



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MALINDI**

**CRIMINAL CASE NO. 25 OF 2011**

**REPUBLIC .....PROSECUTOR**

**VERSUS**

**1. BONAYA TUTU IPU**

**2. NOEL BUYA KAMALE ..... ACCUSED**

**JUDGMENT**

1. The accused persons were jointly charged with Murder contrary to Section 203 as read with Section 204 of the Penal Code. Particulars in the information state that on the 20<sup>th</sup> day of September, 2011 at Ngao Location, Tarasaa Division, in Tana Delta District of Tana River County, jointly inflicted bodily harm to Mathew Moya Komora which occasioned the death of the said Mathew Moya Komora.(sic)
2. The accused denied the charge and were represented by Mr. Gekanana. The prosecution case was as follows: The 1<sup>st</sup> accused Bonaya Ipu Tutu a step son of Lorna Ndisa Abagerera (PW1) resided with the latter at her home in Ngao Tana River. He came back home for the night on 20<sup>th</sup> September, 2011 at 11.00pm just as PW1 was preparing to retire to bed. It would seem that before she could do so her relative Mathew Moya Komora the deceased came by the home. He was drunk. PW1 instructed the 1<sup>st</sup> accused to escort him home. Instead the 1<sup>st</sup> accused called the 2<sup>nd</sup> accused Noel Buya Kamale and the two set upon the deceased, assaulting him viciously declaring that he was a witch.
3. The 2<sup>nd</sup> accused's father (PW5) and other close neighbours tried to intervene and eventually the deceased managed to stagger away. But he collapsed on the way home and his nephew Daniel Manga Abagerera Junior (PW3) was called by Musanzu Joachim Sulubu (PW6) to assist him. With the assistance of other relatives the deceased was taken to Ngao District Hospital and later transferred to Malindi hospital where he died on the next day. The deceased had allegedly declared to his relatives, including his brother John Chengo Abagerera (PW7) that Morris Khamale, Noel Kamale and Bonaya Ipu had assaulted him, after he strayed into PW1's home. On 21<sup>st</sup> September, 2011 the Ngao area assistant Chief Joshua James Kilimbi (PW8) organized for the arrest of the accused. A postmortem conducted by Dr. Tajbali revealed that the cause of death was rupture of the spleen leading to internal bleeding.
4. Both accused persons elected to make unsworn defence statements and did not call any witness. The 1<sup>st</sup> accused said he returned home at 11.00pm on the material night and found the deceased

seated on the ground talking to PW1. The deceased was drunk himself and PW1 went inside the house. But the deceased followed them saying he had lost his way. He and his co-accused escorted the deceased out of the compound and left him after some distance as he said he could make it home. He denied assaulting the deceased and stated that he only learned about it the next day.

5. The 2<sup>nd</sup> accused said he was at home on the material night when attracted by noise from PW1's home. He went there and found the deceased lying down with his co-accused and PW1 at the scene. His father PW5 also came to the scene. Deceased was drunk and he said he had lost the way. He requested to be assisted home. He was unstable and kept falling down. He and his co-accused escorted him some distance. That in the cause of the commotion, PW4 was attracted to the scene and assumed that the men had assaulted the deceased leading to an exchange of words. He said he had had a disagreement with witnesses. After escorting the deceased he went back home only to learn on the next day that he had been assaulted.
6. There is no dispute that the accused persons were at PW1's home arriving at different times sometime after 11.00pm. The deceased was also there. He was drunk and said he had lost his way. There is no dispute that the deceased eventually left PW1's home and in a short while collapsed. He was rushed to hospital but died on the next day from injuries which caused internal bleeding. There is no dispute that all the people at the scene were known to each other as relatives.
7. The court must determine whether the accused person assaulted the deceased and occasioned his death. PW1 said that after he had asked the 1<sup>st</sup> accused to escort the deceased away he heard him slap the deceased and when the 2<sup>nd</sup> accused joined him the two jointly assaulted the deceased. PW1 went outside the house to the scene and tried to stop the beating. The deceased screamed after he had been kicked in the abdomen. PW1 said there was electric light from one Dada's house which was 20 metres away, illuminating the scene. According to PW1 the appellant claimed the deceased was a witch.
8. Because of the noise emanating from the compound, other neighbours including Esther Megi Benjamin (PW4) came out of their houses. PW4 pleaded with the accused to stop assaulting the deceased. Although she stood about 20 metres away the men came close to her, insulted her and warned her not to interfere. They threatened to beat her too. These two men were well known to PW4. She confirmed in cross-examination that PW1's house was illuminated from a light some 20 metres away. She stated that she heard PW1 say:

**“Bonaya and Noel leave the man alone. He lost his way.”**

9. The father to the 2<sup>nd</sup> accused (PW5) also heard these words uttered by PW1. He too went to the scene. In his words:

**“She (PW1) was talking to accused 1 and accused 2 (identified). She was telling them to stop what they were doing. PW1 was saying “stop the fracas.” I took my son (accused 2) to go home with me ... At the scene there was the deceased and the two accused ... deceased sat on the ground complaining that he had been beaten yet he had lost his way home. He said the two accused had beaten him...I ordered the two accused to leave and go home. PW1 helped the deceased get up and he staggered off.”**

The deceased also repeated to several people on that night that he had been assaulted by the two accused. These include the Good Samaritan PW6, his nephew PW3 and his brother PW7.

