



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT CHUKA**

**HIGH COURT CRIMINAL CASE NO. 11 OF 2018**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**FRANCIS MURIITHI IKUNDA..... ACCUSED**

**J U D G E M E N T**

1. **Francis Muriithi Ikunda** the accused herein, is charged with the offence of murder Contrary to **Section 203** as read with Section **204 of the Penal Code**. The particulars are that, on 17<sup>th</sup> June 2018 at Ndagani Area, Karingani Location within Tharaka –Nithi County he murdered one Justin Mwiti Njagi.

2. The accused person denied committing the offence and the prosecution in this case called five witnesses to prove their case. The prosecution's case is based on direct evidence.

3. **James Karani (PW1)** a boda boda rider based at Ndagani area, testified that on the material night (17<sup>th</sup> June 2018) he was at Ndagani at around 11:30 pm where he was proceeding to a joint known as California Bar for a drink and while on his way there, he met the accused herein and the deceased talking near Queen Bee Hotel. The witness stated that he tried talking to them but the two did not pay much attention to him and that is why he proceeded on his way to California Bar. He testified that he took a drink and left the bar after ten minutes and that on his way he met the deceased and accused on the same spot still talking but passed them and proceeded to the stage where he operated his boda boda business. He added that after around twenty minutes, he heard commotion from the direction the deceased and accused were and that he proceeded to the scene and found the deceased lying down. He testified that he noticed that the accused was holding a piece of wood and the deceased was bleeding from his head. He testified that they made arrangements with friends to have the deceased taken to hospital for treatment and that while he was in the process of taking him, the accused joined him and together they took the deceased to Chuka Level 4 hospital where he was later transferred to Embu Level 5 hospital from where he passed on.

4. **Lewis Mutwiiri Kimathi (PW2)** another boda boda rider at Ndagani Area, also testified that on the material day and time he saw the deceased and the accused having a conversation. He however stated that he did not witness the accused hitting the deceased but only learnt later that the deceased had been injured and died at the hospital while undergoing treatment.

5. **Stella Kendi Kaaria(PW3)** a wife to the deceased told this court that she was notified about the incident on the material night and told that her husband had been taken to Chuka Hospital for treatment. She further testified that she went to the hospital and found her deceased husband admitted in the hospital ward not talking with blood oozing from his nose and ears. She also stated that she noticed that his forehead was swollen. She further told this court that the hospital referred her husband to Embu Level 5 hospital where he succumbed to the injuries while undergoing treatment.

6. **Inspector Abdi Duble (PW4)**, the Investigating Officer in the case testified that PW3 went to Chuka Police Station on 19<sup>th</sup> June, 2018 and reported that her husband had been assaulted on 17<sup>th</sup> June, 2018 and that the deceased husband had succumbed to the injuries. He added that on 20<sup>th</sup> June, 2018, the accused surrendered himself to the police station on fear of being lynched by members of the public.

7. The Investigating Officer further informed this court that the accused informed him that there was a fight between him and the deceased after a quarrel over money that the accused owed the deceased.

The Officer told this court that he visited the scene of crime but he was unable to recover anything. He drew a sketch of the scene of crime which he tendered as P Ex 1.

8. **Dr. Moses Njue (PW5)** a doctor in charge of Embu Referral Hospital testified on behalf of his colleague Dr. Kamau who performed post mortem examination on the body of the deceased, informed this court that Dr. Kamau had resigned from civil service and could not be traced. He however confirmed that he had worked with her for 2 years and was familiar with her handwriting. He tendered the post mortem report as P Ex2 which listed the injuries suffered by the deceased as follows: -

(i) **Evidence of medical intervention on the right hand.**

(ii) **Frontal part of the brain had laceration measuring 2cm (evidence of haematoma).**

(iii) **Depressed commited fracture on the frontal region of the head.**

9. The doctor formed the opinion that the cause of death was head injury caused by a blunt force trauma. She issued Death Certificate No. xxxx.

