

REGINA -V- 1. MOSES HAITALEMAE
 2. SIMON TOHUBO
 3. EDWIN WATENAOMAE WAHU
 4. SANIEL AWA

HIGH COURT OF SOLOMON ISLANDS
 (KABUI, J.)

Criminal Case No. 210 of 2001

Date of Hearing: 13th, 14th, 15th, 16th, 17th May and 18th, 19th, 20th, 21st and 29th November 2002

Date of Judgment: 6th December 2002.

DPP in person for the Crown
Mr I. Kako for the 1st and 4th accused
Mr P. Lavery for the 2nd and 3rd accused

JUDGMENT

Kabui, J. The accused were charged for the murder of the late Rocky Kereta'ai on 30th March 2001 at Afio in the Malaita Province, contrary to section 200 of the Penal Code Act, (Cap. 26) "**the Act**". They all pleaded not guilty to the charge against them. A nolle prosequere was later entered by the DPP in favour of Moses Haitalemae (A1) dated 19th May 2001. It was produced in Court on 19th November 2001. I set him free on that date. I will still refer to him as the 1st accused in this judgment.

The Undisputed Facts

On 29th March 2001, the MV. Ramos 1 set sail for Afio on South Malaita laden with passengers and cargo. Amongst the passengers on board were the deceased and the 1st and 3rd accused. They consumed alcohol on board. Some drank hot stuff being Captain Morgan and others drank beer. The MV. Ramos 1 arrived at Afio at about 3.30am in the morning. Like the other passengers, the deceased too disembarked. He was holding a tape-recorder. At the base of the Afio Wharf, an argument began between the deceased and the accused and their companions. A fight between them ensued and thereafter the deceased was attacked and later died.

The burden of proof

The burden of proof is the responsibility of the Prosecution. The Prosecution must prove beyond reasonable doubt that the accused by malice aforethought caused the death of the deceased. I remind myself that the Prosecution bears the burden of proof in this case.

Death of the deceased

There is no dispute that the deceased is now dead as a result of the fight in which the deceased had taken part on 30th March 2001 at Afio, Small Malaita. Drs. Rehman and Anigafutu did examine the dead body at his house at Parasi village on 31st March 2001. The examination of the body was external only as the relatives did not permit internal examination. The report signed by the two doctors on 6th April 2001 concluded that death could have been due to the following possibilities-

1. head injury causing fracture to the skull;
2. chest wall injury causing lung collapse;
3. abdominal injury causing blood loss in the peritoneal cavity.

On external examination, the doctors noticed that the right chest wall was swollen just above the hypochondrium at the level of the 8th and 9th ribs. The ribs could be easily depressed into the chest wall. In evidence in chief, Dr. Anigafutu said that depressed ribs suggested internal injury. He said the 8th and 9th ribs were fixed. He said the 11th and 12 ribs were floating ribs. He said the 8th and 9th ribs were unstable; they were not intact and so could have caused internal injury. He said if the 8th and 9th fractured they could puncture the lungs causing the lungs to collapse. The second observation was that the abdomen was not grossly distended. On percussion, the note was dull suggesting the presence of fluid in the peritoneal cavity. He said any internal injuries would have caused internal blood loss. The medical report concluded that the possible direct cause of death would have been intracranial bleeding secondary to the head injury. This evidence was attacked by the defence as being unreliable in the absence of a proper post-mortem being performed by the doctors. That is to say, the cause of death was not known in terms of what organs in the body were damaged causing the deceased to die on 30th March 2001. Mr. Lavery urged me to place no weight on this evidence because it was dangerously inconclusive. He cited no authority for his argument. The extreme case is where the dead body cannot be found. Can there be a conviction without the dead body? The answer is yes, provided there is evidence to suggest that the death was not due to natural causes. (See **R. v. Onufrejczyk** [1955] 1 A.E.R.247 cited at page 918 in **Archbold, Criminal Pleading, Evidence & Practice**, 36th Edition, by Butler and Garsia, 1966). In **R.v. Peter Loumia and Others**, Criminal Case, No. 7 of 1984, the dead bodies had been buried and had not been exhumed for post-mortem and yet conviction was secured by the Prosecution evidence. In **R. v. Peter Fitali and Others**, Criminal Case No. 39 of 1992, the dead body was never recovered as it had been sunk by the accused at sea. It is significant to note here that the deceased had not met his death by natural causes. There is no evidence of that fact. I will accept the medical report for what it is worth in this case.

