



**Republic v Kamande (Criminal Case 19 of 2015)
[2023] KEHC 1076 (KLR) (Crim) (20 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1076 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL
CRIMINAL CASE 19 OF 2015**

J WAKIAGA, J

FEBRUARY 20, 2023

BETWEEN

REPUBLIC PROSECUTION

AND

JULIUS KAIKAI KAMANDE ACCUSED

JUDGMENT

1. The accused was charged with the offence of murder Contrary to Section 203 as read with Section 204 of the *Penal code* the particulars of which were that on the 23rd day of January 2015 at Rueben slums, he murdered Stephen Kennedy Mbithi.
2. He pleaded not guilty to the said charges and to proof its case the prosecution called and examined a total of twelve witnesses whose evidence for the purposes of this judgement is analysed herein under in order in which they testified.
3. PW1 Mary Watiri Muruira stated that on the 19th day of January 2015 she was at a bar/club at Kwa Reuben known as United Club at 10.00 pm when she met the accused who was a Chief Elder and a regular customer where he was until 1.00 am when she heard of a noise outside the bar as if there was a fight, which made the accused to leave them where he was to go outside, and the quarrel continued for about five to ten minutes, and the customers who were inside the bar I decided to go outside and check what was happening, leaving her behind.
4. From the window, she could see the deceased and one Gachagwa quarrelling with the accused in between them trying to separate them after which Gachagwa left the accused and the deceased and in the process the deceased took a rock and hit the accused, who took a piece of wood and attempted to hit the deceased with it but the people managed to take away the wood from him.



5. She then heard the accused say that he had been looking for the deceased for a long time, but the people managed to separate them and the accused entered the club, she then advised the deceased to leave the accused alone as the issue could get out of hand. He then left the bar with the accused following him and shortly at a distance of one hundred meters she saw the deceased fall down, with the accused next to him before he returned to the bar holding the wood and continued with his drink, while the deceased held and supported by Ndungu towards his house. She later on closed the bar and went to her house until the following day when the wife of the deceased told her that he was unwell and was taken to Kenyatta, where he died after three days.
6. In cross examination she stated that she did not know what the deceased and Gachagwa were quarrelling about, and that the accused left the bar when the noise became louder, to go and separate them being a village elder and that she was later arrested and locked up at the police station for about five days.

He stated that he saw the accused run after the deceased before he fell down.
7. PW2 Caroline Kale Kioko stated that she was running a bar and a club called Intima and that on the 19th the deceased who was her husband came to the house too drunk that usual and could not talk, his shirt was torn and he had a swollen head at the back, when she called the bar maid to inquire on what had happened to him, she told her that he had a quarrel with PW1 who owned a bar next door, who called for him her husband the accused, who beat him up.
8. When she attempted to wake the deceased up, he vomited on her, so she called her neighbours who advised her to give him sugar in case it was a case of intoxication but he did not respond, they then took him to Kenyatta where he was admitted and died on 23rd.
9. In cross examination, she stated that the deceased is the one who was operating their bar and that the bar maid did not tell her of the fight between the accused and Gachagwa and further that the deceased never spoke to her, having come to the house alone.
10. PW3 Johnson Obara Onyancha stated that he received a call, from PW2 the wife of the deceased, who informed her that the deceased could not talk. When he went to his house he found him on the bed unable to talk and walk and when he checked his head, he noticed that it was swollen at the back. They took him to the nearest chemist and when they tried to give him milk, he could not talk, he then went and reported to the police while the deceased was taken to the hospital. When he asked the wife on what had happened, she told him that he had been assaulted by the accused.
11. In cross examination, he stated that PW2 told him that their workers at the bar had given her information on the accused assaulting the deceased and that there was a fight outside his Bar and PW1's bar. He confirmed that he was also a Village Elder in charge of a different zone and that as per of their duty they carry a wooden club or rod.
12. PW4 Cosmas Muendo Mbithi, a brother of the deceased was called by their mother who told her that he was sick and admitted to Shalom Hospital. He visited him and the Doctor told him that he had head injuries. He was transferred to Kenyatta where he died and on the 28th. He identified the body for the purposes of post-mortem examination.
13. PW5 Gladys Mutinda Muendo stated that on the 19th she was working for the deceased at Intima bar when they heard noise from outside and when the deceased went out to check, she followed him and saw the accused fighting with someone she did not know and the deceased told PW1 to tell the accused to stop fighting before coming back to the bar where the accused followed him and knocked his table. They then both went outside the bar and started to fight and the accused went for his log which he



