



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL CASE NO. 83 OF 1997

REPUBLIC PROSECUTOR

VERSUS

HARUN MUDAVI ADOLWA ACCUSED

J U D G E M E N T

The accused Harun Mudavi Adolwa is charged with murder contrary to section 203 as read with Section 204 of the Penal Code (Cap. 63 Laws of Kenya). The particulars of the offence are that on the 8th day of March, 1994 at Kailimoni Sublocation in Kiambu District of the Central province the accused jointly with others not before the court murdered Simon Mbithi Nzioka. The accused denied the charge.

The summary of prosecution case is as follows:

On 8th march, 1994 at about 6.30 a.m. Joseph Odawo Odaro (PW1) left his house within Premier Bag and Cordage Staff housing to go and buy a newspaper where he reclined the main gate he found a vehicle carrying guards towards senior staff houses. After Odaro (PW1) had bought the newspaper he walked back to his house at about 8.30 a.m. only to meet the guards being chased away by a mob of people. Near the main gage PW1 saw one of the guards being stoned until he fell down. Then PW1 saw the accused come with a rungu and hit the guard who was lying down. PW1 said that the accused beat the guards as if he was killing a snake. After that the accused went back to the camp while PW1 ran to the office to get assistance for the injured man. PW1 reported the matter to the Personnel Offices and then reported on duty. He (PW1) was later called by the policemen to go and record a statement. PW1 recognized the rungu (Exhibit 1) which was produced in court as the one that the accused used in hitting the guard. PW1 said that he had known the accused since 1972. He knew him as Harun Mudavi or 'Mfalme'.

Thomas Sauten (PW2) testified that on 8th Marchd, 1994 at about 6.30 a.m. he was on duty at the staff gate where he was informed by personnel officer Mr. Nicholas Okulo that some people would come and that PW2 should open for them. At about 7.00 a.m. PW2 saw a lorry and a pick-up - the lorry was carrying people in uniform. PW2 opened the gate for the two vehicles as already informed. The two vehicles went towards staff quarters. At about 7.30 a.m. PW2 heard a whistle and screams. Then he saw people running, and they were throwing bottles and stones. PW2 run away to avoid being injured. Then PW2 saw somebody lying on the ground. When PW2 moved nearer to see what was happening he saw the accused hit the guard only once. The rungu was produced in court as Exhibit 1. After the accused had hit the guard he threw away the rungu. People then dispersed and later PW2 recorded a statement. PW2 said that he had known the accused for about three months.

PC George Wanjala (PW3) testified that on 8th March, 1994 he was instructed to go and lay an ambush within Premier Bag and Cordage so as to arrest the accused. PC Wanjala (PW3) proceeded to the Premier Bag and Cordage where the accused had a house. The accused appeared and he was asked whether he was Harun Mudavi alias Mfalme. The accused answered in affirmative and was arrested and

taken to Juja Police Station

. John Michael Livu-Ivuli (PW4) testified that he was the Senior Personnel and Administration Manager of Premier Bag and Cordage Ltd. at Juja. PW4 testified that the company had people who were living in company houses illegally. The issue went to court which declared these people illegal occupants. It was then arranged that the illegal occupants would be evicted by using auctioneers and security guards. This exercise was carried out on 8th March, 1994 but there was resistance from those to be evicted. As a result the auctioneers and the guards were chased away and in the process one of the guards was seriously injured and later died. PW4 said that the accused was one of the illegal occupants of the company house as he was not an employee of the company.

John Omusheni Seth (PW5) testified that on 8th March, 1994 at about 8.00 a.m. he was at Premier Bag and Cordage Company Ltd. when he heard a lot of noise in the estate. He saw very many people throwing stones at each other. PW5 went to the main gate where he found many people stoning somebody who was in uniform. PW5 asked these people to stop hitting the man and they obeyed. There was a young man carrying a rungu and PW5 snatched the rungu from him. Then the accused took the rungu from PW5. Then PW5 went away only to be told later that the man who had been hit had died at Thika Hospital.

Julius Kubania (PW6) testified that on 8th March, 1994 he reported on duty at 6.0 a.m. at the premier Bag And Cordage Company Ltd. A lorry and pick-up arrived carrying some people. The two vehicles entered the premises while PW6 was left at the gate. PW6 then heard a whistle and saw a group of people coming. They were chasing each other and it was the workers who were chasing the guards.

PC Thomas Mutinda (PW7) testified that on 8th March, 1994 at about 4.30 p.m. he accompanied O.C.S Chief Inspector Masai (PW10) to Thika District Hospital to visit a victim by the name Simon Mbithi who was being treated at the hospital following fracas at E.A. Bag and Cordage. On arrival at Thika Hospital PW7 and PW10 found that the patient had passed away. PW7 then took the body to City Mortuary Nairobi where he attended postmortem of the deceased on 18th March, 1994. PW7 collected all the exhibits which he produced.

Dr. Alex Onzea Kirasi Olumbe (PW8) testified that on 18th March, 1994 at the City Mortuary he performed postmortem on the body of the deceased Simon Mbithi Nzioka. Dr. Olumbe (PW8) found the deceased to be a male African aged 42 years. He found fracture of the frontal area of the skull. Dr. Olumbe (PW8) formed the opinion that cause of death was intercranial haemorrhage associated with skull fracture consistent with blunt object. He signed the postmortem form which he produced as Exhibit 11.

