



REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRIMINAL CASE NO. 21 OF 2010

REPUBLICPROSECUTOR

VERSUS

KARISA NZAI MKUTANO AND

ARNOLD KITSAO KAHINDIACCUSED

JUDGMENT

1. The two accused are charged jointly with Murder contrary to Section 203 as read with Section 204 of the Penal Code. In that on 27th August, 2010 at Gede Trading centre in Gede Location of Malindi District, within the Coast Province they jointly murdered Kasiwa Nzai Randu.
2. They denied the charge and were represented by Mr. Gekanana. The prosecution evidence was as follows. The two accused persons were drinking ‘*mnazi*’ wine at a pub (locally known as mangwe) on 27th August, 2010. The mangwe is at a place known as Gede stage. Also present at the said mangwe were other patrons including Kasiwa Nzai Randu (the deceased), his brother Furaha Mukoba Mwazomba (PW1), a cousin Karisa Katana Kalume (PW2) and a friend Thoya Kitsao (PW3). The two accused sat at a separate banda some distance from the one occupied by the group of the deceased.
3. An altercation started between the two groups when one of the accused allegedly spoke to a party in the latter group provoking an exchange between the deceased and the 2nd accused. The said accused picked up a wooden tomato crate which he hurled towards the deceased. It hit PW3 injuring him on the face. Soon a scuffle broke out between the two sides. Punches were exchanged. It is not clear what happened next but the entire group went outside the mangwe towards the nearby road.
4. The 1st accused was ahead and disappeared briefly, and when he reappeared he stabbed the deceased in the abdomen. The deceased fell in a waste dump at the stage. At that moment, police on patrol arrived after being notified of the fight. They found the deceased lying on the ground with a stab wound on the abdomen, the intestines protruding. He was rushed to Malindi District Hospital but was declared dead on arrival. According to the postmortem forms there was a deep stab wound on the body. The intestines were perforated three times, with tears. The stab wound penetrated to the back wall of the abdomen. Death was due to excessive hemorrhage. Both accused were subsequently arrested and charged.
5. The accused gave unsworn defence statements upon being placed on their defence. The 1st accused stated that on the material date he started drinking at the mangwe before 2.00pm. Many

- other patrons came to the mangwe. That at about 9.00pm a fight broke out and drew in many people after a man tripped and spilt the drink he and his group were having but instead of apologizing abused the said men. The 1st accused was injured in the fierce fight which spilled over into the neighbouring area. The combatants were drunk. He managed to escape to seek medical attention but did not get treatment. He was directed to obtain a P3 form first. When he went to the police station he was arrested and placed in custody. He denied that he murdered the deceased.
6. The 2nd accused said that he was with the 1st accused at the mangwe on the material day drinking mnazi wine. That other revelers including PW1, the deceased and PW3 sat together in a different banda. He said that PW3 stood up and as he went towards the toilet toppled their drinks. As he returned the accused persons confronted him, but he abused them and was joined by PW1 and the deceased. A fight ensued following the punching of the 1st accused. The 2nd accused stood aside as the fight spilled outside the mangwe but PW1 attacked him. He struggled with him and both fell inside a ditch. It is then he heard the deceased crying out “I am dying”. He and PW1 fled the scene. Later when he learned that police were looking for him, he presented himself and was arrested.
 7. The main facts of this case are not in dispute. The accused persons and the deceased were at the mangwe in question since late afternoon on the material date. They were drinking mnazi wine. They sat separately. While the two accused and their companions occupied one banda, PW1, PW2, PW3 and deceased sat at another, some distance away. At some time in the evening, words were exchanged between a man from the deceased’s camp (identified as PW3) and that of the accused. The exact nature of the cause is not clear but it would seem that accused’s group were unhappy with the said member of the deceased’s group. They exchanged insults with him.
 8. Presently all members of the two camps were trading insults and before long a full fledged fight broke out between the two groups. The combatants went out fighting towards the nearby road and before long, the deceased lay dying, stabbed severely in the stomach, by what must have been a very sharp object. Police who had received a report of the fierce fight arrived and took away the deceased who was pronounced dead on arrival at the hospital. The Accused persons were later arrested and charged.
 9. The court must determine whether any act or omission by the two accused led to the death of the deceased and whether such act of omission was accompanied by the necessary *mens rea*.
 10. The prosecution evidence though PW1, 2 and 3 was that when the fighting broke out initially, a crate was thrown by the 2nd accused towards the deceased’s camp. It hit PW3. He was injured on the head. Next, after exchanging insults the two accused came over to assault the deceased forcing PW1 to intervene, and drawing him into the fight. PW1 said he was engaged in combat with 2nd accused while the deceased fought off the 1st accused.
 11. The 2nd accused admitted that he got up to defend himself after the 1st accused was punched during the scuffle. He fought with PW1. The combatants went outside as PW2 tried to assist PW3 who had been injured by the flying crate. Within a few minutes after they had moved outside, PW2 heard the deceased state that had been stabbed. According to PW1 the 1st accused stabbed the deceased the latter who was walking ahead of him. The deceased cried out saying that he had been stabbed. The scene was close to a rubbish dump. PW1 said as he walked ahead of the 2nd accused he witnessed the stabbing and heard the 1st accused saying to his victim “you are the one I wanted”. The 2nd accused confirmed that the deceased cried out words to the effect “I am dying” but he immediately fled the scene.
 12. During the trial, it did appear that apart from PW1, PW2, PW3, the deceased and the two accused persons, no other patrons were involved in the fight. There was no suggestion during cross-examination that other revelers entered the fray. Undeniably these combatants were on different

