



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 3 OF 2014**

**REPUBLIC**

**VERSUS**

**FRANCIS MAINA MWANGLI.....ACCUSED**

**JUDGMENT**

The accused was charged with the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code**, cap 63; according to the information, on the 17<sup>th</sup> day of August, 2013 at Burguret Sub/Location in Kieni East within Nyeri County, the accused murdered Harrison Maina Mbugi (herein “the deceased”).

His trial commenced on 6 February 2014 when he pleaded not guilty to the charge. Prior to his plea he had been certified to be mentally stable and therefore fit to stand trial by Dr’ Mwenda Richu, a psychiatrist, whose report was submitted to court by Dr. Gor Gudi (PW5).

The deceased’s son, **Antony Mathu Maina** testified as the first prosecution witness. He told the court that on the material day, he was at the deceased’s *Mamboleo* bar (herein “the bar”) at around 9.30pm. He went home leaving some five customers in the bar; they were being served by the deceased. Among those customers were the accused and *Mzee* Wambina (PW3). He knew the rest of the customers but by appearance only. He had known them for about a year as they are people who usually patronized his father’s bar. As far as the accused is concerned, he had known him for close to a month.

Maina testified that on the morning of 18 August 2013, he was woken up by his mother Joyce Maina (PW2) who told him that the deceased had been killed; she got this information from Wambina (PW3). He proceeded to the bar where he found the deceased’s body in the bar; there too were members of the public milling around and police officers from Naromoru police station. He saw a *panga* and an iron bar next to the deceased’s body; he identified these weapons in court.

He further testified that on 20 August 2013, he, together with Kariuki, from the Criminal Investigations Department and other police officers from Naromoru police station, went looking for the accused in Kitui.

Finally, he helped identify his father’s body at the mortuary during the post-mortem exercise.

**Joyce Wairimu Maina (PW2)**, the deceased’s wife, testified that on 17 August 2013, his son (PW1) arrived home at around 9.30pm; he went to sleep after he had had his dinner. Her husband did not return home that particular night. This was not unusual because it was her evidence that at times he could sleep in the bar when he worked late.

The following morning at around 6.30 am, she heard somebody call out at the gate; she could tell from his voice that it was Wambina(PW3) who, according to her evidence, used to spend the night with the deceased at the bar whenever he slept there. He also used to assist him in the bar. She testified that Wambina was also known as James Mureithi. Wambina informed her that they had been attacked at the bar and that the deceased had been killed. They both went to the scene where they found the deceased’s lifeless body lying on the floor, in the bar, in a pool of blood. She did not get any details from Wambina on how the attack took place but, like her son, she noticed a metal rod and *panga* next to the deceased’s body. He also told her that they had allowed a stranger to sleep in the bar. The bar’s door was open and the padlock was on the table.

**James Mureithi Ng’ang’a (PW3)** alias Wambina testified he was a herdsman in Burguret and that he had known the deceased for thirty years. On the material night he slept in the bar with the deceased together with the accused. At around midnight, he heard the deceased calling him telling him that he was being killed. He also heard a voice telling him that he too would be killed and so he continued sleeping till 6 am when he woke up.

The accused, according to him, was a stranger whom the deceased allowed to sleep in the bar. Though he only saw him on the material night, he could remember, when he testified, that it was the accused who spent the night with them at the bar. It was his testimony that it was the accused who killed the deceased because he could tell his voice when he threatened him with death on the material night. He, however, said

that there was no commotion of any sort during the night.

The deceased, according to him, closed the bar at midnight. He closed the main door from inside using a padlock. He also closed the door to the counter. However, the main door was open when he woke up the following morning. His description of the bar was that it was single-roomed, the size of a court room with a counter. The three of them slept in that room on sofa settees. It was his evidence that the metal rod and the panga besides the deceased's body belonged to the deceased.

According to his evidence, although he had known the deceased for a long time, this was the first time he had spent the night with him at the bar. He also testified that it was at the deceased's request that he slept in the bar.