Dr. Zephaniah Mwangi Kamau (PW9) testified that on 25th April, 1994 he examined Harun Indavi Adoluma who was a suspect of murder. PW9 found the age of Adolwa to be 50 years and he was mentally fit. His blood was taken and sent to Government Chemist for grouping. Dr. Kamau (PW9) signed the P3 form which he produced as Exhibit 12.

Chief Inspector Anthony Masai Kyeleve (PW10) testified that on 8th March, 1994 at about 6.30 a.m. he was the officer in charge at Juja Police Station when he received a report that there were screams coming from Premier Bag and Cordage factory. As a result Chief Inspector Kyeleve (PW10) sent his Deputy Inspector Ndegwa to proceed to the scene. After a short time PW10 was forced to proceed to the scene where he found security guards fleeing from the scene. One of the security guards had been knocked down and rushed to Thika District Hospital. PW10 interrogated the company gate keepers and as a result arrested two guards to assist in investigations. It was revealed to PW10 that the man who had hit the security guard was known. PW10 then proceeded to Thika Hospital where he found the body of the deceased which was then taken to City Mortuary. PW10 then instructed his officers to ambush and arrested the accused person which they did. The accused was then charged with murder.

Stephen Kamuso Mweu (PW11) testified that on 18th March, 1994 he received the report of the death of his brother Simon Mbithi as a result went to City Mortuary where he identified the body of the deceased from postmortem examination.

After the prosecution closed its case the accused was put to his defence. He elected to make unsworn statement, in which he explained his movements that particular day. He said that on 8th March, 1994 he heard some noise and when he went out he found a crowd of people. He saw people in civilian clothes and he did not know that they had gone to evict them. People were running up and down and they were armed with rungs and stones. Those people who were breaking into houses started running away. The guards from Red Eagle went towards the main gate where they were beaten. There were many people at the main gate. Then the accused went to his house and at 10.00 a.m. he saw a police vehicle. The accused remained in his house till evening. He went to Nairobi and then back to Juja where he was called by the police and asked to identify himself. When he identified himself the police arrested him.

After the final submission I did the summing up of the evidence and the law to the assessors.

Assessor Njoroge said:

'The case was not proved beyond reasonable doubt to convicted the accused. This was mob justice. I enter a verdict of not guilty.'

Assessor Karuma said:

'The accused started hitting the deceased after he had been beaten by members of the public. It has not been proved whether the deceased died as a result of the beating from the accused. Since I have a doubt I give the benefit to the accused'.

Assessors Omari said,

'This is unfortunate death of the citizen. The death occurred when there was a commotion. It is not clear whose action resulted in death of the deceased. Benefit of doubt is to be given to accused. I enter verdict of not guilty'.

In this case it is not in dispute that the deceased died as a result of the injuries received when the mob set upon him on the morning of 8th March, 1994 at Juja. From the evidence adduced it is now clear that this episode arose out of an eviction exercise carried out by auctioneers. This was a lawful exercise since the issue of occupation of staff houses had been determined by a court of law and the occupants who included the accused declared trespassers. As the auctioneers moved in with the assistance of security guards the illegal tenants resisted this eviction. The guards were chased away by the illegal tenants who used sticks bottles, stones and other missiles. We have evidence to the effect that the accused was one of the illegal tenants who took a thick stick (produced in court as Exhibit 1) in hitting the deceased. Joseph Odawo Odaro (PW1) testified to the effect that he saw the deceased being stoned until he fell down. Then he saw the accused hit the deceased as if he was killing a snake. Then we have the evidence of Thomas Sauten (PW2) to the effect that he saw somebody lying on the ground and the accused hit him (the person lying on the ground) only once. Hence we have evidence of two witnesses to the effect that they saw the accused hit the deceased with a rung (Exhibit). The accused on his part denied having been involved in hitting the deceased but admitted having been present when there were chaos at the scene.

Mr. Opin who appeared for the accused argued that prosecution had not proved the case against the accused to the required standard of proof and that there was reasonable doubt since it could not be shown that it was the accused's specific act that caused the death of the deceased.

Mrs. Shikuku for state argued that those who saw the accused use a stick on the deceased knew him and hence this is a case of recognition. There was however, one aspect of this case that Mr. Opin referred to; and this was to do with accused's position. He appears to have been a popular person with the workers. He was well known. He led the others into resisting the eviction. We have evidence that those who were chasing the guards had bottles, stones and sticks. We have evidence that the deceased was stoned until he fell to the ground. Nobody saw the accused throwing stones. The three assessors returned a unanimous verdict of not guilty.

I have carefully considered the evidence adduced in this case and the final submissions made and find that while it is true that the deceased died as a result of what is community called mob justice it is not clear as to whether the accused indeed inflicted the fatal blow. It is quite possible that the deceased was killed by being stoned and the accused came to the scene after the deceased had died. All these facts raise reasonable doubt in my mind and hence I agree with the assessors that the accused is not guilty. He is accordingly acquitted on this charge of murder. He is to be set free forthwith unless otherwise lawfully held.

Order accordingly.

Delivered at Nairobi this 18th day of September, 1997.

E.O. O'KUBASU

J U D G E