



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CRIMINAL CASE NO. 59 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

BENSON NDEGWA KAMAU.....ACCUSED

JUDGEMENT

1. The accused **BENSON NDEGWA KAMAU** alias “Ben” was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the Penal Code the particulars of which were that on the night of 26th day of December 2014 at Dandora Phase 4 in Njiru Sub-county within Nairobi County, murdered **MARGARET NJERI MUCHOKI**.

2. He pleaded not guilty and on 27th day of January 2016 his trial commenced before me where the prosecution called a total of nine (9) witnesses to prove its case. When put on his defence the accused gave unsworn statement of defence and called no witnesses.

PROSECUTION CASE

3. The prosecution case was that the deceased was a friend of **PW4 BETH WANJIRU MURIA** who was working together with **PW3 EMILY WANJIRU KINUTHIA** at Java Bar situated at Dandora Phase 5 while the accused was a regular customer thereat. On 26th December 2014 **PW3** was working as the Assistant Manager of the said bar while **PW4** was the counter girl.

4. It was **PW3's** evidence that three (3) men and two (2) ladies came to the bar at about 11.15 p.m. when they were just about to close and since they were regular customers she told the deceased to open for them and they were served. Of the new customers she knew the accused who proceeded to sit with Mary Njeri the service girl who was by then drunk and as it happens in the night clubs the accused wanted to go away with the said Mary Njeri which did not go well with the deceased. This annoyed the accused who insisted on going away with the said Mary Njeri leading to a fight between the accused and the deceased. The accused then hit the deceased with a beer bottle on her head causing her to fall down. When **PW3** responded to the fight the accused stabbed her too with the beer bottle.

5. **PW3** was later called to the police station where she managed to identify the accused at an identification parade. **PW4 BETH WANJIRU** corroborated **PW3's** evidence and stated that the accused whom she knew went to Java Bar where she was working and the deceased who was her cousin and staying together with her in the same plot had passed through the place where she was working at to wait for her. The deceased then joined the accused in their table together with Mary Njeri whom the accused wanted to go with but the deceased stopped her. This action annoyed the accused causing him to slap the same before hitting her with a beer bottle. She was able to see well what was happening since there was electric light. It was her evidence that Mary Njeri was too drunk and that is why the deceased stopped her from going away with the accused as he thought the same was taking advantage of her.

6. It was her further evidence that they called the manager who was sleeping upstairs who came and as he opened the door of the bar which had been closed the accused escaped and was at large for a long time until on 6/6/2015 when he appeared at a meeting called by **PW1 PETER MBURU KAROGO** the area Assistant Chief of Kanyago who was having a Nyumba kumi meeting. It was his evidence that the accused appeared drunk and started to create disturbance. He instructed the youths to take him away to their office. It was during the meeting that some youths mentioned that he was a suspect of murder. The accused was then re-arrested by **PW2 MUSA NDANGAZA MULI** who took him to the AP Camp then to Kanyago Police Station where he was booked with the offence of murder. It was his evidence that he had known the accused for over five (5) years.

7. **PW6 C.I. MOSES MWANGI** was on 9/6/2015 requested by **PW7 PC MUSA NDOLO** to conduct an identification parade where **PW3** identified the same by touching him first. **PW4** was unable to identify the accused at the said identification parade. After the parade the accused indicated that he was satisfied with the same and signed the identification parade forms.

8. **PW7 PC MUSA NDOLO** stated that he received the report on the murder of the deceased on 26/12/2014 and proceeded to the scene at

Java Club Dandora Phase 5 where they found the deceased lying in a pool of blood motionless. They presumed that she was dead. He commenced investigations and recorded statements from witnesses. They tried tracing the accused who had escaped from the scene until 6/6/2015 when he resurfaced at the Assistant chief's meeting and was thereafter re-arrested and charged.

9. PW8 DR. PETER NDEGWA conducted post-mortem examination on the body of the deceased having been identified by **PW5 JOEL NJERU WANYOIKE** her brother-in-law and confirmed that there was no defensive injuries on the deceased meaning that the attack was sudden. The right side of the neck was slit open with several right neck blood vessel jugular. He formed an opinion that the cause of death was exsanguinations due to neck injuries due to sharp force trauma.

DEFENCE CASE

10. When put on his defence the accused gave unsworn statement and stated that he had gone to the bar at 12.30 a.m. and the manager opened for him having recognized him and ordered for beer before going back to his house. He did not hear anything about death until the year 2015 when he was called for a meeting at the Chief's camp and he went there while drunk and was arrested and taken to Kanyago Police Station. He stated that from 2014 he had been in the area and did not run away.

SUBMISSIONS

11. At the close of the defence case the parties filed written submissions which they relied upon. On behalf of the defence it was submitted that there were contradictions from the prosecution evidence and that the accused was only arrested for being drunk. It was submitted that there was gaps in the prosecution case and therefore the case was not proved beyond reasonable doubt for which the case of **REPUBLIC v HASSAN SUBIRA, CRIMINAL CASE NO. 10 of 2015** at Voi [2017] eKLR was tendered in support.

12. On behalf of the prosecution it was submitted that the accused was placed at the scene by **PW3** who saw him break a bottle and stab the deceased in the neck showing that he had intention to cause death. It was submitted that the accused had consumed alcohol at the scene which was a bar and that under **Section 13 (4)** of the **Penal code** it is provided that intoxication shall be taken into account for purposes of determining whether the person charged had formed an intention, specific or otherwise in the absence of which he would not be guilty of the offence. It was contended that the accused had been intoxicated by his own will as he had gone to the said bar willingly and ordered alcohol and his behaviour shows that he knew what he wanted at the time and was frustrated about not getting it from which the case of **REPUBLIC v TERESIA KILONZO & ANOTHER [2017] eKLR** was submitted.