**John Ndirangu (PW4)** the area assistant chief testified that he got the news of the deceased's death from a village elder at about 6.20am apparently on 18 August 2013. He proceeded to the scene where he found the deceased's body. He informed the officer in charge of Naromoru police station who in turn sent officers to the scene and collected the deceased's body.

The investigation officer, police constable **Adan Ali (PW6)**, was informed of the murder on 18 August 2013 by the officer in charge of Naromoru police station where he was then attached. They both went to the scene where they found the deceased's body lying in his bar, in a pool of blood. He observed that the deceased had sustained multiple cuts on the head, legs and hands. They retrieved the body from the scene and took it to Nanyuki District Mortuary. They also recovered a *panga* from the scene.

From their investigations, they tracked the accused at Kambiti from where they arrested him. In particular, the accused was tracked by police constable Josephat Langat.

The pathologist, **Dr. Ayub Gitaka (PW7)**, conducted the postmortem on the deceased's body on 20 August 2013. He observed that it had deep cut wounds on the cheek region and on the temporal region; there were also lacerations on the front part of the head and on the upper limb. The ulna was fractured. There were multiple lacerations above the left elbow and cut wounds on the dorsal aspect. The skull was fractured with visible brain tissue. He opined that the cause of death was severe head injury secondary to multiple cut wounds.

The accused opted to give unsworn statement when he was put to his defence. He told the court that he lived and worked at Burguret as a farmhand. He neither knew the deceased nor James Mureithi (PW3). He admitted, however, that on the material day, he went to the deceased's bar at 6 PM but left at 8 PM after taking some drinks. He left some other people in the bar. He woke up the following day to go to work at Kambiti.

And with that he closed his defence.

As usual, the immediate task this court is confronted with in cases such as the present one is to analyse the evidence against the law upon which the charge the accused is faced with is founded. And here we are talking about **section 203** of the **Penal Code**; this provision of the law defines the offence of murder. It states as follows:

### **203. Murder**

***Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.***

Thus, one can only be convicted of the offence of murder if it is established beyond reasonable doubt that a person has died; that his or her death is as a result of unlawful act or omission; that the unlawful act or omission is by another person; and finally, the act or omission that resulted in the death was motivated by malice aforethought.

The fact of death of the deceased does not appear to attract much dispute for there is sufficient evidence that Harrison Maina Mbugi was alive and well until the 17<sup>th</sup> day of August 2013 when his life was brutally ended. His son (PW1) left him in his bar attending to customers on the night of 17 August, 2013; Mureithi(PW3) with whom he shared a room on the fateful night testified that he saw him too on the material night but woke up to find him dead on 18 August 2013. He alerted the deceased's wife (PW2) who in turn informed her son (PW1); both were consistent in their evidence that they found the deceased's body sprawled on the floor of his bar after they received news of his death on 18 August 2013.

Coupled with this evidence was the pathologist's (PW3) evidence on the manner and the cause of the deceased's death; he conducted a post-mortem on the body that was positively identified to be that of the deceased. Of particular interest to the present question, he capped his evidence with a certification of the death of the deceased.

Thus, death of a person, as contemplated under section 203 was proved beyond all reasonable doubt.

The next question of concern is whether the death was caused by an act or omission of another person. Again, here, going by the evidence of the deceased's son (PW1), his wife (PW2), Mureithi (PW3) and the investigation officer (PW6), it is apparent that the injuries out of which the deceased died were not of his own making but acts of another person. These acts were, no doubt, unlawful because there was no evidence, and neither was it ever suggested, that the acts may have been justified.

Equally important to consider is the question whether the accused was behind the deceased's brutal murder. The evidence from which the answer to this question can be found is largely circumstantial. It is circumstantial because none of the prosecution witnesses has stated, in no uncertain terms, that he saw the accused murder the deceased. The accused was implicated by Mureithi and, remotely, by the deceased's son.

According to Maina (PW1) he recalled having left his father at the bar attending to Mureithi(3), the accused and three other customers whom

he knew but could only identify them by appearance. He had known them for a year; he also knew the accused but for a shorter period. As far as the accused is concerned, he had been seeing him, apparently patronizing his father's bar, for less than a month. That is as far as his evidence implicating the accused went.