sides of the fight; on the one hand the accused persons and on the other, the prosecution witnesses and the deceased. The fighting broke out in the mangwe and combatants went out towards the road. There is no dispute that in the course of the fight, only minutes since it started, the deceased was severely stabbed. So deep was the stab that it transected the abdominal aorta and ran up to the back wall of abdomen, exposing the intestines also perforated at three places.

13. It seemed at some point of the trial that the defence was suggesting that the injury could have resulted from a fall in the dump. That in my view is not likely; such a fall, even on a sharp object could not cause such severe frontal to back transection with three tears to the small intestines. It may be true that the knife allegedly recovered by police may not have been the one used in the stabbing but certainly a sharp object was forcefully lodged into the abdomen of the deceased during the fight. In the circumstances of this case, it does appear that the accused persons were the aggressors and when they met resistance from the deceased's group they got even more aggressive. Their aim was to subdue their opponents by assaulting them. In the circumstances of this case, it is believable that the 1st accused stabbed the deceased.

14. Regarding the question whether common intent has been established between the two accused Section 21 of the Penal Code is instructive. It states:

“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 purpose an offence is committed of such a nature that its commission is a probable sequence of the prosecution of such purpose, each of them is deemed to have committed the act.”

15. The accused persons stated that they were angered by the fact that PW3 had knocked down their wine while passing near the place they occupied ostensibly to go to the toilet. They confronted him on his way back to the mangwe. He did not apologize but hurled insults at them. At that moment the 2nd accused, according to the prosecution evidence, hurled a wooden tomato crate which hit pW3. The fighting broke out then. It must be recalled that the fighting though taking place first in the mangwe and later outside was a continuous transaction taking some minutes. Both the accused persons were engaged to the last minute in the fighting.

16. PW1 told the court that while he fought off the 2nd accused his brother the deceased struggled with the 1st accused. Indeed both PW1 and 2nd accused in their testimony state that they were so engaged when they heard the deceased, not far off declare that he had been stabbed and was dying.

In the case of **Rex v Tabula Yenka s/o Kirya & 3 others (1943)10 EACA 51** the Court of Appeal stated:

“To constitute a common intention to prosecute an unlawful purpose ...it is not necessary that there should be any concerted agreement between the accused prior to the attack on the so called thief (or perceived offender). Their common intention may be inferred from their presence, their action and the omission of any of them to disassociate himself from the assault.”