13. It was finally submitted that the accused defence amounted to mere denials and did not shake the prosecution case. The court was therefore urged to find that the prosecution had proved its case beyond reasonable doubt and find the accused guilty.

ANALYSIS AND DETERMINATION

14. To sustain a conviction on a charge of murder under **Section 203** of the **Penal Code** the prosecution is under legal and evidential duty to prove the following elements of the offence:-

a) Proof of the fact and cause of death.

b) Proof that the deceased met his/her death as a result of an unlawful act of omission or commission on the part of the accused person.

c) Proof that the said unlawful act of omission or commission was committed with malice aforethought.

15. The fact and cause of death of the deceased is not disputed and was proved beyond any reasonable doubt through the evidence of the following prosecution witnesses:- **PW3 EMILY WANJIRU KINUTHIA** who was with her at Java Bar who saw her in a pool of blood before being hit by the accused with the same murder weapon, she confirmed that the deceased was buried on the 7th of January 2015. **PW4 BETH WANJIRU MURIA** a cousin of the deceased whom she had gone to see at the murder scene, **PW5 JOEL NJERU WANYOIKE** her brother-in-law who identified her body at the city mortuary for purposes of post-mortem report and **PW7 PC MUSA NDOLO** who found her dead at the said bar and took the body to the city mortuary and confirmed the fact of the death. The cause of death was proved through the evidence of **PW8 DR. PETER NDEGWA** who performed post-mortem examination on the same and confirmed cause of death as exsanguinations due to neck injuries due to sharp force trauma. As at the time of this judgment there was no reported cases of "miraculous" resurrection of the deceased either caused by "the mighty prophet" or through the power of Jesus Christ as in Lazarus and therefore find and hold that the fact and cause of death were proved beyond any shadow of doubt.

16. On whether the said death was caused by unlawful act on the part of the accused person:- **PW3** put both the accused and the deceased together at Java Bar Dandora. She knew the accused as a regular customer to the said bar and that is why even though they were approaching closing time, she advised the deceased who was working at a nearby bar and had passed by for **PW4** to open for them. It was her evidence that the accused was with one Mwangi alias "Mwash" and while the accused was sitting on the same table with a service girl called **MARY NJERI** and his group buying them beer and seducing her, the deceased was sitting on the opposite table and observing the happenings. This evidence was corroborated in material particular by **PW4 BETH WANJIRU MURIA** whose evidence also put the accused and the deceased together.

17. The fact that the accused was in the said bar on the said night was confirmed by the evidence of **PW6 CI MOSES MWANGI** who conducted an identification parade upon the arrest of the accused where **PW3 EMILY WANJIRU** who knew the accused before was able to identify him while **PW4** who had not known him before the date of the murder was unable to identify him. The offence took place at a well lit bar as per the evidence of **PW3** who was also attacked by the accused when she went to the aid of the deceased and therefore find that there was no mistaken identity of the accused who in his defence confirmed that he had gone to the said bar and the manager who knew him

opened for him and he order beer which was given to him thereby corroborating the prosecution evidence.

18. Having put himself at the scene and having taken into account the eye witnesses' evidence of **PW3** and **PW4** I am satisfied and hold that the death of the deceased was caused by unlawful act on the part of the Accused person and reject his defence.

19. On whether the said unlawful act was committed with malice aforethought which is defined in **Section 206** of the **Penal Code** as follows:-

“(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.”

The following evidence stands undisputed:-

20. The accused having spent his money buying beer to one Mary Njeri and being an investor wanted to enjoy the fruits of his investment by going away with the said girl who at the time was drunk. The deceased for whatever reason attempted to frustrate the said intention which did not go down well with the accused who slapped her before hitting her and stabbing her with the beer bottle. The accused then turned his anger against **PW3** whom he also stabbed. It is therefore clear that the prosecution established motive of the attack on the deceased to stop her from interfering with the plan of the accused to recover his investment in kind.

21. Whereas the offence took place in a bar and there is evidence that the accused and his group had been drinking alcohol, in the absence of any evidence to the contrary I agree with the submission by the prosecution that the accused has not placed himself under the defence of intoxication provided for in **Section 13 (4)** of the **Penal Code**. The accused was in full control of his will, he wanted to go away with a service girl who was already drunk and the deceased thought that he was taking advantage of her and therefore attempted to stop the mission. The accused was in his proper state of mind as according to the evidence of **PW3** he knew that the deceased was working in a low end bar.

22. A look at the injuries sustained by the deceased clearly shows that the accused had the intention of causing death or bodily injuries likely to cause death. By using a beer bottle to stab the deceased on the neck suggested and I hold that he intended to kill her for death was the natural and probable result of the said act.

23. Having taken into account the maximum and positive evidence tendered by the prosecution, the credibility and reliability of the evidence of **PW3** and **PW4** and the circumstances leading to the arrest of the accused weighed against his defence it is abundantly clear and I find that the prosecution has proved its case against the accused beyond reasonable doubt and therefore find the same guilty of murder contrary to **Section 203** of the **Penal Code** and convict the same accordingly and it is so ordered.

Dated, signed and delivered at Nairobi this 28th day of February, 2019.

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J. WAKIAGA

JUDGE

In the presence of:-

Mr. Naulikha for the State

Mr. Oduor for the Accused

Accused present

Court assistant- Karwitha