Mureithi (PW3), on the other hand, testified that he slept with the deceased and the accused in the bar. On his evidence concerning the deceased's death he stated as follows:

***“We were asleep the three of us...The deceased was hit on the head with a metal rod. The deceased called me and said he is being killed. I was told that I will also be killed but I did not see who was saying it because the lights were off. I went back to sleep after the threats. I slept until 6 AM when there was light. I went to the deceased's wife to inform her.”***

He testified further;

***“When I was ordered to sleep the third person had ran away. I did not know him before. I only saw him on the material night. I saw him from 7 PM to midnight. I can recognise him. he is the accused in the dock. It is the accused who was killing the deceased. I knew him by his voice when he told me to sleep because he would kill me too.”***

And in answer to questions put to him during cross-examination he testified thus;

***“It was dark when the deceased told me that he was being killed. I covered myself when I was threatened...the metal rod and panga were the deceased's weapons. I had seen the deceased place the weapons somewhere before we went to sleep.***

***“I saw the accused on the night only from 7 PM to 12 AM. We were talking with the accused as we were about to sleep. There was nothing peculiar about his voice. The accused was not very talkative. When the deceased called me the door was open and it was open in the morning.”***

In my assessment, this evidence was less direct. As I understand it, the person who allegedly threatened Mureithi with death is the same one who is said to have killed the deceased. But it is clear from the evidence of Mureithi that he did not know him or, at the very least, he was not certain who it was. I gather this from his statement that:

***I was told that I will also be killed but I did not see who was saying it because the lights were off.***

It is therefore reasonable to proceed on the understanding that the deceased's son's evidence and that of Mureithi was circumstantial. And this being the case the evidence has to be evaluated in the light of the law on circumstantial evidence before coming to the conclusion whether it is sufficient to sustain a safe conviction.

It is a well-established rule that circumstantial evidence can found a conviction as long as it wholly inconsistent with his innocence but is consistent with his guilt. If the circumstances proved are consistent either with the innocence of the accused or with his guilt, then the accused is entitled to the benefit of doubt. (See **Sarkar on Evidence, 12<sup>th</sup> Edition, Page 34**).

In order to justify an inference of guilt the incriminating facts must be incompatible with the innocence of the accused or the guilt of any person and incapable of explanation upon any other reasonable hypothesis than that of his guilt. Secondly, the circumstances from which an inference adverse to the accused is sought to be drawn must be proved beyond reasonable doubt and must be closely connected with the fact sought to be inferred. In summary,

- (a) The circumstances from which the conclusion is drawn should be fully established;
- (b) All the facts should be consistent with the hypothesis;
- (c) The circumstances should be of a conclusive nature and tendency;
- (d) The circumstances should exclude every hypothesis but one proposed to be proved. (**Sarkar, at page 34**)

This law has been applied in numerous cases but in this part of the world the leading ones are **Republic versus Kipkering Arap Koske & Another (1949) XVI EACA 135** and **Simon Musoke versus Republic (1958) EA 715**.

In **Republic versus Kipkering Arap Koske & Another**, the Court of Appeal for Eastern Africa, quoting Wills on Circumstantial Evidence, held as follows:

***In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused.***

And in **Simon Musoke versus Republic**, this principle was extended when the same court cited with approval a passage from the decision of the Privy Council in **Teper versus Republic (1952) AC 480** where it was held at page 489 that: -

***It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.***

Looked at from this perspective, it is reasonable to conclude that the prosecution evidence does not stand up to the threshold of circumstantial evidence upon which this court can safely convict the accused.

In the first place, the deceased's son's evidence that he left the bar when several people, including the accused, were being attended to and, it was still open for business, invites the possibility that any of the people he left in the bar or others who might have been to the bar after he left may have harmed the deceased. It is not conclusive from the deceased's son's evidence the accused must have been the only person who may have maimed and killed the deceased.

Turning to Mureithi's evidence, I must state that, having been in the same room where the deceased was murdered, he ought to have given a perfect or a near perfect eyewitness' account of what transpired at the deceased's bar either on the night of 17 August 2013 or in the wee hours of the following day. Going by the nature of injuries that the deceased sustained, it is possible that he was cut multiple times on different parts of his body. It is therefore baffling that this witness did not hear of any commotion at all except the deceased telling him that he was being killed and unidentified voice threatening his own life.