Evidence by the 2nd Accused

The 2nd accused is Simon Awa Tohubo. This is the essence of his evidence. He said the reason why he was angry with the deceased was that the deceased had sworn at him and others. He said he ran after the deceased until he caught up with the deceased at point C in Exhibit 2. He said he kicked the deceased on the right buttock but the deceased did not fall down. He said he then returned to the Fishery Wharf. On being cross-examined by the DPP, he said he kicked the deceased when he was running away from him but the deceased did not fall down. He said he kicked the deceased between points B. and C. On being cross-examined by Mr. Lavery, he said he kicked the deceased close to point F.

Evidence by the 3rd Accused

The 3rd accused is Edwin Wateinaomae Wahu. This is the essence of his evidence. He too said on oath that the reason why he ran after the deceased was that the deceased had sworn at him, the 2nd accused and others. He said the deceased ran towards the Medical Depot at point F in Exhibit 2. He said he fell down in the muddy ground. He said he saw people at the Copra Shed at point D. He said an object landed on his left upper arm and he shouted as to who threw that object at him. He said he saw the deceased who then punched him. He said he punched the deceased on his mouth. He said the deceased fell to the ground. He said he saw a piece of timber by the deceased's side on the ground at point D. He said he did not kick the deceased at any time. He said he only punched the deceased at point D. He said he wore stockman type boots but did not use them against the deceased.

Evidence by the 4th Accused

The 4th accused is Saniel Awa. This is the essence of his evidence. He said on oath that he ran towards the Copra Shed at point D from the Wharf area. He said he passed point C but did not kick the deceased. He said he saw someone ran past but did not recognize who it was.

The effect of their evidence

The effect of the evidence of the 3rd and 4th accused as shown above is that none of them had come into contact with the deceased so as to cause the deceased any harm. That is to say, none of them had caused the death of the deceased on 30th March 2001 although they had reason to be angry with the deceased for his behaviour. Although the 2nd accused had kicked the deceased, that kick did no harm to the deceased.

The Prosecution case

Out of the Prosecution witnesses called, only two were eye-witnesses. They were PW2 and PW3. PW2 was Peter Porasioru also known as Peter Once. This is the essence of his evidence. He met the 1st accused at point B or thereabout. There, he was able to persuade the 1st accused to put away his knife. He saw the 2nd and 3rd accused fighting with the deceased and moving towards point F, the Petrol Shed. He reached the Petrol Shed. He saw the 3rd accused fell to the ground and the deceased likewise fell to the ground at point C. He did not see the cause of their fall to the ground. He saw the 2nd and 4th accused kick the deceased whilst the deceased was on the ground. They kicked the deceased on his belly and on his ribs with their legs. The 4th accused kicked the left side of the deceased and the 2nd accused the right side. He saw no one else than the 2nd, the 4th accused and the deceased. PW3 was Jimmy Ninipua. He saw the 2nd accused kick the deceased on the left side of the deceased with his right leg but the deceased did not fall to the ground. The kick landed on the left side of the deceased's hip. He pulled the 2nd accused. The 3rd accused also kicked the deceased on the buttock. He was wearing black safety boots. At point C, the deceased fell down to the ground. The 2nd and 3rd accused kicked the deceased at point C. The 2nd accused kicked the deceased on the ribs. The 3rd accused kicked the deceased on the right side of the deceased. He pulled the 2nd accused by his shirt and pushed away the 3rd accused. The 3rd accused kicked the deceased again. He saw no one else than the 2nd, 3rd accused and the deceased.

