



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCRC NO.11 OF 2019

REPUBLIC.....PROSECUTION

-VERSUS-

ERIC MULWA KIVUVA.....ACCUSED

RULING

1. **Eric Mulwa Kivuva** 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 the 5th day of August 2018 at Kasunguni market Mutulani sub-location in Kilungu sub-county within Makueni county murdered **Peter Muia Kasimu**.

2. The prosecution called a total of thirteen (13) witnesses to prove its case. There is no single witness who saw the person/persons who killed the deceased person. What has been presented before this court is circumstantial evidence which the court must carefully evaluate to establish whether it is sufficient to form a prima facie case against the accused person.

3. There is a lot of caselaw on what circumstantial evidence is and how it should be treated. In the case of **Sawe –vs- R (2003) KLR 364** the Court of Appeal had this to say:

1. “In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt.

2. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.

3. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.”

4. Later in **Nzivo –vs- R (2005) 1 KLR 699** the Court of Appeal reiterated the same by stating thus:

(5) In a case dependent on circumstantial evidence in order to justify the inference of guilt the incriminating facts must be incompatible with the innocence of the accused or the guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of his guilt. It is also necessary before drawing the inference of the accused’s guilt from circumstantial evidence to be sure that there are no other coexisting circumstances which would weaken or destroy the inference.

5. Circumstantial evidence therefore means evidence that tends to prove a fact indirectly by proving other events or circumstances which afford a basis for reasonable inference of the occurrence of the fact at issue. The circumstances should be of a conclusive nature and tendency and they should be such as to exclude hypothesis but the one proposed to be proved.

6. I have carefully considered the evidence on record and the submissions by Mr. Kilonzo for the accused. The evidence on record is that the deceased’s body which was not easily identifiable was found in the land of one Jackline Mbithi (*who did not testify*) on 5th August 2018 morning.

7. The body was later taken away by the O.C.S Kola to the mortuary. Later at 3:00 pm the deceased’s wife **Evelyn Kalunde** (Pw9) managed to identify the body as belonging to the deceased. It was Pw9’s evidence that the deceased had not returned home the previous night and she had early morning gone to make an inquiry from his good friend Kithuka (Pw1) who told her he had left him at the bar at 4:00 am.

8. Pw1 **Francis Kithuka Githoga**, Pw2 **Tobia Mutie**, Pw3 **Leonard Mwema Ndambuki**, Pw5 **Thomas Muloi**, and Pw8 **Alexander Musyimi** all said they had been at Mutisya's club or Mainswitch bar with the deceased, accused and Pw1 on the night of 4th and 5th August 2018. Pw8 was clear in his evidence that he was at the Mainswitch bar from 4th August 2018 to the wee hours of 5th August 2018 arriving home at 5:00 am. He said it takes him thirty (30) minutes from the club to his home.

9. He must have left the club around 4:00 – 4: 30 am. This witness said he did not witness anything peculiar while at the club. He could not also remember if he left the deceased at the club, as he was too drunk by the time he was leaving the club.

10. Pw1 and the deceased worked for one Mr. Muema. On the material day he had been paid Kshs.1,800/= as he was a casual worker while the deceased who was an employee was given an advance of Kshs.1,000/=. He said their first stop was at Nyota Ilobi bar which belonged to their boss. They started drinking Moon Walker a spirit.

11. The deceased left briefly to take some soup and he returned. By then the accused was outside and had left his alcohol in a glass. The deceased started taking it. Upon his return the accused asked the deceased why he was taking his drink. The deceased did not respond but hit him and a fight ensued between them they went outside, fighting and were separated. Thereafter and they all went back to the bar and continued drinking upto 11:00 pm when the bar closed.

12. From there, they went to the Mainswitch bar followed by the accused. The deceased and Pw1 ordered for alcohol. The accused remained outside and when the deceased went there, a fight broke between them again. They were separated and the drinking continued. According to Pw1, he left the bar alone at 4:00 am and went home.

13. Pw2's evidence is to the effect that as they took alcohol at the Mainswitch bar, the deceased reported to them that he had been beaten by the accused. Shortly thereafter the accused arrived and attacked the deceased. They were separated and the accused was reprimanded.

14. The accused left and went outside and the deceased left to go home. They heard them fighting and went and separated them again. The accused remained behind crying. The witness did not know the time Pw1 and deceased left. Pw2 said they all got drunk and when the bar was closed they walked home together.

15. Pw3 while at Mainswitch bar saw the deceased holding his face saying the accused had hit him. The deceased was with Pw1. The accused followed crying saying the deceased had injured him. The deceased then left. He did not see the time Pw1 left, but the accused stayed and left later. They (*about ten people*) left at 4:00 am walking together. He said he had seen a swelling on the deceased's head.