17. The accused persons attacked the deceased and his group in the first place as a form of revenge because PW3 had knocked down their wine and insulted them. Words to the effect that “we will show you” or “teach you a lesson” were uttered by them. Although the 2nd accused did not directly engage the deceased, he was locked in battle with the deceased's brother PW1, who had come to the deceased's aid, and was so engaged when the deceased was stabbed. The aim was to punish by assaulting the deceased and his group of revelers.

18. In the case of **Njoroge v R [1983] KLR 197**, the Court of Appeal made the following observations.

“If several persons combine for an unlawful purpose and one of them in the prosecution of it kills a man, it is murder against all who are present whether they aided or abetted or not, provided that the death was caused by the act of someone of the party in the course of his endeavours to effect the common assault of the assembly....their common intention may be inferred from their presence, their actions and the omission of either of them to dissociate himself from the assault.”

19. The tragic incident started off as a drunken brawl but ended with the deceased fatally injured through stabbing. PW1 witnessed the stabbing and heard the deceased cry out. The deceased told both PW1 and PW3 immediately that Karisa (1st accused) had stabbed him. PW1 said he also heard the 1st accused say as he approached the deceased before stabbing him words to the effect that “it is you I wanted”. The incident occurred just about dusk as when PW7, the first police officer arrived. He found the fighting over, the victim on the ground. He put the time at 6.00pm. PW1 said it was about 7.00pm but there was moonlight. These persons had been together most afternoon and were well known to each other. The fighting continued uninterrupted right from the mangwe to the scene of the stabbing.
20. In these circumstances, I believe that there was sufficient opportunity for unerring identification of the assailants. It is not believable that the 1st accused who had been a key combatant ran away from the scene after he was injured and was therefore not present during the stabbing. He told the court that he went directly to the hospital but was referred to the police station. He did not directly state anything concerning the stabbing of the deceased.
21. I am satisfied on the evidence before me that the accused persons while engaged in a fight with the deceased occasioned him fatal injuries. The circumstances of this case were that the combatants were drinking on the material evening when the brawl broke out. Evidently there is no basis for concluding that a defence of intoxication could have been sustainable in the accused’s favor. (see Section 13 Penal Code as discussed by the Court of Appeal in (Njoroge v R [2002]2 KLR 200)).
22. However, I am of the view that the proven circumstances justify a finding of guilt and conviction in respect of the lesser offence of Manslaughter contrary to section 202 (1) as read with Section 205 of the Penal code. I find that the prosecution evidence tendered has established the said lesser offence against the two accused persons beyond any reasonable doubt. They are convicted accordingly.

Delivered and signed at Malindi this **6th** day of **March, 2014** in the presence of the accused, Mr. Gekanana for them, Mr. Nyongesa for the State.

Court clerk – Samwel.

C. W. Meoli

JUDGE

MR. NYONGESA - We do not have record. Treat as first offenders.

C. W. Meoli

JUDGE

MR. GEKANANA – Accused are remorseful. They are first offenders. We pray for leniency.

NOTES ON SENTENCE

Accused persons are treated as first offenders. They have benefitted from reduction of the charge to manslaughter. However, drunk or angry the accused may have been there can be no justification other than lawlessness for inflicting the sort of severe injuries proved in respect of the deceased. The court takes a dim view of their conduct in light of the gravity and circumstances of the offence.

C. W. Meoli

JUDGE

SENTENCE – Each accused sentenced to serve 15 (FIFTEEN) years imprisonment. Right of appeal 14 days.

C. W. Meoli

JUDGE

MR. GEKANANA – I pray for discharge of sureties and copies of proceedings and judgment.

C. W. Meoli

JUDGE

COURT – application allowed.

C. W. Meoli

JUDGE