The Defence case

As I have said, the evidence so far is that the 3rd and 4th accused denied kicking the deceased at all at any time whilst the 4th accused's kick was negligible. That is their evidence on oath from the witness-box. In view of that, I can see no ground for them to raise provocation or self-defence as an excuse so as to reduce murder to manslaughter under section 204 of the Penal Code Act. Mr. Lavery, Counsel for the 2nd and 3rd accused, argued that there was evidence of provocation in the form of the deceased using swearing words against the accused. The 2nd accused said in evidence that the deceased had said these words to him and the 3rd accused, **"man fuckem sister belong hem and mummy belong hem hemi no fightem me"** or words to that effect. The 2nd accused said the swearing took place when PW2 was talking to the 1st accused at point B or thereabout. The 3rd accused's version of the swearing was, **"man fuckem sister belong hem or sister-in-law or mummy belong hem, hem no fightem me"** or words to that effect. My understanding of this kind of swearing is that it is a challenge to fight with the condition that if the party at which the swearing is directed does not comply, it would amount to agreeing to fucking his sister or close relative as said by the person who utters the swearing. Of course, no one from Malaita would dare fuck his sister or close relative and he or she would take up the challenge and fight to honour his sister or relative etc. How do I know this? I do because it is also my custom in north Malaita. It is a powerful weapon to incite a fight. There is also a positive side to it. It can also be used by women to stop a fight. That is, a woman can swear on her own head or part of her

body to stop or prevent a fight between men. The penalty is the payment of compensation. Much weight is added if the woman doing the swearing is a married woman relative. The law should stop the negative use of this practice. In fact, to challenge someone to fight a duel is an offence, contrary to section 88 of the Act. It is also an offence under section 178 (n) of the Act to use threatening or abusive or insulting words or behaviour with intent to provoke a breach of the peace or whereby a breach of the peace may be occasioned. Obviously, to tell someone to fuck his sister or close relative is an insulting remark to say the least. If the behaviour of the deceased constituted an offence under section 178(n) above, I do not think it can be converted into a defence of provocation. The reason is that an assault against any person is a criminal offence, contrary to sections 244 and 245 of the Act. That is, swearing in custom cannot be a reason for justifying an assault on someone. It is both unlawful and unconstitutional for it to constitute provocation in custom. (See **R. v. Loumia and Others** cited above confirmed on appeal in Criminal Appeal No. 1 of 1985). Mr. Lavery also argued that the conduct of the deceased towards the accused after he disembarked at Afio Wharf up to point B comprised a series of provocation as well. There is evidence of that but I do not think any of them could be regarded as extreme provocation under section 204(a) of the Act. I reject that argument. Mr. Lavery also argued that the 3rd accused acted in self-defence when he punched the deceased at point D. I reject this argument. The deceased punched the 3rd accused only once and never caused any harm to the 3rd accused. In fact, the 3rd accused's retaliatory punch sent the deceased down to the floor from which he never got up again. I do not think the 3rd accused's conduct falls within the meaning of section 204(b) of the Act cited above.

The Law

The law of murder is clearly stated in section 200 of the Act. Section 202 of the Act defines "**malice aforethought**" as constituting an intention to cause the death of or grievous bodily harm to any person, whether such person is the person actually killed or not, or knowledge that the act which caused death will probably cause the death of, or grievous bodily harm to, some person whether such person is the person 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. The law is extensively discussed at pages 610 to 614 in the publication, *Criminal Law in Solomon Islands* produced by the Prosecution Branch under the Law and Justice Sector Strengthening Program funded by AusAid for Solomon Islands. There is of course the issue of parties to this alleged murder of the deceased. The 2nd, 3rd and 4th accused are being jointly charged with the murder of the deceased on 30th March 2001. The DPP and Mr. Lavery both raised the issue of joint enterprise between the accused as to the extent of the role each played in causing the death of the deceased. Section 22 of the Penal Code Act is the section dealing with joint offenders in prosecuting a common purpose. This section was explained by acting Chief Justice, Sir John White at page 5 of His Lordship's direction to the assessors in **R. v. Peter Loumia and Others** cited above thus, ... "**Put shortly, that means that where two or more people form a common intention or plan to prosecute, that is, to carry out some unlawful enterprise- take another example, for example, a burglary, and to assist each other in carrying it out then each of them is a party to, and equally guilty of any crime that one of them does when carrying out that common plan. The words "a probable consequence" means a consequence, a result. The important thing to keep in mind is that a person taking part knows what did happen could well happen that a person taking part knows that. That does not mean that those involved sat down and considered the matter as to what might well happen, but it does mean that the prosecution must prove beyond reasonable doubt that others concerned knew that in carrying out the plan it could well happen that one or more of them could do what in fact took place. As I have said, a common intention to carry out a common purpose or plan, as I have explained it, can be inferred from the evidence of what happened, so that it is for the assessors to decide whether the evidence did prove beyond reasonable doubt that a common**

