanted to cut him again A1 hit him and he fell and the axe also fell and A2 reached for it and cut him on the head.

25. PW 5 confirmed accused persons were drunk PW 2 confirmed that he learnt from Chief that A2 had an injury on the head while A2 had an injury on his leg & back and could not walk. From the evidence of prosecution witnesses particularly PW 3 & PW 4 coupled with evidence of accused persons in defence it would be safe to conclude that the unlawful act that led to the death of the deceased was not premeditated with malice aforethought.

26. The accused person's and the deceased together with PW 4 and other revelers were at a palmwine club/den when according to PW 1, A2 & Tsuma Kidzao differed or according to A2 he differed with PW 4 & a scuffle/commotion ensued and the deceased also joined and he suffered fatal injuries.

27. In consideration that mensrea has not been established, this court can only find the accused persons guilty of manslaughter. They are accordingly convicted for offence of manslaughter and acquitted of the offence of murder. They are convicted accordingly and acquitted of the offence of murder.

**DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 08<sup>TH</sup> DAY OF OCTOBER, 2021**

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

**In the presence of:-**

*Ogwel – Court assistant*

*Accused 1 & 2 – Present in persons*

*Mr. Njoroge Advocate for accused persons*

*Mr. Mulamula for state*

***Hon. Lady Justice A. Ong'injo***

***Judge***