- used to hit the deceased with on the lower back and when the deceased came back to the bar, he had a swollen head. He was then escorted to his house by two people. The following day she was informed by PW3 that he had been taken to the hospital from where he died.
14. In cross examination, she stated that they were two bar maids and that she could not remember how many bottles of beer he the deceased had taken. That he went outside immediately the noise started and did not talk to the accused but spoke to PW1 whom he told to tell him to stop fighting. The accused later on came to their bar shouting at the deceased and started to knock the table and abusing the deceased provoked by what he had told PW1. She stated that there was no fight between the deceased and Gachagwa but with the accused. She stated that PW2 did not call her to establish what had happened to the deceased.
 15. PW6 Gladys Mutheke Musyoka stated that she found people chasing each other of whom he knew the accused and the deceased and that the deceased fell down and raised his hand with the accused hitting him with the log, people then came and separated them, and the deceased who was her neighbour taken to his house and that in the morning she met the wife of the deceased who told her that he had been taken to the hospital in critical condition, later she was told of his death.
 16. In cross examination, she stated that she was working at Mama Kativo Pub and that she had closed the bar at 12.00 when she heard the noise. She knew the accused who was working at the chief's camp. She denied working for the deceased but stated that she saw the accused chase the deceased towards the road and that she did not follow them before they were separated. The deceased was taken to his house by his friends in her presence.
 17. PW7 Jeffs Maingi was informed by PW4 his brother that the deceased had been transferred to Kenyatta and when he visited him, he could not talk. He then reported to the police and the accused was arrested.
 18. PW8 Corp. Nancy Wakunyo recorded statements from witnesses on an assault case from the wife of the deceased, visit the deceased in the hospital but he could not talk, they later arrested the accused who was charged upon the death of the deceased. In cross examination she stated that there was an allegation that the accused had assaulted the deceased who was in critical condition, she knew the accused who used to arrest people and bring to the police station and would also occasionally be arrested and that he cooperated with them upon his arrest.
 19. PW9 Dr Nall Kitari examined the accused who avoided eye contact and was dodgy and manipulative meaning that he was holding something. He alleged to had been treated at Mathare but with no record. In cross examination he said that the accused told him that the deceased was a thief and concluded that he was untruthful.
 20. PW10 Corp Augustine Kingeno Keter received a report from Obara (PW3) that the deceased had been seriously injured by the accused and taken to shalom hospital and later to Kenyatta and on 22nd they attested the accused, in cross examination he stated that he knew that the accused was assisting the area chief and that the case was assigned to PW8.
 21. PW11pc Daniel Kieni photographed the body of the deceased at Kenyatta and later visited the scene of crime which was between in time pub and united pub where he received the murder weapon and took photographs. In cross examination he stated that in time pub was run by the deceased while united pub by PW1 and that the log was recovered inside united pub.
 22. PW12daniel Kioko Munyoki took over the investigations and visited the scene on allegation that the deceased was assaulted by a village elder the accused who was taking beer at united bar and that two employees of the pub showed him the residence of the accused who was later on arrested. It was his evidence that PW1 who was friend of the accused was arrested and she told them how the accused



warned the deceased before they started to fight before the crowd stopped them. The accused later followed the deceased and started beating him with log which he was carrying. He later recorded statements from witnesses.

23. In cross examination, he stated that he was guided by PW1 to where the log was kept behind the door of her bar but did not take it for finger print extraction and that he later arrested the accused. He stated that the accused was drinking at united bar and that the fight was at place between the two bars and that when the deceased ran away, the accused followed him and started beating him and that this information was given to him by witnesses who were at the scene.
24. When put on his defence the accused testified as DW1 and stated that he was working as a village elder within the area and that the chief had sent him to the bar to check on those who were selling illicit brew and that while at the PW1,s bar, he heard noise from outside and when he responded, found two men fighting, who turned out to be the deceased and one Gachagwa and while attempting to separate the, the deceased stated that he was only there for the purposes of turning them over to the police to arrest them , thereafter went and reported to the police and the chief on phone.
25. He denied hitting the deceased and that he was only framed because of the nature of his work and that apw1 was selling illicit brew and drugs and that is why he was at her Pub to gather intelligence on her and denied that she was his girlfriend.
26. In cross examination, he confirmed that he used to go to the bar for purposes of gathering intelligence and give the report to the area chief and that it was the deceased and Gachagwa who were creating a disturbance.

