



**REPUBLIC OF KENYA**

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

**HIGH COURT CRIMINAL CASE NO. 1 OF 2012**

**REPUBLIC.....PROSECUTION**

**VERSUS**

**PETER MAINA KIAMA.....1<sup>ST</sup> ACCUSED**

**JOSEPH MACHARIA KIAMA.....2<sup>ND</sup> ACCUSED**

**RULING**

PW1 **Mark King'ori Ndung'u** was the Bar man at Joginda Bar belonging to Mama Denis a.k.a Grace Wangui. On 18<sup>th</sup> December 2011, a Sunday. He opened at 2:00pm. The 1<sup>st</sup> accused came to the bar at 8:00pm and went to the back. On his way back he accidentally knocked down deceased's beer. A quarrel ensued. PW1 took 1<sup>st</sup> accused out leaving deceased and others.

Later deceased left in company of Dickson Mboithi. Shortly Mama Denis was heard calling that a person had fallen outside the bar. Ongoing out PW1 found deceased being put inside a motor vehicle.

On cross examination, he stated that he was among those who were arrested on the same day and held in police custody till the following day. That he recorded his statement while in police custody and it was not read to him. That the husband to the bar owner John Githaiga was in the bar at the material time having come in at 4pm. That he did not see 2<sup>nd</sup> accused, who is brother to 1<sup>st</sup> accused in the bar that night. He confirmed that the 1<sup>st</sup> accused knocked deceased's beer accidentally contrary to what was had recorded in his statement. That he did not state that the deceased and the 1<sup>st</sup> accused quarreled or that he saw deceased leave the bar. He did not know who killed the deceased.

PW2 **John Gitonga Njagi**, husband to bar owner was in the bar. Around 8:00pm she went to him and reported there was a person lying outside the bar. He rushed there, saw the person then rushed to assistant chief's office where he found an AP to whom he reported. He was advised to arrange for the person to be taken to hospital. Upon return he found that his wife had called the Chief who had come and taken the person to hospital. Police later visited the bar at around 12:30am and arrested him.

That the deceased had been drinking in bar from 5:00pm with his brother. He said he did not witness anything unusual that day neither did he see that two accused persons on that day.

On cross examination he said his statement was recorded on 19<sup>th</sup> by his wife claiming that he is not educated and left it to her. That the same was read back to him.

He stated that he did not see the two accused in the bar that day, he did not witness the beer incident and he did not see any quarrel between the accused and the deceased. He denied stating that deceased entered bar while drunk. He did not see any injuries on the deceased when he saw him lying outside the bar. On re- examination he said he was seated at the back of the bar and never witnessed anything.

PW3 **Grace Wangui Gitonga** was going to the shops about 8:00pm and as she approached the same she saw a person whom she knew as Baba Shiro lying down. She did not know whether he was sick or dead. She went into the bar and alerted her husband PW2. She also rang the deceased's wife. The police visited the scene and arrested her husband. She later recorded a statement with the police.

On cross examination she confirmed that she self-recorded her statement. She contradicted her husband by denying writing his statement stating that he dictated it to the police. She said the bar had two rooms and her husband was in the rear room. When she entered the bar about 8:30 pm she did not see the two accused persons. The deceased was lying on his back. He did not have any visible injuries.

PW4 **Dr. Kimathi Paul** produced the post mortem report on behalf of Dr. Njuki who conducted it on the 22<sup>nd</sup> December 2011 at Mukurweini District Hospital. Name Mukunya Dishon, male African aged 46 years old. Blood was oozing from the nostrils, hematoma on the occipital region of the head, bruises on the anterior chest wall, on the head, depressed fracture of the occipital (back of the head), massive

subdural and intra cerebral bleeding. Cause of death was severe head injury.

On cross examination he testified that the history indicated in the report was that deceased was injured in a fight outside a bar. He stated that a fall on a concrete floor could cause similar injuries.

On re-examination he testified that a motorcycle helmet could cause same injuries as those caused by blunt force similar to falling down.

PW5 **Ian Gumo Waitere** a clinical officer based at Othaya sub county hospital. That on the 18<sup>th</sup> December 2011 she was on duty when the deceased was brought in by well-wishers and booked as patient No. 97465/2011. Upon examination he was found to be already dead. He had an injury on the head.

Those who brought him alleged he had been assaulted by two brothers with a motor cycle helmet.

While still handling the deceased, the two brothers came in. One had an injury on the head, and he alleged to have been injured by the deceased. Their arrival caused a fracas between them and those who had brought the deceased. He was forced to call the OCS Othaya who sent in officers to provide security. The injured person was treated and the police took him away with his brother. The police also took away the body to the mortuary.