16. Pw5 was at Mainswitch bar at 10:00 pm and left at 3:00 am. He said he did not witness anything strange at the club. He however said there had been a fight between the accused and deceased but it was not in the club and he did not witness it. It is the accused and deceased who told them. He however said he had seen an injury on the accused's lower lip while the deceased had a swelling on the forehead.

17. The doctor who produced the postmortem (EXB1) Pw7 **Dr. Patrick Kihyu** found the cause of death to be "*raised intracranial pressure as a result of bleeding in the brain secondary to blunt head injury.*"

The deceased had bruises on the head, chest, fractures on the left 2nd, 3rd and 4th ribs and right frontal bone, loss of brain shape, blood clot under the skin on the upper part of the head.

18. It is not clear from the evidence on record how far the scene where the deceased's body was found and the Mainswitch bar was. According to Pw2 it was 500 metres; Pw3 said it was 100 metres while Pw5 said it was 300 metres. The assistant chief (Pw10) and the police officers (*Pw11, Pw12 and Pw13*) who were involved in this case never saw the need of finding out the distance between the scene and the said Mainswitch club.

19. From the evidence of the witnesses who were at the club, there is none of them who saw the accused and the deceased leave the club together. Infact Pw3 was categorical that the deceased was the first to leave and the accused stayed behind and left much later.

20. On the other hand, Pw5 said Pw1 and the deceased left together. The witnesses did not know when the accused left. Pw1 told the court he left the Mainswitch club alone and left the deceased behind at 4:00 am. The other witnesses testified that by the time the club was closed Pw1, accused and deceased were not present.

21. Pw4 **Jacinta Katunge Albanus** in her evidence in chief said she heard Pw2's voice among others on 5th August 2018 at 5:46 am. The people appeared drunk. She said nothing more. It's in cross examination that she said she heard Pw2 say that the person had released a voice like a pumpkin. To her somebody must have been beaten and burst.

22. The prosecution elected not to re-examine her on this. This evidence does not add any value to the prosecution case.

23. Pw12 and Pw13 who were meant to be the investigators did not assist the court either. They claim that witnesses told them that the accused and deceased fought on their way home. Further that while at the bar the accused had said he would revenge.

Lastly Pw13 told the court that according to him the several fights between the accused and deceased led to the deceased's death.

24. The postmortem report (EXB1) has outlined the various injuries that the deceased suffered and what the cause of death was. The witnesses (*Pw1, Pw2, Pw3 and Pw5*) did not give any evidence on any of these injuries save for Pw5 who said the deceased showed them a

swelling on the forehead. Of course these witnesses spoke of the scenario before the deceased left the club. None of them knew exactly what happened to the deceased after he left the club whether alone or with somebody else.

25. Pw13 never produced any witness before this court to confirm how the accused had promised to revenge against the deceased. He did not also avail any evidence showing when the deceased and accused had fought on the way home.

26. There is no dispute that the accused and deceased may have had their share of squabbles at the club and even fought but was that sufficient evidence to have the accused charged for the murder which occurred long after the drama at the club? From the line of authorities on circumstantial evidence the court has the duty to judge the total cumulative effect of all the proved circumstances each of which reinforces the conclusion of the guilt of the accused person.

27. It has also come out clear that the witnesses Pw1, Pw2, Pw3, Pw5, the deceased and accused were among those who had been drinking at Nyota Ilobi bar then Mainswitch bar. Pw1, Pw2 and deceased had been drinking since 6:00 pm of 4th August 2018 and they were taking hot drinks. The rest of the witnesses including Pw2 drunk upto 4:00 am the next day. Did they really remember what had happened?

28. In a case grounded on circumstantial evidence, the evidence must irresistibly point at none other than the accused as the person who committed the offence. This is not the case here. In fact, the main Investigating Officer (Pw13) said its because of the fights between the two that the accused was suspected to be the one who killed the deceased. The Court of Appeal in the case of **Sawe –vs- R (2003) KLR 364** stated this of suspicion:

(7) “Suspicion however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”

29. I agree with Mr. Kalonzo counsel for the accused that the evidence adduced by the prosecution is not sufficient to establish a prima facie case to require the accused to be placed on his defence. I so find.

30. In light of the above, I find the accused not guilty and acquit him under section 306(1) Criminal Procedure Code. He shall be released unless otherwise held under a separate warrant.

Orders accordingly.

Delivered, signed & dated this 25th day of June 2020, in open court at Makueni.

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H. I. Ong’udi

Judge