purpose and agreement to help each other, knowing what could well happen, was the situation in this case"...

The Court's view of the evidence

PW2 is the cousin of the deceased. They come from the same village being Parasi. He knew all the accused well. They were not strangers to him. He had been instrumental in disarming the 1st accused at point B of Exhibit 2 who is now acquitted. He did see the 3rd accused and the deceased fall down at point C or thereabout. PW3 however only saw the deceased fall at point C and point D but not the fall of the 3rd accused at point C as seen by PW2. PW2 saw the 2nd and 4th accused kick the deceased at point C but PW3 only saw the 2nd and 3rd accused did the same to the accused at point C but did not see the 4th accused at point C. PW2 did not see PW3 nor did PW3 see PW2 at point C or at any other place during the fight. These are stark inconsistencies in the evidence of the only two eye witnesses called by the Prosecution. PW2 did not see what PW3 saw and vice versa. Were they lying to the Court? They were both adamant, under cross-examination, that they saw what they said they saw. According to the evidence by the Prosecution witnesses, the fight commenced at about 5:30 am at point A moving towards points B, to C and then to D in Exhibit 2. From point B onwards, the fight was a running fraca between the deceased and the men who were chasing him. Those who were chasing the deceased were the accused and they were doing so because the deceased had sworn at them at point B. This is not disputed. What is in dispute is that they were not responsible for the death of the deceased. The 2nd accused said he had kicked the deceased on the buttock but that kick was not life threatening in anyway. The 3rd accused said he did not kick the deceased but punched the deceased at point D on the mouth because the deceased had punched him first. The 4th accused said he did not kick the deceased although he was in the vicinity of point C. If I were to believe the accused, who then was responsible for the death of the deceased? Contrary to what the 2nd accused told me on oath in evidence, he admitted in his caution statement kicking the deceased at point C. He said the deceased fell to the ground on the grass and he kicked the deceased the second time. This confirms PW2's evidence that he saw the deceased fall at point C and that the 2nd accused kicked the deceased. The 2nd accused in his caution statement also said he, Michael and the 3rd accused followed the deceased to the Copra Shed and then saw Michael fall to the ground on the grass at point C. This too confirms that he was able to see. Under cross-examination by the DPP, he admitted that one could see someone if that someone was close as two fathoms or less away. When confronted with his caution statement, he said his oral evidence on oath was the true version of his evidence. The 3rd accused in his caution statement said he saw the deceased fall to the ground on the grass at point C. He said he saw the 4th accused at point C. This confirms PW2's evidence as to seeing the deceased falling down at point C and seeing the 4th accused at point C. He said it was early morning and he was able to see what was happening. This confirms PW2's evidence as to being able to see at day-break. The 3rd accused said he fell down on the muddy ground but did not say where but I took it to be at point C. This confirms PW2's evidence that he saw the 3rd accused fall down at point C.

Were PW2 and PW3 telling the truth?

Their evidence can be discredited on the ground of lack of identifying the accused and their own credibility. The amount of light that there was during the fight is crucial in terms of the identity of the accused. PW2 heard shouting coming from the Fishery Office. He put the time as about 5.30am in the morning. He went towards the base of the Afio Wharf and met up with the accused and the deceased at point B. He spent some time talking to the 1st accused who was in possession of a knife. He was able to calm down the 1st accused who then put away his knife. By that time, the 2nd and 3rd accused had been fighting with the deceased. They were moving towards point F. He went after them and caught up with them towards point D, the Copra Shed. By that time it was already daylight. There is sand there also. Under cross-examination by Mr. Kako, he maintained his story. He never wavered.