10. When placed on his defence, the accused conceded that there was some altercation between him and the deceased on the material day (17<sup>th</sup> June, 2018) near California Bar in Ndagani. He further told this court that the deceased was a friend to him and that he met him in 2010 after he moved to Chuka from Moi University. He further stated that he knew him as a barber and stated that he used to visit his barber shop for shaving.

11. He further recalled lending the deceased some Kshs. 2,000 and that the deceased delayed in refunding but paid by instalments within 3 months and later it transpired that he had overpaid him by Kshs. 300. The accused added that on 17<sup>th</sup> June 2018, while he was drinking with a friend at California Bar, the deceased found them and approached them with a demand of a refund of his Kshs. 300 which he claimed he was not in a position to refund. The accused stated that he asked the deceased to give him time until the end of the month but the deceased became aggressive as he did not believe that he had no money.

12. He further testified that, as he stepped out of California Bar, he found the deceased waiting for him at the entrance and that he started demanding for his money. When the accused could not pay him, the deceased became furious and picked a piece of wood from a makeshift bridge near the bar and started beating him with the timber, according to the accused he pleaded with the deceased but his pleas fell on deaf ears and that the timber broke into two pieces. The accused stated that he picked one piece and hit the deceased on the forehead and he fell down marking the end of the fight. He testified that there were people watching from some distance but when the deceased fell down they rushed in to assist the deceased and that the deceased was rushed to the hospital and that he was among those who took the deceased for treatment at the hospital. He conceded that when the onlookers rushed in, he disappeared from the scene at first fearing the hostility from boda boda riders but he testified that he in fact informed one of them to pick him ahead which he did as they headed to Chuka Level 4 hospital. He told this court that he surrendered to the police on 19<sup>th</sup> June 2018 after he learnt that the deceased had succumbed to the injuries sustained.

13. In his submissions through Counsel, the accused submitted that he attacked the deceased out of provocation and that he was acting in self defence. He contends that he harbored no ill will or intention to kill.

14. This court has considered the prosecution's case and the defence offered. The accused person is charged with murder Contrary to **Section 203 of the Penal Code**. In a case of murder there are 3 essential ingredients which must be established and proved by the prosecution beyond doubt. They are: -

**a) The death of the deceased and the cause of that death;**

**b) That the accused committed the unlawful act which caused the death of the deceased and**

**c) The accused had the malice aforethought that constitutes 'mens rea' of the offence.**

15. **The fact of death and cause**

The death of the deceased is not in dispute. The medical evidence (P Ex2) tendered by PW5 (Dr. Moses Njere) confirms that the deceased herein, died due to a head injury caused by blunt trauma.

The fact of death and the cause was established beyond doubt by the evidence presented.

16. **(ii) Proof that the accused committed the unlawful act which caused the death of the deceased (actus reus).**

Again, on this element, there is no doubt that the accused person caused the fatal injury from which the deceased later died. The evidence tendered by both the prosecution and the defence clearly points out that an argument over Kshs. 300 owed to the deceased by the accused arose on 17<sup>th</sup> June 2018 near California Bar within Ndagani Area. As a result of the argument, the accused hit the deceased on the forehead using a piece of timber which caused him to fall down. He was rushed to hospital with his head bleeding profusely. The evidence of PW1 as well as the accused clearly brings out the picture of what transpired during and after the accused quarreled over money. The quarrels escalated which saw the accused hit the deceased on the head. The deceased fell down due to the impact and was rushed to hospital.

The accused concedes the fact and this court finds that the element of *actus reus* has been established and proved beyond doubt.

**(iii) Mens rea**

The element of *mens rea* is a crucial element in an offence of murder because under **Section 203 of the Penal Code**, the offence is defined as;

**“any person who of malice aforethought causes death of another person by unlawful act or omission is guilty of murder.”**  
(emphasis added)

In the absence of this crucial element, the charge of murder cannot be sustained.

