



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HIGH COURT CRIMINAL CASE NO. 161 OF 2017

FORMERLY MACHAKOS HCCRC. NO. 86 OF 2015

REPUBLIC.....PROSECUTION

-VERSUS-

JOSEPH MATIAS MUTHANYA.....ACCUSED

RULING

1. **Joseph Matias Muthanya** the accused herein, faces a charge of murder contrary to section 203 and 204 of the Penal Code. The particulars are that the accused on the 6th day of February, 2015 at Kalembwani market in Mukaa sub-county within Makueni county with others not before court, murdered **Leonard Muasya**.

2. A summary of the prosecution case is that the scene of crime was outside a bar called Thome bar. The deceased had entered the said bar at night and got involved in a scuffle with more than one customer and they followed each other outside. Thereafter, the deceased rushed back into the bar and closed the door. The people outside were baying for his blood. They finally gained entry into the bar and beat up the deceased to death the same night.

3. Eight (8) witnesses testified on behalf of the prosecution. Pw1 **Josiah Mutuku Ngunza** was in the bar when all this took place. He said he pleaded with those baying for the deceased's blood as they wanted to break into the bar. The people he talked to were Dani, Mulinge, Munana, Kathii, Tia alias Kangele *alias* Mathias. Using the light from the bar he saw an injury on Mathias forehead.

4. He was not able to persuade the group to leave the deceased alone. After a while he heard the sound of bottles being thrown from the bar as stones were thrown inside. He later saw the deceased on the ground. In cross examination, he confirmed that the deceased had stabbed Dani and Mulinge. That the accused was not part of the quarrel in the bar. He thereafter called and informed Pw2.

5. Pw2 **Jonathan Mbai Maundu** is the bar owner and was only called to the scene after the fact and he found the deceased lying down dead. Pw3 **Elizabeth Mwendu Wambua** a bar maid at Thome bar Kalembwani testified that on 6th February, 2015 night, there was a scuffle at the said bar, involving Mulinge a young man and the deceased. The deceased followed the young man out but returned after about 10 minutes.

6. He closed the door and window at the front part of the bar. Stones started hitting the windows, door and roof. Two men who were inside the bar jumped out leaving her with the deceased, who stood on top of a table. He then jumped into the store from where he took a carton full of empty bottles and smashed them on the floor. She ran out through the rear door and stood 200 metres away.

7. She only heard loud bangs in the bar and breaking of bottles. She called Pw2 and informed him of what was happening. When she was taken back to close the bar by Kyalo they found the deceased lying facing downwards with stones on his back and neck. When Pw2 arrived, they went to the bar and found so many breakages of bulbs and bottles, and a report was made to the police. She did not see the people who threw stones at the bar and the deceased. She mentioned that the deceased had been behaving like he was out of his mind.

8. Pw4 **Norman Muba Nyamai** is the deceased's father. He only received a report of the death of the deceased. He confirmed that the deceased had a mental problem. Pw5 **Nicko Nzuki Mutisya** was with Pw1 at the Thome bar. He stated that the deceased had disagreed with Mulinge and he slapped the latter and another and the two walked out of the bar. The deceased also walked out and returned running after 10-15 minutes.

9. The deceased closed the door and he could hear people outside demanding for the doors to be opened as they wanted Muasya. They tried to force the door open. On sensing danger, him and Pw1 walked out via the back door of the premises, leaving the deceased there. The witness stated that there was light inside the bar but it was dark outside.

10. Pw6 **Oliver Kyalo Musau** is a younger brother of the deceased. He received a report of the death and went to the scene the next day. On 10th February, 2015 he witnessed the post-mortem. Pw7 **Stephen Mwaniki Musau** another brother of the deceased received a report of the death of the deceased. He went to the scene and confirmed the report.

11. Pw8 **No. 68893 Corporal Fred Wanyala** is the investigating officer herein. He stated that the deceased was attacked and beaten inside a bar, and he died in front of the Thome bar. The body was collected and a post mortem conducted later. The accused was arrested in connection with the offence after Pw1, Pw3 and Pw5 identified him. He produced two stones (EXB2) recovered from the scene. Pw8 produced the postmortem with the consent of both parties. The postmortem (EXB1) shows the cause of death as head injury secondary to blunt force.

12. Mr. Kituku for the accused filed written submissions at the close of the prosecution case. He set out the case of the prosecution as stated by all the eight (8) prosecution witnesses, while highlighting portions of their evidence.

13. There is no dispute that there was a scuffle at Thome bar on the night of 6th February, 2015. It involved the deceased, Mulinge and Dani. Mulinge went into hiding. Pw1, Pw3 and Pw5 were all at Thome bar on this night. Pw3 was the barmaid attending to the customers. It is the evidence of these three witnesses that the accused was not part of the group that quarreled inside the bar. Infact he was never inside the bar.

14. Pw1 said he had an engagement with about five persons who wanted to break the door and were baying for the deceased's blood. He identified the accused as one of the people he engaged. Besides talking to them he did not witness them doing anything unlawful. On the other hand, Pw5 who was drinking with Pw1 testified that when they heard people demanding to have the door opened they sensed danger and walked out through the back door. He does not make mention of any discussion between Pw1 and those who were demanding for the door to be opened.

15. Pw3 the barmaid also testified that when the deceased ran back into the bar he said young men were chasing him. The stones then started hitting the windows, door and roof. At that point, the two (2) Kamba men who were in the bar went out through the rear door and she was left with the deceased. At no point did she witness anyone engage with those who wanted to force the door open. I believe the two (2) mentioned Kamba men who left were Pw1 and Pw5.

16. The evidence of Pw1 pointing at the accused as one of those who wanted to beat the deceased is not supported by any of those who were at the scene. Infact, none of the witnesses Pw1, Pw3 and Pw5 ever witnessed how the accused met his death.

17. Pw8 who investigated the case said he arrested the accused because he had been identified by Pw1, Pw3 and Pw5 which is not true. It is only Pw1 who mentioned the accused and his evidence is not corroborated by the evidence of any of those who were at the scene. Pw8 did not even explain why he arrested the accused ten (10) months after the incident. Had the accused disappeared? It's not known. From the evidence, its one Mulinge who is at large, since the occurrence of this incident.

18. All in all, I find that the prosecution has completely failed to link the accused with the murder of the deceased person. **I find him not guilty and acquit him under section 306(1) Criminal Procedure Code. He shall be set free unless otherwise held under a separate warrant.**

Orders accordingly.

Delivered, signed & dated this 27th day of February, 2020, in open court at Makueni.

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H. I. Ong'udi

Judge