When cross-examined by Mr. Lavery, he said he had a watch. He said the stars and moon were in the sky. He said daylight was already coming. He said there was sand also so he was able to see. I suppose what he meant was that as the day was breaking, the reflection from the sand provided a certain amount of light. He knew the accused personally. I do not think he had any difficulty identifying them at point C. He was trying to stop the accused and the deceased from fighting. There is no evidence to show that he was taking side with deceased. Someone must however have thought that for he received a bang on his back at point C, the object turning out to be a piece of timber. The accused and the deceased and him were all related and that is why he was not taking sides during the fight.

PW3 heard the sound "**fight, fight**" coming from the base of the Afio Wharf. He put the time at about 5.30am. He had a watch. He ran towards the sound and saw the 1st, 2nd, and 3rd accused. He reached them at the point where PW2 was talking to the 1st accused. That must be at point B. He saw PW2 talking to the 1st accused. At that time, the deceased was moving towards point F, the Petrol Shed. The 2nd accused kicked the deceased with his right leg and landed on the left side of the deceased but the deceased did not fall. He pulled the 2nd accused away. The deceased kept on moving towards point C. The 3rd accused followed the deceased and kicked him on his buttock. The 3rd accused again kicked the deceased. The deceased fell down at point C and the 2nd and 3rd accused kicked him there before he got to point D where he again fell to the ground. There is grass at point C. He said daylight was breaking at the time of the fight. He said there are gravel but no sand. He had known the 2nd and 3rd accused before. He met them many times at church services at Rokera. They also knew him well. In response to a question asked by the Court, he said it took him 15-20 minutes to move from point B to C and D. It took him 9 to 12 minutes to move from B to C. These are of course time estimates. Indeed, when the fight reached points C and D, according to the time estimate, it must have been almost 6am. Indeed, the day was breaking. I think there was enough light for PW3 to see what he saw. Like PW2, he was trying to stop the men fighting each other. He did not take sides for he knew the deceased as well as the 2nd and 3rd accused.

The fight was a moving one. So, PW2 and PW3 were trying to focus their eyes on moving objects being the men who were fighting each other. It was not day-time so that visibility was good. There was however sufficient light from the breaking of the day plus their knowledge and familiarity of the deceased and the accused as to their identity. But be that as it was, only the persons who were close enough to the fighters would be able to see them clearly for short moments. PW2 and PW3 were the only persons who were close enough to see what the accused and the deceased were doing to themselves. PW2 actually held the deceased in his hands at point C. PW3 also touched the 2nd and 3rd accused in an attempt to stop them fighting between points B, and C. The fact that PW2 did not see what PW3 did see at point C was largely due to their respective positions at the relevant time at point C and the focus of their eyes at the relevant moments. There are also inconsistencies in the caution statements of the 2nd and 3rd accused as to what each saw at point B up to point C. The 2nd accused said he saw Michael Awa fall to the ground at point C. The 3rd accused in his caution statement did not see Michael Awa fall. He only saw the deceased fall to the ground. The 2nd accused did not see the 4th accused at point C but the 3rd accused did. These inconsistencies are again due the nature of the fight. It was a running fight where the target was a moving one. There was no time for the eyes to scan every moment of the fight. What the eyes caught at different moments of the fight was what had seen and recognized by PW2 and PW3. So, one cannot say that PW2 and PW3 were not telling the truth when they said they saw what they had told the Court in evidence. I believe them and the evidence they gave in Court. They have no reason to tell lies to the Court. Whereas the accused thought they had a good reason to fight the deceased and fought him. Obviously, they overreacted and overdid it and thereby caused the death of deceased. I do not believe them when each of them told me that they never caused any harm to the deceased. There is of course the problem as to how one apportions blame between them. That is, who delivered the fatal kick that caused the death of the deceased. The matter is further complicated by the fact that the cause of death is not conclusive according to the medical report. Obviously, kicks by the 3rd accused who wore a pair of stockman boots would have been fatal in my