17. It is important to note that the element of *mens rea* can be deduced from what an offender says or does prior or during the commission of the offence and it can also be inferred from his/her actions when committing the act and after. The provisions of **Section 206** is clear on this. It provides: -

“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 to some person, whether that 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.**

**c) An intent to commit a felony;”**

18. Going by the provisions of **Section 203 of the Penal Code**, the prosecution has a duty or the burden to prove that the deceased died as a result of the unlawful act of commission or omission of the accused or in killing the deceased and that the act was actuated by express malice pursuant to **Section 203** or implied malice as provided under **Section 206 of the Penal Code**.

19. In this matter it is quite apparent from the evidence tendered before me that the accused hit the deceased on the head as a result of a quarrel which degenerated into a fight. I am persuaded that the accused hit the deceased at the spur of the moment and had not planned or intended to cause serious harm to the deceased. I do not find enough evidence that it is the deceased who started the fight but from the evidence of PW1 it is clear that the deceased and the accused were seen having a conversation. PW1 did not know what the conversation was all about but the accused has clarified that it was about Kshs. 300 which he conceded he owed the deceased. It is understandable that the deceased might have felt slighted by the fact that he found the accused enjoying himself with a drink at California Bar but he at the same time was reluctant to refund him Kshs. 300 which he owed him. It is unclear from the evidence tendered what really caused the tension and the fight but going by the defence case, it would appear that the deceased was quite displeased by failure by the accused to refund him his money and that is probably what caused the fight.

20. I have considered the evidence tendered which indicates that the deceased suffered one blow or blunt trauma on the forehead. The medical evidence supports the defence position that the accused hit the deceased once on the forehead using a broken piece of wood. The action taken by the accused after the deceased fell down in my view shows that the provisions of **Section 206 of the Penal Code** can apply against him. This is because his action was not accompanied by indifference whether death or grievous harm would be caused by his action. He immediately embarked on accompanying the deceased to hospital for treatment after initially taking cover to avoid the hostility of the crowd that responded to rescue the deceased.

21. The accused has raised a defence of provocation in this case and I do find that based on the facts presented, that defence was not shaken by the prosecution. As I have observed it is difficult to tell what transpired outside California Bar at the material time because it was only the deceased and the accused who were having a conversation. The witnesses who testified were standing at a far distance and only saw the deceased falling down and when they rushed to rescue him, they found the accused holding a piece of wood on his hand. There is no doubt that the accused had hit the deceased but in my considered view there is no evidence to suggest that the act was premeditated. His action was clearly done on the heat of the moment. In such circumstances, the provisions of **Section 207 of the Penal Code** applies. The provision states: -

**“When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, he is guilty of manslaughter only.”**

22. From the foregoing, this court finds that the prosecution’s case has not established and proved the charge of murder sufficiently because the element of *mens rea* is missing from the case. However, I am satisfied that the prosecution has proved the offence of manslaughter as provided under **Section 207 of the Penal Code** and this court finds him guilty of the offence of manslaughter and is hereby convicted of that offence accordingly.

**DATED, SIGNED AND DELIVERED AT CHUKA THIS 13TH DAY OF JANUARY, 2022.**

**HON. JUSTICE R. K. LIMO**

**JUDGE**

**SENTENCE:**

This court has considered the mitigation raised by the convict. It is however regrettable that the accused killed the deceased over Kshs.300/- which he owed him. He has not told this court whether he has refunded the money to the family of deceased and he cannot say he is

remorseful when he has not done anything to show his remorsefulness. A life of a young man was equally lost and the accused ought to have controlled his anger. He therefore deserves a custodial sentence for purposes of rehabilitation. He is hereby sentenced to serve **15 years** in jail. He has 14 days right of appeal.

**HON. JUSTICE R. K. LIMO**

**JUDGE**

**12/1/2022**