



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**CRIMINAL CASE NO. 15 OF 2018**

**LESIT, J.**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**ONESMUS MWANZIA KIJAGA.....1<sup>ST</sup> ACCUSED**

**RASHID BRIAN MWANGI.....2<sup>ND</sup> ACCUSED**

**RULING**

1. The accused persons, **Onesmus Mwanzia Kijaga** alia **ONE**, hereinafter the 1<sup>st</sup> accused and **Rashid Brian Mwangi**, the 2<sup>nd</sup> accused face two counts of **murder** contrary to **Section 203** of the **Penal Code**. It is alleged that the two accused persons with others not before court, on the 2<sup>nd</sup> July 2017 at around 8.30 p.m. murdered **Stephen Waweru Ndungu**, the deceased in count 1 and **James Kaminya** respectively the deceased in count 2.

2. The prosecution called 8 witnesses to prove their case. The prosecution case is that the two deceased persons, with their friends including, PW1 (Nganga), PW4 (Wang’ombe), PW5 (Kirimi), one Githinji and one Martin were inside stoppers Bar Glucola in Ruaraka when some youths entered. The youths were identified as the 1<sup>st</sup> and 2<sup>nd</sup> accused and were said to be in company with one who had rasta hair and another.

3. It is alleged that the accused stabbed Ng’ang’a (PW1), Waweru deceased in count 1 and Kaminya deceased in count 2. Wang’ombe took Waweru and Kamunya to hospital where he realized that he too had a stab wound on the neck. Waweru died the following day after the incident and Kaminya one month later.

4. The two accused were arrested by PW7 and his colleague P. C. Koigi on 27<sup>th</sup> February 2018 following a tip off. This was 8 months after the incident. The case was on 30<sup>th</sup> March 2018 given to PW8 (CPL Lekisima) to complete the investigations.

5. The prosecution has the evidential burden to prove the case against both accused persons beyond any reasonable doubt. At this stage all the prosecution needed to do is establish a prima facie case. They have to prove first that it is the accused persons who stabbed the deceased; secondly that the deceased suffered injuries from that act from which they died, and thirdly that the accused actions were motivated by malice.

**Did the accused persons stab the deceased causing them injury?**

6. The eye witness account is by four witnesses, that is, PW1, PW3, PW4 and PW5. The evidence of each witness was different. PW1’s evidence was that there was a rasta man who entered the bar where they were and overturned the table where he, the deceased and Stanley Maina were seated. The rasta man was chased away only to return with 3 or 4 other youth.

7. According to PW1, the four youth found Waweru and Kaminya near the door intending to leave. They pushed them back in. PW1 testified that when the youth pushed everyone back to the bar, he came face to face with the 1<sup>st</sup> accused who had a knife. He stabbed him once in his stomach and twice in his hands. PW1 did not witness any other assault because someone carried him behind the counter for his safety.

8. PW4 said that he was sitting alone on a single chair facing the deceased persons just before the attack. He said he witnessed the 1<sup>st</sup> accused stab PW1, and then Waweru and Kaminya. PW4 said that both deceased who were standing near the door of the bar at the time of the attack.

9. PW5 testified that he had entered the bar at 2.30 p.m. and found both deceased, one Martin, PW1, one Maina and PW4 inside watching a football match. His testimony was that at 8 p.m. a youth adorned with rasta hair entered the bar and hit the table where the deceased persons were seated. He later returned with the two accused and others. PW5 said that he saw the 1<sup>st</sup> accused stab PW1. He then saw both deceased lying on the floor injured but could not tell who injured them.

10. PW3 was an independent witness in the sense that she was a cashier at the Keg bar. Her evidence was that there were twin bars divided by a partition, one selling keg alcohol where she worked while the other sold beer.

11. PW3 testified that the deceased were in the Keg Bar taking keg alcohol which she sold to them from 8 p.m. She said she received a report that rasta man was creating disturbance in the Beer Bar and she went there and brought him back to the keg bar where she said he had been sitting with the deceased. She said that she heard commotion in the Beer Bar and on going to check found the 2<sup>nd</sup> accused on top of a table swinging a knife. Her evidence was that she saw the 2<sup>nd</sup> accused stab Waweru. Kaminya was on the floor injured but she did not know by whom.

12. From these evidence it is clear that only two witnesses said that they saw who stabbed the deceased, PW3 and PW4. Their evidence is contradictory because while both said they knew both accused and both deceased very well, and while both agree that the lighting was good at the scene each saw different things. PW3 said it was the 2<sup>nd</sup> accused who was armed with a knife and who stabbed both deceased, while PW4 said it was the 1<sup>st</sup> accused who stabbed both deceased.

13. The issue is whether the contradiction in the evidence of these two witnesses can be resolved within the evidence adduced in the case.