10. According to the latter, the deceased stated to him as soon as he arrived at the scene where he had collapsed:

***“If I die, Morris Khamale, Noel Khamale, his son and Bonaya Ipu beat me and another ... I did not recall”***

Moris Khamale is father to the 2<sup>nd</sup> accused, who in his testimony only indirectly confirmed that the deceased had been assaulted. The evidence of the eye witnesses was not shaken during cross-examination. Neither did 2<sup>nd</sup> accused suggest the existence of any grudge with PW4 during cross-examination. He was later to assert the same in his defence.

11. The defence suggests that the accused escorted the deceased from PW1's compound and he was subsequently assaulted. However, the evidence of the prosecution eye witnesses including PW5 strongly indicates that the deceased left the scene alone and that by the time he left, he had already been assaulted. If indeed the appellant had not assaulted at the scene of PW1's compound, there would have been no fracas or commotion rousing many villagers to come to PW1's and neither would PW4 have heard PW1 utter the words: **“Bonaya and Noel leave the man alone. He lost his way”**. Nor would PW5 have heard PW1 say; **“leave this man ... stop the fracas”** forcing him to go to the scene and pull away his son the 2<sup>nd</sup> accused therefrom.
12. Even the 2<sup>nd</sup> accused said he and PW4 were drawn to PW1's home by noise. The deceased was clearly assaulted at PW1's by the two accused on allegations of being a witch for straying into the home. Even if he was drunk and fell, as suggested by the 2<sup>nd</sup> accused, he could not have sustained multiple perforations on of the spleen as indicated in the postmortem form. The medical evidence as to the cause of death is consistent with the assault described by PW1: slaps, kicks in the abdomen etc.
13. At the time PW7 arrived, after midnight, the deceased had defecated on himself and could not walk. He was writhing in pain and lay in a shop corridor. He was dead within hours. The defence raised by the accused cannot stand and has been displaced by the overwhelming prosecution evidence. Section 206 of the Penal Code states:

***“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances –***

- a. ***An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;***
- b. ***Knowledge that the act or omission causing death will probably cause the death of or grievous harm actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;***
- c. ***An intent to commit a felony;***
- d. ***An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony”***

14. The accused were apparently angered by the intrusion of the deceased on PW1's home on the material night. They together accused him of being a witch. They assaulted him viciously. Their intention to cause him grievous harm is manifested in the viciousness of the attack.
15. Reviewing all the evidence tendered before me, I am satisfied that the prosecution has proved its case against the two accused beyond any reasonable doubt. I find them guilty as charged and convict them.

**Delivered and signed at Malindi this 14<sup>th</sup> day of February, 2014 in the presence of Mr.**

**Gekanana for them, Miss Mathangani for State.**

**Court clerk - Samwel**

**C. W. Meoli**

**JUDGE**

**MISS MATHANGANI** – They may be treated as first offenders. I don't have the records.

**C. W. Meoli**

**JUDGE**

**COURT** – Record and sentencing on 4<sup>th</sup> March, 2014 for Mr. Gekanana to attend and mitigate.

**C. W. Meoli**

**JUDGE**

4-3-2014

Before Hon. Lady Justice Meoli – J

Mr. Nyongesa for State

Miss Ochangu for Accused holding brief for Mr. Gekanana

Court clerk – Samwel

Accused present

Interpretation – English/Kiswahili

MR. NYONGESA - Accused can be treated as first offenders.

**C. W. Meoli**

**JUDGE**

**MISS OCHANGU** – The accused are remorseful. They are sole bread winners of their families.

**C. W. Meoli**

**JUDGE**

**NOTES ON SENTENCE**

Accused persons treated as first offenders. I have noted mitigation but on sentence this court is bound by precedent in Court of Appeal.

**C. W. Meoli**

**JUDGE**

The accused mercilessly descended on an old man and beat him to death for no apparent reason.

**C. W. Meoli**

**JUDGE**

**SENTENCE**

Accused to suffer death in the manner authorized by law. Right of Appeal 14 days.

**C. W. Meoli**

**JUDGE**