



**REPUBLIC OF KENYA**

**IN THE HIGH COURT KENYA AT MERU**

**CRIMINAL CASE NO.16 OF 2015**

**REPUBLIC.....PROSECUTION**

**VERSUS**

**ISIAH GATOBU MUTHAMIA.....ACCUSED**

**JUDGEMENT**

1. Isiah Gatobu Muthamia is charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code Cap 63 Laws of Kenya.
2. The particulars are that Isiah Gatobu Muthamia on the 29<sup>th</sup> night of January 2015 at Kithirune Market in Meru Central District in Meru County murdered Nicholas Gitonga.
3. The prosecution called 8 witnesses in support of its case that the accused caused the death of the deceased, PW1 testified that the accused assaulted and threw the deceased out of his bar when he was unable to raise Ksh.5 for the beer he had taken. PW1 said that the deceased had taken beer for Ksh.25 but he only had Ksh.20 which he paid. He said that the deceased was kicked by the accused out of the bar and he fell down but was unable to stand and a vehicle that was parked nearby took him to hospital but was announced dead on arrival.
4. PW2 the deceased father was woken up by Patrick Mutwiri who asked him for money to hire a motorcycle to go to the police station and report that Gitonga had died. He said he found the accused person at the police station and he learnt that the accused person is the one who hired the vehicle that took the deceased to hospital.
5. PW3 identified the body of the deceased at the Meru Hospital Mortuary where Dr. Paul Wambugu examined the body on 3<sup>rd</sup> of February 2015 and established the cause of death as severe bleeding due to shattered spleen secondary to injury on the abdomen as per the post-mortem report produced by PW4 Dr. Njeru Charles.
6. PW5 corporal Japheth Musyimi conducted the investigations herein. PW5 testified that he and PW8 PC Joshua Sila intercepted the accused when he wanted to flee from Nkubu by matatu at 6.00 am in the morning and he was apprehended and charged. He said that members of the public forced the accused to take the deceased to the hospital because he is the one who inflicted the injuries to the deceased. He said the scene where the deceased lay was 10 meters across the road from the accused person's bar and it was not true that the deceased was killed elsewhere.
7. PW6 Peter Mutuma testified that he was at the bar when the deceased entered while making noise and the accused person chased him out but shortly thereafter he again dashed into the bar and picked the glass that PW6 was using to take beer and he took the beer and then started bragging. That it is then that the accused held the deceased and pushed him out as the deceased resisted and held the door on both sides, the accused then kicked him on the chest using his knee and managed to move him out of the bar. PW6 said that he learnt the following day at the market that the deceased had died and he was asked to record a statement.
8. PW7 Patrick Gitonga also testified that he was at the accused person's bar when the deceased came in making a lot of noise and the accused person sent him out of the bar but shortly thereafter he ran into the bar again and took a customer's beer in a glass and took it. That this annoyed the accused who took him by the collar to take him out and in the course of him hit him in the abdomen using his knee. He said that after he had paid for his beer he left the bar and saw the deceased was lying besides the bar. The following day he learnt that the deceased had died and he went to record a statement at Githingo police station. PW7 said there was security light outside the pub which enabled him to see that the deceased was lying beside the bar.
9. At the close of the prosecution's case the accused person was placed in his defence and he gave a sworn statement denying that he had killed the deceased. He says he was in the store away from his bar when he heard a lot of noise in the bar and when he went there he found a customer who was known to him as a loader was surrounded by other people who wanted to take him to hospital using a motorbike but he advised them to use a motor vehicle which he paid for. He said the owner of the motor vehicle KBT Toyota Probox was known as Mwirigi. He accompanied the deceased in the motor vehicle to Githongo Hospital together with Gitonga and Gichunge but the deceased was

pronounced dead on arrival. He said the deceased was foaming from the mouth when they took him to hospital. The accused alleged that when the two people who accompanied him to hospital heard that the deceased had died they attempted to escape but the doctor warned them and referred them to the police station. The accused testified that at the police station an ambulance was brought to take the body of the deceased to Meru Level 5 Hospital Mortuary and they were advised to go home and report at the police station the following day. The accused said that if he had committed the offence he could not have taken the deceased to the hospital and that he was fabricated because his business was thriving and yet he was not from Imenti Central. He said he was not aware that he was wanted by the police and he remained at home from 29<sup>th</sup> January 2015 up to 12<sup>th</sup> February 2015 when he was arrested when he was on way to his farm in Mitunguu to harvest potatoes.