14. For one while PW1, PW4 and PW5 said it was the 1<sup>st</sup> accused who had a knife, PW3 said it was the second accused. PW4 said 1<sup>st</sup> accused stabbed the deceased while PW3 said it was the 2<sup>nd</sup> accused. PW3 contradicted other material evidence in regard to where the deceased were seated just before the accused. She even contradicted what drinks they were having just before the attack. She said that the deceased were seated with rasta man at the Keg bar and that she started selling keg to them at 8 p.m. Her evidence was contradictory of itself because she said that when the commotion started she went to the Beer bar to check, where she found the 2<sup>nd</sup> accused on top of a table swinging a knife. She then witnessed the attack. At one time she said she saw who stabbed both deceased. At another point she changed and said she did not see who stabbed the deceased Kaminya.

15. PW5 on his part said the rasta man was never in the Beer bar where he and the deceased were seated. He said that he came much later to overturn the table before ushering in the accused persons and other youth. PW4 also said the deceased were taking beer. Having considered this issue, I find the contradiction in the Prosecution case irreconcilable.

#### **The second issue is whether the injuries suffered by the deceased in the case resulted in their death?**

16. The prosecution did not avail the post mortem form in respect of the deceased Waweru. However, I have no doubt that Waweru was stabbed in his stomach and rushed to hospital by PW4. The brother of Waweru, PW2 learnt of the incident on 3<sup>rd</sup> July, one day after the incident. He was told his brother died on the same day of the attack by personnel at Kenyatta National Hospital when he went there to check on him. PW2 said that he identified the deceased to the doctor for post mortem on 13<sup>th</sup> July 2017, but that he did not see any injuries on him since his body was half covered.

17. As for Kaminya, his wife PW6 testified that her deceased husband was first treated at Kenyatta National Hospital for 1 and a ½ weeks. He was discharged and went home for one week. She returned him to hospital one week later, this time to Kiambu Hospital. She said that her late husband died a month after the incident. She said that she could not afford to pay for postmortem so none was carried out.

18. PW6 produced the burial permit and death certificate of her late husband as P.exh. 2(a) and (b). The death certificate gave the cause of death as pneumonia. She gave treatment notes p.exh.3. I saw those notes. There were notes from Kenyatta Hospital which indicated that the deceased was admitted and treated for penetrating wound to the right chest on the 2<sup>nd</sup> July 2017. He was found stable and recovered on 11<sup>th</sup> July 2017 when he was discharged by Kenyatta Hospital.

19. I saw other treatment notes dated 23<sup>rd</sup> July 2017. The Hospital stamp is not clear but going by the evidence of PW6, it was Kiambu Hospital. The notes indicated that the patient had a history of assault. The doctor required an x-ray to be done in order to ascertain whether the patient was having complications as a result of the stab wound injuries. Apparently none seems to have been done before he died.

20. In conclusion on this issue, the prosecution did not adduce any medical evidence of either what the deceased Waweru was being treated for, or the post mortem form or any document to show the cause of death. It is however clear that the reason why he was taken to hospital was due to injuries suffered on the material day.

21. For the deceased Kaminya, the medical notes before court shows he had a penetrating wound to his chest from which he recovered and was discharged by Kenyatta Hospital. Subsequently, he was treated at Kiambu Hospital for pneumonia preceding his death. The X-ray called to determine a connection between injuries suffered on 2<sup>nd</sup> July 2017 and his admission to Kiambu Hospital on 23<sup>rd</sup> July 2017 was never taken. Therefore, no nexus was created. The prosecution failed to establish what caused the death of the two deceased, and especially the second deceased Kaminya who died a month after the incident. For Waweru, there was an indication he died on day of the incident clearly after suffering injuries inflicted on him at the Beer Bar.

#### **Was malice proved?**

22. Regarding malice aforethought what was required is for the prosecution to establish who inflicted the fatal wounds and then adduce

evidence to show that their actions were actuated by malice. The prosecution's case was contradictory as to which between the two accused was armed with a knife with which the deceased were stabbed.

23. Even though it is not necessary to establish the motive for the attack, determining motive may help establish malice aforethought. In this case there seemed to have been no motive for the attack. The witnesses who were with both deceased, that is PW1, 4 and 5 all said they did not know what the motive was. PW3 suggested it was a fight over which TV channel should be watched. PW3's suggestion is wild and received no support from the other witnesses. There was however evidence by PW4 that the attack took place during election campaigns. All witnesses were clear that nothing unbecoming had happened at the bar before the youths attacked PW1 and the deceased who were men in their forty's and fifty's. I find that malice aforethought was difficult to establish, and especially where the evidence of who attacked the victims was contradicted.

24. Having carefully analyzed and evaluated the evidence adduced before me, I find that the prosecution did not establish a prima facie case against both accused to warrant this court place any of them on their defence. Having come to this conclusion, I acquit both accused persons for both counts of murder under **Section 306** of the **Criminal Procedure Code**. They should be set at liberty unless otherwise lawfully held.

**DATED AT NAIROBI THIS 26<sup>TH</sup> DAY OF JULY, 2021.**

**LESIT, J**

**JUDGE**

Delivered through teams this 26<sup>th</sup> day of July, 2021 in the

presence of:

Kinyua - court assistant

Ms Gikonyo for the State

Mrs. Kinyori for the 1<sup>st</sup> accused

Mr. Wamwayi for the 2<sup>nd</sup> accused

Accused 1 present

Accused 2 present

**LESIT, J.**

**JUDGE**