view. According to the medical report, the right chest wall was swollen at the level of the 8th and 9th ribs. It says the ribs could easily be depressed into the chest wall. It would infer to my mind that there was internal injury on that part of the body. How serious it was and to what extent is not stated in the report. PW2 saw the 2nd and 4th accused kick the ribs and belly of the deceased at point C. He saw the 2nd accused kick the right side of the deceased. He maintained this under cross-examination. According to PW3, he saw the 2nd accused kick the deceased on the ribs and the 3rd accused doing the same on the right side. The number of kicks applied to the body of the deceased by each accused is not known. The result of the kicks was the cause of death of the deceased. That, I think, is not disputed. The swearing by the deceased at point B was aimed, it would appear, at the 1st, the 2nd and 3rd accused and perhaps Michael Awa, Edson Mae. The 4th accused was not at point B at that time. However, he admitted in evidence that he was somewhere between points C and D. He had come from the Wharf area to that point. He saw the 3rd accused ran towards point D. He did not see the 2nd accused. In this regard, PW2's evidence was crucial. When he saw the deceased and the 3rd accused fall at point C, he was about 15 feet away from him. In evidence in chief, this is what PW2 said about the 4th accused as recorded in my notes-

..."I saw Saniel Awa and Simon Tohubo kick the deceased (witness identifies Saniel Awa in the dock). (Simon Tohubo identified by witness in the dock). Simon Tohubo and Saniel Awa are brothers. Moses is their brother. I heard someone saying, em now one falla boy long Parasi where alketa eni eni kaeni". This talk came from Simon Tohubo. He said it loudly to the public. This talk came when they kicked the deceased. I saw them kick the deceased. Deceased was on the ground. Deceased was on his hands and knees when he fell down. They kicked the deceased on his ribs and belly. They used their right legs. Saniel Awa kicked the left side and the other kicked the other side. I cannot describe the kicks. They were fighting. I cannot recall how many kicks. I saw the kicks. This was a fight. I saw no one else. I held the deceased with my hands. Saniel and Simon came out. I spoke to the deceased and he said nothing. I said, "Enough Rocky. Stop fight". Deceased looked weak and could not talk or speak. Deceased was not strong-he was not balanced. If I let go he would fall"...

On being cross-examined by Mr. Kako, PW2 said,

..."I saw them kick the deceased. Saniel Awa and Simon Tohubo did this kicking. Saniel kicked the left side. Simon Tohubo kicked the right side...I was walking towards them when I saw them kick the deceased. They were in front of me when they kicked the deceased. I saw them. I saw when the kicks were delivered to the deceased's body. I did not hear any sound because I was rushing towards them. After the boys carried the deceased away I went to see the accused. I spoke to them and Saniel said they were wrong".... On being cross-examined by Mr. Lavery, PW2 said,

..."Edwin Wahu and Saniel Awa kicked the deceased at point C. Simon kicked the left side and Saniel kicked the right side between the legs and arms. I did not hear sound of kicks because I was coming towards them. I was intending to stop the fight"... This evidence remains unchallenged by the defence in its essence. The allegation of bias and that of identification of all the accused will not assist them. I have already ruled in favour of the Prosecution on these two issues. In response to my question, the 4th accused said he knew PW2. He knew him prior to the fight. He said, PW2 was, in fact, his uncle. How was it that his uncle could not recognize him if his uncle saw him that early morning of the fight? I believe the evidence of PW2 as to the identification of the 4th accused at point C. It would appear from the evidence that the fatal kicks were administered by the accused at point C. The description by PW2 of the condition of the deceased when PW2 held him with his hands at point C is evidence that the deceased had been badly hurt. It could not have been due to being drunk because if that were so the deceased would have staggered well before he got to point C.

Who delivered the fatal kicks?