On cross examination he confirmed that the serial number of the deceased's treatment card was not legible. That the names and address appearing on the card were also cancelled and different color of ink was used to write on the card. He could not tell who had made the cancellations. The card did not indicate the time of examination. The commotion was in the outpatient department.

He could not recall the people who brought the deceased to hospital. His statement was recorded on 15<sup>th</sup> February 2012. It is his colleague who treated the Peter Maina Kiama.

On re-examination he testified that he indicated in his statement that the deceased was brought in at 9:30pm. That the commotion was between the group that brought the deceased and the one that brought the brothers.

PW6 **Lawrence Kinyua Muthoni** BSc Biochemistry, working at the Government Chemist testified that samples were received for analysis from No. 77703 PC Linus Lotulya of Othaya police station. These were blood samples from the two accused persons and the deceased, a shirt and jacket of the 1<sup>st</sup> accused, and another of the deceased.

His findings were that the accused's blood was not found on the deceased's clothes.

PW7 **No. 77703 Cpl Linus Lotulya** was at the material time based at the Crime Office Othaya Police station. On 18<sup>th</sup> December 2011 he and his colleagues were sent to Othaya district hospital on official duties with regard to two persons alleged to have been involved in a fight. Upon arrival they found a large crowd. The Dr. on duty told them that one was dead on arrival while the other person was being treated. The crowd identified the deceased as Isaack Mukunya Dishon. They also learnt that the fight had taken place at Joginda Bar at Kagonye Trading Centre. They arranged for the body to be taken to the mortuary and took away the suspects and motor cycle no. KMCJ 756P alleged to belong to Peter Maina Kiama.

He visited the scene with colleagues. They interviewed people who were in the bar. They established that a fight had broken out between the deceased and the two accused persons, whereby Peter Kiama hit the deceased on the head with his helmet. The fight spilt to the outside of the bar where the deceased fell unconscious. Members of the public arranged for deceased to be taken to hospital.

Peter Kiama had a cut wound on the front part of his head.

The witness produced in evidence the treatment notes for Peter Kiama, Logbooks for KMCJ 756P – Joseph Macharia Kiama, KMCJ 451R- Peter Maina Kiama, the mental assessment reports for both, and the postmortem report which indicated that cause of death was secondary to severe head injury. He also produced the exhibit memo. He said he had recovered the weapon, the helmet. He drew a sketch plan of the scene which he also produced. He was satisfied that the two accused had committed the offence of murder and the two were charged with **Murder c/s 203 as read with s. 204 of the Penal Code that on 18<sup>th</sup> Day of December 2011 at Mugaa Kagonye Village In Nyeri South District of Nyeri County they jointly murdered Isaac Mukunya Dishon**

On cross examination he confirmed that he was the investigation officer.

He confirmed recovering exhibits including the helmet but it was not taken to the government analyst for examination. That the 2 accused were arrested together with four other persons who stayed at the station for some time and recorded statements.

He stated that the bar was just one room. It had no rear section. Among the other four suspects who were released, one Dickson Boithi Kanyora told him that he was in the company of the deceased when he was hit by the 1<sup>st</sup> accused with a helmet as he was leaving the bar. And that even when deceased fell down 1<sup>st</sup> accused continued to hit him and nobody came to his aide. That he too was threatened with violence.

PW 8 **Titus Wambugu Mwangi's** testimony was that on the material night he had gone to Kagonye shopping Centre to buy flour and cooking fat. He met the 1<sup>st</sup> accused who asked him to buy him a drink. He told him he had no money then but would buy him another day. Then he went into a shop to buy cigarettes. On coming out he found the 1<sup>st</sup> accused on the ground, and Dickson Boithi was there. The 1<sup>st</sup>

accused told him that Dickson had hit him. He then called John Macharia so that they would take 1<sup>st</sup> accused to hospital. At this point the state sought to have the witness declared as hostile but since the statement they were referring the witness to had not been supplied to the defence, they were directed to do so and the witness stood down to another date to enable the defence to take at the same.

At the next hearing the state withdrew its application and proceeded with the witness. He confirmed that he, 2<sup>nd</sup> accused took 1<sup>st</sup> accused to hospital. 2<sup>nd</sup> accused rode the motor bike. He did not have a helmet. At 3:00am they were all arrested and placed in cells. He said he was taken from the cells to record a statement yet he was drunk. He never read it neither was it read to him.

On cross examination he told the court the two accused persons were brothers and their sister on Lucy Wangui was his mother. He denied seeing anyone beating the deceased.