10. Defence case was closed on 28<sup>th</sup> October 2019 and the accused person's advocate given 21 days within which to file written submissions but as at 10<sup>th</sup> February 2020 when a date for judgement was fixed the same submissions had not been filed.

11. From the evidence on record for the From the evidence on record for the prosecution and Defence the issues for determination by this court are whether the ingredients for the offence of murder have been established by the prosecution namely:

**(i) The death of the deceased and the cause of death;**

**(ii) That the accused caused the unlawful act or omission which caused the death; and**

**(iii) That the accused had malice aforethought as defined under section 206 of the Penal Code.**

12. PW3 Jacob Nkoroi identified the body of Nicholas Gitonga to Dr. Paul Wambugu who conducted post-mortem on 3<sup>rd</sup> February 2015. It is therefore not in dispute that the first ingredient of the offence of murder i.e Fact of death has been proved by the prosecution. The Post-mortem report produced by Dr.Charles Njeru and prepared by Dr.Paul Wambugu confirms that the cause of death was due to bleeding due to shattered spleen secondary to abdominal injury. The second ingredient has also been proved.

13. PW1 Morris Mugambi Marango, PW6 Peter Mutuma and PW7 Patrick Gitonga all gave direct evidence that the accused person the owner of the bar where they were drinking from kicked the deceased in the abdomen while removing him from the bar because he was a nuisance to other patrons. It is therefore not true that the accused person was not at the scene or that the deceased was killed elsewhere and his body dumped near the accused person's bar. The act that led to the death of the deceased was unlawful. PW7 said the accused applied a lot of force when he hit the deceased in the abdomen in a bid to remove him out of the bar.

14. Whether the unlawful act was actuated with malice aforethought, Section 206 of the Penal Code defines malice aforethought as follows:

**“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances**

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**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;**

**d. an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”**

15. PW1 gave the reason for the assault on the deceased as paying his bill for beer taken less Ksh.5/=.PW 6 and 7 on the other hand said that the deceased came into the bar while making noise and the accused person chased him out but shortly thereafter he dashed back into the bar and took a customer's beer and drank it. This annoyed the accused person and he used excessive force to remove the deceased out of the bar by kicking him in the abdomen and the chest and his spleen was ruptured leading to excessive haemorrhage that led to his death. This court finds that the accused in using excessive force must have known that he was endangering the life of the deceased. He knew the deceased person as a loader at the market where he was operating his bar and if its true that he had failed to pay Ksh.5/= that was not sufficient cause to lose life. If it is also true that the deceased caused annoyance to his customers. He should have reported to the authorities or use alternative means to subdue him rather than inflicting injury to his vital organ.

16. The defence by the accused person that he was fabricated because of his thriving business was never raised with the investigating officer or PW1, PW6 and PW7 and therefore cannot be relied upon to find that the accused did not commit the offence.

17. Whether malice has been proved or not the witnesses testified that they did not know of any grudge between the accused and the deceased. The father of the deceased testified that the deceased frequented the accused person's pub and therefore it was not the first time he was there and it cannot be said that the accused had planned to cause any harm to the deceased except that the circumstances prevailing at that point made him to commit the unlawful act that led to the death of the deceased. This leads this court to find that the evidence adduced by the prosecution witnesses supports the offence of manslaughter rather than murder. The accused is therefore found guilty for the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code and is convicted Under Section 322(1) of the Criminal Procedure Code. He is however acquitted of the offence of murder.

**HON.ANNE ADWERA ONG'INJO**

**JUDGE**

**DATED AND DELIVERED VIA MICROSOFT TEAM AT MERU ON THIS 30<sup>TH</sup> DAY OF JULY 2020.**

**HON.ANNE ADWERA ONG'INJO**

**JUDGE**

**In the presence of:**

Accused: Present in person

Ms Mbithe for state

Mr Kinoti: Court Assistant

Mr Sandi Advocate holding brief for Ngugi Advocate for accused.

**HON.ANNE ADWERA ONG'INJO**

**JUDGE**