Worse still, when Mureithi was allegedly threatened with death, he simply slept on till the following morning when he woke up to find the deceased sprawled in a pool of blood. How a person would be brutally murdered and another slept on in the same room as if nothing was happening is intriguing, to say the least; for our purposes, it is something that called for explanation from the prosecution. It may well be that Mureithi may have been so drunk that he was insensitive to what was going on around him or was simply less bothered by the events at the material time; if this was the case, it did not come out clearly in evidence and certainly, this court cannot proceed on such presumptions because it is not its business to speculate and fill in the gaps in the prosecution case. As far as Mureithi's evidence is relevant to the determination of this case, it is enough to say that it raises reasonable doubt whether the accused is the culprit in the murder of the deceased.

And this is not all. At the risk of repeating myself, Mureithi initially stated in his evidence that when the deceased told him that he was being killed he had no idea who was murdering him; this is what he said:

***I was told that I will also be killed but I did not see who was saying it because the lights were off.***

Now, if he did not know the person who was talking and this is the same person who is alleged to have murdered the deceased how did he come to the conclusion that, in fact, it was the accused. I would suppose if he knew it was the accused, he would tell, almost immediately, that indeed it was the accused who was not only killing the deceased but who was also threatening him with death.

In the same breath, Mureithi's evidence that he thought it is the accused who murdered the deceased because he heard him talking is also contradictory having admitted that he could not tell who was talking because "the lights were off".

There is also an angle to the deceased's wife evidence that contradicts the evidence of Mureithi. As I understood the deceased's wife's evidence, Mureithi was the deceased's employee who, at times, could spend the night with him at the hotel whenever he worked late. But the evidence of Mureithi and that of the deceased's son painted Mureithi as one of the patrons in the deceased's bar. Mureithi himself said that he was a herdsman except that he had known the deceased for 30 years. He added that the only time he spent the night at the deceased's bar was on the fateful night when the deceased was murdered. The deceased's son, on the other hand, said that he left his father serving customers including Mureithi.

The contradictions in these witnesses' testimony are material to the fact whether the accused actually murdered the deceased. It may be coincidental that the deceased was murdered on the night which Mureithi was spending in the deceased's bar for the very first time allegedly, at the deceased's request; however, that coincidence cannot be taken for granted; it casts a dark cloud of doubt on the allegation that the accused may have killed the deceased.

All this evidence is against the backdrop of the accused's denial that he spent the night at the deceased's bar on the material night. As a matter of fact, he put forth what in effect is an alibi. He did not, however, say where he slept on the material night. I agree, and it is trite that when an accused opts for an alibi as his defence, he is thereby bound to explain and prove where he was at the time the offence was committed. But it is equally trite that the strength of a prosecution case does not depend on the gaps in an accused's defence. The prosecution will always bear the legal burden to prove its case beyond all reasonable doubt; the weakness of an accused's case does not necessarily make up for the gaping holes in the prosecution case.

In the final analysis, I am inclined to come to the conclusion that the circumstantial evidence available is not sufficient enough to support a safe conviction. To be precise, what has been presented as the inculpatory facts cannot be said with any sense of conviction to be incompatible with the innocence of the accused and that they are incapable of explanation upon any other reasonable hypothesis than the accused's guilt. Instead, I find there are several other co-existing circumstances which destroy or weaken the inference of guilt on the part of the accused.

Having so held, it is unnecessary for me to consider the question of whether there was malice aforethought; obviously, this would have been an issue for attention had I found the accused to be the person behind the acts that resulted in the deceased's death.

Inevitably, I come to the conclusion that the state has not proved its case beyond reasonable doubt. Accordingly, the accused is acquitted of the charge of murder and he is set at liberty unless he is lawfully held. It is so held.

**Dated, signed and delivered in open court this 13<sup>th</sup> day of March 2020**

**Ngaah Jairus**

**JUDGE**