Submission

27. At the close of the defence case, the Accused through Ms Odembo filed written submissions while the state through Mr. Okeyo, made oral submissions, it was submitted by the accused that the evidence on record were contradictory conflicting and had discrepancies. It was contended that the charge sheet was defective as it was at variance with the evidence tendered. It was stated that there was no proof of motive and or malice aforethought on the part of the accused.
28. On behalf of the state it was submitted that the prosecution placed the accused at the scene and that there was a fight I his presence which he later joined.

Determination

29. The fact of death was not disputed as confirmed through the evidence of the wife, his two brothers and an employee. Whereas the prosecution did not present the post-mortem report to confirm the cause of death, there is uncontroverted evidence that he had head injuries in as much as PW3 suspected intoxication, I find and hold that the cause of death was head injuries. Failure to produce the post-mortem report was not fatal to the prosecution case as was stated in the case of *R v Francline Mugendi Miriti & Another* [2019] eKLR in which the court quoted with approval, the old East African case of *R v Cheya* [1973] EA 500 where the court held that lack of the post mortem report was not fatal to the case as it was open to the prosecution to rely on other evidence to establish the fact. This position was confirmed by the court in the case of *R v Mohamed Wanyioke and Another* [2017] eKLR where it was stated that the mere fact that post mortem was not conducted does not mean that the cause of death cannot be established.
30. The defence have raised the issue that the charge sheet was defective as not supported by the evidence on record, I am not persuaded by this line of submission. A charge sheet will, only be defective if and when



it fails to meet the threshold of section 134 of the Criminal Procedure Code which states that every charge or information shall contain and shall be sufficient if it contains a statement of a specific offence or offences with which the accused is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence.

31. The Court of appeal in *Peter Ngure Mwangi v R* [2014] eKLR went further and stated that the charge sheet can be defective if it is in variance with the evidence adduced in its support and whether that defect prejudiced the accused. In this case the only defect pointed by the accused was on the date of the offence and the alleged contradiction by the witnesses on the same, which I consider a minor defect which did not prejudice the accused who was able to tender in his defence on where he was on the said date and taking into account the fact that the offence allegedly took place on the night of 19th leading to the morning of the 20th, that contradiction in the witness testimony is reasonably expected to occur.
32. The only dispute in this case is whether the said death was caused by the accused. At the close of the defence case, there remained a doubt as to whether the same was caused by the accused with malice aforethought, the evidence of PW1 was that there was a fight between the deceased and one Gachagwa which the accused responded to by separating them and that the deceased then took a rock and hit the accused with it and in defence he took the log and attempted to hit him with nut people separated them having said that he had been looking for the deceased for along time. This evidence is contrasted by that of PW6 who stated that she saw the accused following the deceased who fell down before he hit him with a log before people separated them and took the deceased to his house.
33. The above evidence is contradicted by that of PW5 Gladys Mutinda Muendo, who stated that they heard noise from outside the pub owned by the deceased and that the deceased went out to check and found the accused fighting with someone which made him tell PW1 to stop the accused whom he considered her husband from fighting and that the accused later followed the deceased into his bar and theory then went outside to fight.
34. As submitted by Ms Odembo, there remains a contradiction and a doubt as whether the initial fight was between the accused and Gachagwa or the deceased and Gachagwa and as to whether the accused hit the deceased with the log when he joined the fight between him and Gachagwa or as a result of what it is alleged the deceased had told PW1 and this being a criminal trial the benefit of that doubt must be given in favour of the accused person.
35. The other doubt raised by the defence is the motive of the offence, did the deceased attack the accused when he went to separate him and Gachagwa or did the accused attack the deceased for what he allegedly told PW1? the prosecution did not make any attempt to clarify the same by offering corroborative evidence and this doubt remained in the mind of the court at the close of the defence case.
36. Whereas there remains a strong suspicion that the death of the deceased might have been caused by the accused, courts have held over and over again that mere suspicion however strong cannot form a basis for conviction in a criminal trial where proof is expected to be beyond any reasonable doubt, which the supreme court of Nigeria in the case of *Baker v State* (1987) 1nwlr 579 Quoted In The Case Of *Gordon Omondi Ochieng v R* [2021] eKLR means just what it says and does not admit of plausible possibilities but does admit of a higher degree of cogency consistent with an equally higher degree of probability .
37. I therefore find and hold that the prosecution failed to prove beyond reasonable doubt that the death of the deceased was caused by the accused with malice aforethought and consequently find the accused not guilty. The accused shall be set free forth with unless otherwise lawfully held. And it is ordered.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 20th DAY OF FEBRUARY 2023

J. WAKIAGA



JUDGE

In the presence of:

