IN THE COURT OF APPEAL

AT NAKURU

(CORAM: GICHERU, MULI & TUNOI, JJ A)

CRIMINAL APPEAL 2 OF 1994

1. **SHADRACK KINYANJUI MUGO**
2. **JOEL NJOROGE …….APPELLANTS**

AND

REPUBLIC…….……..RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Nakuru (Lady Justice R.N. Nambuye) dated 6th & 8th December, 1993

IN

H.C. CR. C. NO. 12 OF 1993)

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JUDGMENT OF THE COURT

"Now let it work. Mischief, thou art afoot, Take thou what course thou wilt."

So said Marcus Antonious (Mark Antony) in Shakespeare's Julius Caesar after inciting the plebeians soon after the assassination of Julius Caesar by the conspirators.

Section 20 of the Penal Code, Chapter 63 of the Laws of Kenya is in the following terms:

> "20. (1)When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say-
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> (a) every person who actually does the act or makes the omission which constitutes the offence;
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> (b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;

(c) every person who aids or abets another person in committing the offence;

(d) any person who counsels or procures any other person to commit the offence;

and in the last-mentioned case he may be charged either with committing the offence or with counseling or procuring its commission.

(2) A conviction of counseling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence.

(3) Any person who procures another to do or omit to do any act of such a nature that, if he had himself done the act or made the omission, the act or omission would have constituted an offence on his part is guilty of an offence of the same kind, and is liable to the same punishment, as if he had himself done the act or made the omission; and he may be charged with doing the act or making the omission."

This appeal is concerned with subsection (1)(c) of the section aforementioned as is set out above.

It is common knowledge in this country that before, during and after the month of April, 1992 Molo Division in Nakuru District of the Rift Valley Province was notorious for tribal clashes where bows and arrows were used besides the burning of houses.

John Serem Chumo, a retired Captain of the Kenya Army and now the deceased in the instant appeal, was in-charge of security at Gecheha Farm in Rongai Division of the Nakuru District. Early in 1992 he informed the Farm Manager, Henry Kimani Thairu (P.W.7) that he wanted the security personnel at the Farm to be armed with bows and arrows to protect themselves from cattle rustlers as there had been cattle rustling at the Farm and on the neighbouring farms. At that time the security personnel at the Farm were only armed with pangas. The deceased volunteered to obtain some bows and arrows but P.W.7 told him that if he did so he should inform him so as to get the requisite permits for them.

The deceased lived at his house which was one and a half kilometres away from Gicheha Farm where he was employed. He owned a bicycle which he used as his mode of transport to and from his house and for going round the Farm to ensure that the security personnel under him were at work. For the latter purpose, he was paid a bicycle allowance.

On 22nd April, 1992 at about 7.00 a.m. the deceased left his house at Umoja Farm in Rongai Division of the Nakuru District with his bicycle carrying bows and arrows wrapped in a manila bag. He also carried with him an office file and a jembe. According to his wife, Naomi Chebet Serem (P.W.8), the deceased had told her that the Manager of Gicheha Farm, P.W.7, had asked him to look for bows and arrows and take them to the Farm. Shortly after leaving his house, the deceased boarded a "matatu" vehicle registration number KAB 448A, Isuzu Pick-Up which was being driven by its owner while its regular driver, Shadrack Kinyanjui Mugo, the first appellant, and its conductor, Joel Njoroge Kamau, the second appellant, were at that time assisting each other as conductors. His bicycle onto whose carrier was tied the manila bag containing the bows and arrows was loaded onto the top of the "matatu" and thereafter this "matatu" was driven towards Nakuru Township. En route to Nakuru Town, passengers embarked and disembarked at various stops until the "matatu" reached its destination at Nakuru Bus Stage where all the passengers alighted except the deceased who appeared hesitant to disembark. While he was still in the "matatu" the second appellant went onto the rack on top of the "matatu" to off-load the luggage thereon. According to Samson Karanja (P.W.1) who was a passenger in this "matatu" and had just alighted therefrom, as the second appellant was off-loading the luggage he shouted "Mishale" "Mishale". When the second appellant did this, the deceased was still inside the "matatu". Meanwhile, alerted by this shout, people at the Bus Stage comprising mainly of "matatu" touts and hawkers rushed towards this "matatu" asking where the "Mishale" were. In a moment, the "Matatu" was surrounded by a crowd of more than 50 of such people. The second appellant came down from the top of the "matatu" and together with the

first appellant got into it and pulled out the deceased literally handing him over to the hostile crowd. The latter immediately started beating the deceased with stones and pieces of timber plucked out from the nearby kiosks and as they did so they were shouting "Huyu ndiye anaua sisi huko Molo", that is to say, "this is the person killing us at Molo". The assault on the deceased with stones was concentrated on his head and as soon as the crowd had started beating him, the "matatu" vehicle registration number KAB 448A left the scene. Likewise, the first and second appellants vanished from the scene. These events were witnessed by Richard Kiptoo Chirchir (P.W.13) who was throughout at the scene.

Meanwhile, the owner of the "matatu" referred to above made a report to the police who on arrival at the scene found the deceased unconscious and throwing his legs in the air with his face covered with stones. They also found 3 blood - stained bows. After removing the stones covering the deceased's face, the police rushed him to Nakuru General Hospital where he was admitted in the intensive care unit of the Hospital but within 10 to 15 minutes he died. His post-mortem examination by Dr. Noah Oloo Kamidigo (P.W.9) on 27th April, 1992 showed that externally, the 39 years old deceased had sustained multiple bleeding deep bruises all over the head. Internally, he had sustained subcutaneous haematoma all over the skull and massive subdural haematoma bilaterally on the parietal areas of the skull. His cause of death was cardio - pulmonary arrest due to massive subdural haematoma.

The appellants were arrested on 23rd April, 1992 and charged with the murder of the deceased contrary to section 204 of the Penal Code. At their trial in the superior court, they severally denied involvement in the death of the deceased and adopted their respective statements under inquiry as their respective defence. In his statement under inquiry, the first appellant, where relevant, had this to say:

> "When near Mr. Mwema's gate we picked another male passenger. The passenger had a bicycle with a sack. The bicycle and the sack were loaded onto the matatu. From there we picked two other passengers and headed for Nakuru. I did not know the contents of the sack because I was just seated in the vehicle. We arrived in Nakuru town at around 8.00 a.m. At the stage I alighted with the other passengers. I went to the place where they show the list of arrangement of the vehicles. As I was scanning, the list I heard shouts 'Mishale' 'Mishale'. When I turned I saw the sack that had been loaded at Mwema's place had been put down. Then all over a sudden there was a lot of people. Some were beating the vehicle. They had also surrounded the owner of the luggage (sack). Because of the commotion and the way I know the results of such fracas, I decide to run away to Pinkam House to watch the scenario from there. I saw people beating up somebody and throwing stones about. After a short while a police land rover came and people scattered away. The land rover dropped some armed policemen at the scene then drove away. When everything else had cooled down I went to the Municipal Offices where I normally pick the vehicle. I just went and found the vehicle there and because I have spare keys I got in and drove off. Just after a short distance I met (the owner of the vehicle who) told me that he is the one who had (gone) to the Police Station to inform them (of) what was happening. The bicycle was still on the carrier and when I asked him about it he told me to unload the bicycle and leave it with him. He was to take it to the station. I then went away to the stage to resume my normal duties. I was the second according to the arrangement. I then heard that the owner of the vehicle had been arrested. So when I took the vehicle home at around 8.00 p.m. I was informed by the wife that police were looking for me. Because it was late I said I would go to the Police Station in the morning. So today morning I came to Nakuru Police Station together with the conductor and the matatu. I gave the keys to the owner of the vehicle and then we were brought here at Bondeni and locked up."

The second appellant had, where pertinent, the following to say in his statement under inquiry:

> 'At Nakuru Matatu stage when the matatu entered and parked I climbed onto the carrier of the matatu after I had also received fare from two passengers who were in the front cabin to off-load the luggage.

After I had off-loaded some luggage for some female passengers I then took the parcel wrapped in a manila bag to off-load but the sisal fibre which had tied the manila bag came off and I then saw that the bag contained some bows and another small manila bag which had been used to cover the protruding part

of the bows was left in my hands. The rest fell down and that is when I shouted questioningly in Kiswahili "Kwani ni Mishale". By then the man who had come with the parcel and the bicycle had come up nearer to receive the parcel and the bicycle. Then all of sudden before I could even of-load the bicycle people who had surged forward started beating the man and hitting the matatu on the sides some shouting "tuchome gari". My brother-in-law sensing danger started the vehicle and before he could gain speed I jumped down. My brother-in law drove away alone leaving me and Kinyanjui behind.'

Noting the prosecution's submission that the second appellant's manner of shouting "Mishale" Mishale" in view of the existing tribal clashes was intended to provoke the members of the public into beating the deceased and that that is what happened, the learned trial judge, Lady Justice R.N. Nambuye, proceeded to hold that in her judgment that was so. Indeed, believing the evidence of P.W.13 which to some degree was corroborated by the appellants' respective statements under inquiry parts of which are set out above, the learned judge found that it was the appellants who pulled out the deceased from the "matatu" in question and handed him over to an already incensed crowd. According to her therefore, although the appellants fled from the scene when the hostile crowd at Nakuru Bus Stage set upon the deceased with stones and pieces of timber, their role in the events leading to the death of the deceased had been complete. This notwithstanding, however, the learned trial judge erroneously applied the provisions of section 21 of the Penal Code which relates to joint offenders in the prosecution of a common purpose instead of those under section 20 of the same Code as are set out above which latter relates to principal offenders subsection (1) (c) of which was the correct one in the circumstances of the case before her. Because of this error, the learned judge held that there was no common intention between the appellants and the actual killers of the deceased - the crowd at Nakuru Bus Stage. Consequent thereto, she found that malice aforethought was lacking on the part of the appellants and thought that the offence disclosed against them was one of manslaughter contrary to section 205 of the Penal Code which she substituted for that of murder contrary to section 204 of the same Code. The learned trial judge then proceeded to find the appellants guilty of manslaughter, convicted them and on 8th December, 1993 sentenced them to 8 years imprisonment. Against that conviction and sentence the appellants appeals to this Court and have each put forward 23 grounds of appeal which are almost identical in all respect the gravamen of which is that their conviction of manslaughter was against the weight of evidence and that in the circumstances of the case before the trial judge their sentence of 8 years imprisonment was manifestly excessive.

At the hearing of this appeal on 26th September, 1994, Mr. Bowry for the appellants submitted that the evidence of P.W.13 which was relied upon by the trial judge should not have been acted on in view of the fact that it emanated from a single witness who, according to Mr. Bowry, was frightened and confused and therefore likely to have misapprehended the facts. To him, a conviction based on such evidence was unsafe. Hence, the appellants' conviction as is set out above is unsustainable.

Regarding the appellants' sentence of 8 years imprisonment, Mr. Bowry contended that considering that the appellants were first offenders and had been in custody for a period of about 20 months, that sentence was manifestly excessive and the same should be reduced so as to enable the appellants gain their freedom.

Mr. Etyang for the respondent, however, was of the view that the evidence of P.W.13 represented what he saw at the material time at Nakuru Bus Stage. Whether or not he immediately reported this incident to the police, what he narrated to the superior court at the trial of the appellants did take place. Reliance on the evidence of P.W.13 by the learned trial judge was therefore proper and her acting on it was safe.

Concerning sentence, Mr. Etyang's contention was that the appellants were principal offenders and should count themselves lucky for having been convicted of manslaughter. Hence, he concluded by saying that the appellant's sentence ought not to be interfered with as to him, their entire appeal was unmeritorious.

Towards the close of his address to the assessors in the superior court, Mr. Bowry in effect said that at the material time at Nakuru Bus Stage there was a mob reaction to a situation that led to the death of the deceased which could not have been encouraged by any of the appellants. Thus, according to him, what led to the killing of the deceased by the crowd at Nakuru Bus Stage on the morning of 22nd April, 1992 had not been encouraged by the appellants.

In the case of The Queen v. Coney and Others, (1882) 8 Q.B.D. 534 at pages 557 and 558, Hawkings, J. said this:

> "In my opinion, to constitute an aider and abettor some active steps must be taken by word, or action, with the intent to instigate the principal or principals. Encouragement does not of necessity amount to aiding and abetting, it may be intentional or unintentional, a man may unwittingly encourage another in fact by his presence, by misinterpreted words, or gestures, or by his silence, on non-interference, or he may encourage intentionally by expressions, gestures or actions intended to signify approval. In the latter case he aids and abets, in the former he does not. It is no criminal offence to stand by, a mere passive spectator of a crime, even of a murder. Non-interference to prevent a crime is not itself a crime. But the fact that a person was voluntarily and purposely present witnessing the commission of a crime, and offered no opposition to it, though he might reasonably be expected to evidence upon which a jury would be justified in finding that he wilfully encouraged and so aided and abetted. prevent and had the power so to do, or at least to express his dissent, might under some circumstances, afford cogent But it will be purely a question for the jury whether he did so or not. So if any number of persons arrange that a criminal offence shall take place, and it takes place accordingly, the mere presence of any of those who so arranged it would afford abundant evidence for the consideration of a jury of an aiding and abetting."