PW9 **Dickson Boithi Kanyora** testified that the deceased was his 'baba mdogo'. On the material night they were in a bar when the two accused whom he referred to as Gacuguma and Wataduni respectively entered the bar. They began to fight between them and in the process they shook the table where he and the deceased were seated causing the deceased's beer to pour on him. The deceased slapped Gacuguma. He separated them. The two were thrown out by the bar owner one King'ori. When he and the deceased decided to leave they found the two accused waiting for them at the door and Gacuguma attacked the deceased with a helmet, hit him and he fell down hitting his head. Gacuguma hit him again. Wataduni attacked him. He went get a motor cycle but it was not working. He called a 'Probox' and took deceased to hospital. Later he saw the two accused at the hospital where the police also came. He said all this happened due to drunkenness and the bar owner witnessed it all.

On cross examination he said the statement was recorded for him but was never read to him. That he entered the bar around 6:30pm towards 7:00pm. That he was in the bar with the owner of the bar and others both at the front and at the rear. He conceded that he and others were arrested for the death of his uncle, and was released after recording his statement.

He told the court that it was the 1<sup>st</sup> accused who hit the deceased with a helmet. When his statement was read, he had told the police that both the accused had a helmet each and they hit the deceased with it till he fell down. He said the statement was not correct. It was re-read to him and he said it was not correct because only Gacuguma hit his uncle.

He said he was hit by the second accused on the forehead. He did not complain to the police or obtain a P3.

Asked whether he knew Titus Wambugu, he said he only knew people by their nick names. His statement was read to him again and he had given each of the accused person's three names. He denied having done so.

He could not explain why he did not call for help during the attack yet he alleged it happened in the corridor leading to the exit of the bar. He said the two helmets had blood from his uncle's injuries.

On re- examination he said the accused persons picked their helmets from their motor bikes. He changed his story saying that between his uncle and him it was him who was first hit, and he went out screaming. That state closed its case.

Each side made submissions as to whether the accused persons had a case to answer. The defence relied on the court of Appeal case of **Gerald Muchiri Kiruma vs. Republic [2007] eKLR**

The only issue for determination is whether the prosecution has made out a prima facie case to warrants the accused being put on the defence.

A charge of murder will be established where the prosecution has led evidence to show that:

- i. A person died
- ii. Death was caused by unlawful means
- iii. The person who caused the death had malice aforethought as defined under s. 206 of the Penal Code:

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

*(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) (d).....*

The prosecution's position as submitted by Mr. Magoma is that the accused persons have a case to answer. That the facts speak for

themselves how the two accused fought in the bar, were separated by the deceased, were ejected by the owner of the bar, went out, waited for the deceased who was in the company of PW10, and attacked them with helmets, with the intention of killing the deceased then escaped using their motor bikes.

The defence through Mr. Njuguna Kimani submitted that the evidences on record was inconsistent, contradictory, and fell below the required threshold. That most witnesses were suspects of the same murder their evidence was inspired by self-preservation. That if their evidence was removed or rejected, the prosecution would have nothing to rely on. A prima facie case was described in **Bhatt -Vs-Republic [1957] 332**

*...to be one where a reasonable tribunal applying its mind on the evidence and the law would convict if the accused person chose to remain silent. The burden to establish this is always on the prosecution as the presumption of innocence prevails until the pronouncement of guilt by the court.*

It was held in **Republic -Vs- Wachira (1975) EA 262** that an accused person should only be acquitted at this stage only if: -

*“There is no evidence of a material ingredient or if the prosecution has been so discredited and the evidence of their witnesses so incredible and untrustworthy that no reasonable tribunal properly directing itself could safely convict”*

How does the case for the prosecution hold up against those two standards?

We begin with the presumption of innocence and the twin sister that is the onus of the part of the prosecution to establish a prima facie case.

All the civilian prosecution witnesses except PW9 said they did not witness any fight between the two accused persons and the deceased. PW9's testimony contradicts and is contradicted by the other witnesses as to the events he alleges led to the death of the deceased. It is him only who witnessed a fight between the two accused persons as being the cause of the deceased's beer spilling. The bar man stated that the 1<sup>st</sup> accused accidentally hit the table spilling the beer. The other witnesses testified that the 2<sup>nd</sup> accused was not at the scene, and PW2 even said he never saw the two accused at the scene. PW9 alleged that the bar owner threw out the two accused persons yet the bar man stated that he is the one who took out the 1<sup>st</sup> accused. PW9 alleges that the deceased was hit severally with two helmets until he fell down and while he was still down. That piece of evidence was not corroborated by the evidence from the treatment documents which indicated 'swelling on the occiput' which is the back of the head, where the postmortem report showed there was a fracture. The Dr. testified that the same fracture could have been caused by a fall on the concrete floor. The description of the alleged attack, as a brutal repeated hitting of the deceased by two men using two helmets until he fell down and which continued while he was down does not corroborate with the single injury at the back of the deceased's head. That description draws an image of multiple injuries on the body of the deceased.