The only evidence on this point comes from PW2 and PW3. What each of them saw were kicks from the accused landing on the body of the deceased. The number of kicks coming from each accused is not known although where on the body of the deceased the kicks were landing was stated by PW2 and PW3. The medical evidence clearly suggests that the deceased must have died from internal injuries although those injuries were not identified and described in the medical report for obvious reason. Only PW3 saw the 3rd accused was wearing safety boots. This fact was not denied by the 3rd accused. In evidence, the 3rd accused describes the boots he was wearing that morning as stockman boots. Common sense tells me that the use of boots of that sort with force could be a lethal weapon. This is not to say that kicks without boots by the 2nd and 4th accused is less dangerous. It all depended on the number of kicks on the same spot on the deceased's body, the angle from which the kicks were aimed at the body and the position of the body on the ground. The medical evidence is far from being able to apportion blame on any one of the accused. The combination effect of the kicks had obviously led to the death of the deceased. None of the accused would have known and measured the amount of force necessary to cause death or otherwise. Each of them simply carried out his wish to attack the deceased. I think section 22 of the Act does not apply here. There is no evidence of forming a common intention with one another to prosecute an unlawful purpose and in the prosecution of that unlawful purpose, an offence was committed resulting in the death of the deceased. What happened here, though contradicted by other evidence, was that the deceased committed a number of provoking acts against the 3rd accused and his companions commencing at point A, culminating in his swearing at them at point B. The swearing at B provoked the accused to attack the deceased. They behaved in a retaliating manner towards the deceased and killed him. They attacked the deceased simultaneously except the 4th accused who joined in at point C. His conduct then was not retaliatory but was supportive of the 2nd and 3rd accused. They all kicked the deceased at point C whilst he was down on the ground. The deceased then was stationary at least for a short time giving the time for the accused to kick him. There is evidence to suggest that he had been attacked from point B to point C but the kicks had either missed or had not been effective. The punch delivered by the 3rd accused on the mouth area of the deceased at point D causing the deceased to fall backwards had caused injury to the back of the head of the deceased. According to the medical evidence, the head injury could be fatal but that suggestion is not conclusive. I think section 21 of the Act applies in this case. Section 21 states-

... "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-

- (a) every person who actually does the act or makes the omission which constitutes the offence;**
- (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"...**

In my view this case falls within (a) above. That is, the 2nd, 3rd and 4th accused were persons who actually committed the offence of murder in this case for each of them was deemed to have taken part in committing murder and to be guilty of it if found guilty.

Was there intent to commit murder?

As I have said, the accused's common wish to attack the deceased can only be inferred from their feeling of anger upon being sworn at by the deceased at point B. The common wish was reactionary in nature than being planned and premeditated. One thing was however clear from the evidence. The 2nd and the 3rd accused chased after the deceased from point B onwards wanting to attack him. The 2nd accused said although he kicked the deceased somewhere between points B and C, that kick was not fatal in any way. The deceased did not fall and apparently kept on moving towards point C. The 3rd

and the 4th accused both said that none of them ever kicked the deceased. If I believe them, which I do not, the question of intent does not arise because they would not have committed murder as alleged by the Prosecution. As I have said, such stand by the accused would not have permitted the defence of provocation to be raised. So, provocation is not an issue here. It is however clear from the evidence that the 2nd, 3rd and 4th accused were totally indifferent to the consequences of their act towards the deceased. Kicking the deceased who was on his knees and hands on the ground probably as he was trying to get up or that was how he landed on the ground could result in causing grievous harm to him. Probably, the accused did not wish grievous harm to occur or were simply being indifferent to the happening of that possibility. Whichever was the state of mind at point C, they must have known that by kicking the deceased in the manner they did would have caused grievous harm to the deceased which could have caused his death as in this case. Although their action was not premeditated, they must have been aware of the risk of doing what they did to cause the death of the deceased. There was an implied intent on their part to cause grievous harm to the deceased. They are tall men and well built physically. Kicking the deceased in the way they did was a sure way of hurting him gravely indeed. (See pages 613 to 614 of the same publication cited above). It is not at all surprising that the deceased died soon after the fight was over. The Prosecution has proved their case beyond reasonable doubt. I therefore find the 2nd, 3rd and the 4th accused guilty of murder and convict them accordingly. I sentence each of them to imprisonment for life. I do not think an allocutus is a necessary procedure in this case as imprisonment for life is mandatory upon me to impose for murder. The term of imprisonment for life begins today. All the accused are entitled to appeal if they so wish.

F.O. Kabui
Judge