It does therefore appear to us that although to constitute an aider and abettor some active steps must be taken by word, or action with the intent to instigate the principle or principals, the question of what amounts to encouraging is one of fact in each case. Indeed, as Slade, J. said in a judgment read on his behalf by Lord Goddard, C.J. in the National Coal Board v. Gamble, [1959] 1Q.B. 11 at pages 25, 26 & 27:

> ‘the words "assist" and "encourange" necessarily imports motive, i.e., purpose or object. It is not sufficient that the alleged abettor should be proved to have done some act, or to have made some omission, without which the principal offender could not have committed the offence; nor is it sufficient that such act or omission had the effect of facilitating the commission of the offence or that it in fact operated on the mind of the principal offender so as to decide him to commit it. The prosecution must prove that the act or omission upon which they rely as constituting the alleged aiding and abetting was done or made with a view to assisting or encouraging the principal offender to commit the offence or, in other words, with the motive of endorsing the commission of the offence.
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> Some acts or omissions speak for themselves; they are consistent only with a desire to encourage or assist. Other acts or omissions are quite colourless and no sinister inference can legitimately be drawn from them. The motive for these can only be supplied by other conduct, for example, where an otherwise equivocal act is accompanied by words or encouragement to commit the offence.’

To drive this point to its logical conclusion, in Regina v. Allan and Others, [1965] 1 Q.B. 130 at page 138, the Court of Criminal Appeal had this to say:

> ‘In our judgment, before a jury can properly convict an accused person of being a principal in the second degree to an affray, they must be convinced by the evidence that, at the very least, he by some means or other encouraged the participants. To hold otherwise would be, in effect, as the appellants’ counsel rightly expressed it, to convict a man on his thoughts, unaccompanied by any physical act other than the fact of his mere presence.’

Following this passage, the Courts-Martial Appeal Court in Regina v. Clarkson and Others, (1971) 55 Cr. App. R. 445 at page 451 concluded that:

> ‘mere intention is not in itself enough. There must be an intention to encourage; and there must also be encouragement in fact’.

In the present appeal, after the shouting of ‘Mishale’ ‘Mishale’ as we have outlined towards the beginning

of this judgment, the appellants were seen by P.W. 13 pulling the deceased out of the 'Matatu' vehicle registration number KAB 448A, Isuzu Pick-up and surrendering him to an already hostile crowd. P.W.13 was a conductor in a 'matatu' vehicle registration number KYZ 367 belonging to one Andrew Cheruiyot which operated between Rongai and Nakuru and which had a common destination with the 'matatu' vehicle registration number KAB 448A referred to above at Nakuru Bus Stage. He was familiar with the appellants and at the material time on 22nd April, 1992 when he saw them pull out the deceased from their 'matatu' he was not more than 10 metres away from them. This was in the light of day and although he told the superior court that he was frightened and confused as the crowd at Nakuru Bus Stage set upon the deceased with stones and pieces of timber and that his main aim was to save his life, the learned trial judge thought that he was a credible witness and expressed herself to be satisfied that it was safe to act on his evidence. We can find no basis upon which she can be faulted in this regard.

In the ordinary course of events, the shouting of the words "Mishale""Mishale" per se even at Nakuru Bus Stage would be of little consequence to an ordinary Kenyan. But in the circumstances obtaining before, on and after the material day-22nd April, 1992 - as we have pointed out above, these words were ominous of an imminent tribal clash. Their utterance by the second appellant in the presence and hearing of the first appellant in the manner and circumstances narrated above was meant to incite the crowd at Nakuru Bus Stage against the deceased and his being pulled out of the "matatu" vehicle registration number KAB 448A by the first and second appellants as is outlined above was for no other purpose but to have him lynched. The appellants not only encouraged the lynching of the deceased but they were instrumental to it. Like Marcus Antonius (Mark Antony) in Shakespeare's Julius Caesar, they set the mischief afoot and disappeared from the scene leaving it to take whatever course it would. The course it took was the unlawful stoning of the deceased on the head and as is indicated above, from the forecity with which this was carried out, it cannot have been with any other intention than that of causing his death. The killing of the deceased was clearly with malice aforethought and amounted to murder in terms of section 203 of the Penal Code and from what we have attempted to demonstrate above, under the provisions of section 20(1) (c) of the same Code, each of the appellants was deemed to have taken part in committing this offence and to be guilty of the same. They should thank their stars that their charge of murder was reduced to that of manslaughter after the trial judge erroneously found them guilty of the latter offence, proceeded to convict them of the same and sentenced them to 8 years imprisonment. It is with regret that we can do nothing to rectify this mistake. Indeed, it is with this note of sadness that we think that the appellants' appeal against conviction and sentence is without merit and the same is dismissed in its entirety.

This judgment is given under rule 32 (2) of the Rules of this Court as Muli, J.A. has since the hearing of this appeal ceased to hold office.

Dated and delivered at Nakuru this 9th Day of May, 1995.

J.E. GICHERU

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JUDGE OF APPEAL

M.G. MULI

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JUDGE OF APPEAL

P.K. TUNOI

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JUDGE OF APPEAL