It is noteworthy that PW9 testified that he, the deceased and all those he alleged were involved in the alleged fight were all very drunk.

The prosecution attempted to lead evidence that the 1<sup>st</sup> accused's injuries were as a result of the fight with the deceased. However, their own witness PW8 Titus Wambugu Mwangi testified that it was Dickson Boithi PW9 who injured the 1<sup>st</sup> accused. The state even attempted to have PW8 declared a hostile witness but abandoned the application. His testimony on oath that it was PW9 who injured the 1<sup>st</sup> accused provides a contradiction to PW9's testimony the accused were in a fight with the deceased, further weakening the credibility of PW9's testimony.

PW9 testified that the murder weapons, the helmets were stained with the deceased's blood. PW7 the Investigating Officer said he recovered one broken helmet. This is one of the alleged murder weapons. Why was it treated so casually yet it held the key to the murder? PW9 testified that each accused hit the deceased with his own helmet, what happened to the other helmet? Why was it not recovered? And whose helmet was recovered? The 1<sup>st</sup> or the 2<sup>nd</sup> accused's? Why was it not taken to the government chemist for analysis yet, according to the PW9 it had the deceased's blood and as would have been the most direct evidence that indeed the deceased was injured with it helmet? Why was it not produced as evidence was also not produced? All these questions ought to have been answered by the prosecution. As it is there is no murder weapon and the allegation that the deceased was injured with a helmet remains just that.

The prosecution's laying great reliance on the evidence of PW9 Dickson Boithi Kanyora turns out to be irrational. His testimony is set out here. It is inconsistent and contradictory. He was the most difficult witness to get to come to court. His demeanor in court as the record shows created the impression of a person who just wanted to get over with the onus of testifying, who was non-committal to what he was saying as he kept changing his mind, describing some questions as hard questions and having no answers for others. His description of how he and the deceased were attacked was not credible as it was contradicted by other testimony. He claims to have taken the deceased to hospital yet the owner of the bar testified that she called his wife, and the chief was called as well and they took him to hospital.

It is important to also point out that most of the prosecution witnesses were suspects as they were all rounded up on the night of 18<sup>th</sup> immediately after the deceased was found to be dead. They all recorded their statements while in police custody. The case of Gerald **Muchiri Kiruma vs. Republic [2007] eKLR** cited by the defence addresses the exact circumstances. There the Court of Appeal found that the evidence of persons who had been detained in custody as suspects of the same offence could not be relied upon to convict the person who was finally charged because it was likely such evidence was 'conspiratorial and self-serving' and had an impact on the credibility of the said witnesses.

One can see the thread of self-preservation in a lot of the testimonies where witnesses simply say they saw nothing and heard nothing. Even the one who is alleged to have seen something, his evidence is incredible due to its own inconsistencies.

The government analysts report did not place the accused persons near the deceased when he sustained the injury on his head. The testimony of the doctor who performed the postmortem was that that injury found on the deceased could have been from a fall. PW9 says they were

drunk. No helmet was produced as the murder weapon. Is it possible there was a fall?

In the end we have a person who lost his life and a family which lost one of their own, two persons facing the serious offence of having murdered him, all in circumstances that could only have been cleared through investigations and evidence presented to the court.

From the evidence the injury on his head could have been caused by a fall or blunt object. There is only discredited to evidence to show that the two accused either singly or together could have caused the said injury, and no evidence of malice aforethought or mens rea. This is not evidence that could support a conviction.

The only finding available to me in the circumstances is that the prosecution did not establish a *prima facie case* to warrant the accused being put on the defence. Section 306 of the Criminal Procedure Code states:

*(1) When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is no evidence that the accused or any one of several accused committed the offence shall, after hearing, if necessary, any arguments which the advocate for the prosecution or the defence may desire to submit, record a finding of not guilty.*

After a careful consideration of the evidence and submissions, I find that no prima facie case has been made to warrants accused being put on the defence and make a finding of not guilty under s. 306(1) of the Criminal Procedure Code.

**Dated, delivered and signed at Nyeri in open court this 23<sup>rd</sup> day of January 2019.**

**Mumbua T Matheka**

**Judge**

In the presence of:

Court Assistant: Jerusha

Mr.Njuguna for both accused

Magoma for state

Accused present

**Mumbua T Matheka**

**Judge**

**23/1/19**