



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 94 OF 2013**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**SAMWEL MWANGI MAINA.....1<sup>ST</sup> ACCUSED**

**MOSES KAMAU GICIGO.....2<sup>ND</sup> ACCUSED**

**RULING**

*SAMWEL MWANGI MAINA* and *MOSES KAMAU GICIGO* are charged with the offence of Murder, contrary to *Section 203* as read with *Section 204* of the *Penal Code*.

The particulars of this offence are that on the 19<sup>th</sup> day of December 2013 at Farmers Bar, Moi's Bridge location, in Eldoret west District within Uasin Gishu County, the accused persons murdered *Kevin Wafula*.

The prosecution case is that PW-2 is the father of the deceased and at the time of the alleged incident they were living at Moi's Bridge, Bwayi area. The deceased was employed by Generali, to work in a lorry. He had travelled (deceased) to Lodwar, and returned home on 17<sup>th</sup> February, 2013

at about 7.30p.m. He told the father he had not been paid, but upon payment he'll see him the following day. He left.

On 19<sup>th</sup> December, 2013 PW-4 was working as a night watchman at Moi's Bridge. He went to a club to buy cigarettes. He found the first accused, *Samwel Mwangi*, fighting with another young man. As he wanted to leave the club doors were locked. PW-4 called the watchman (Soldier) to open for him. As the door was being opened, the first accused had gone for a club. The door was opened and PW-4 left. There were electric light in the bar. He could not tell what the fight was about.

PW3, on 19<sup>th</sup> December, 2013 at 4.00 a.m was guarding a garage at Moi's Bridge. He was informed by another guard who was working nearby that behind the Bar people were making noise. He went at Farmers Bar and saw four persons standing there. There were no lights but he had a torch. One of the 4 persons told another to avail petrol. There was a person they were beating. One went for the petrol. When it was availed the one who had asked for it poured it on the person they were beating. He then lit fire on the body using a matchbox. There was abrupt fire and light. The victim jumped up and fell down. The man kicked him and poured more petrol on him. As he was burning PW-3 left. He went to another watchman who was guarding a hardware. They returned together and witnessed as the victim burnt. The four assailants were there as the victim burnt. PW-3 was able to recognize the first accused. He is the one who sent for petrol. He knew him for about one year and was able to recognize his voice as he sent for petrol. They spoke in Kikuyu language.

On the material night at around 4.00 a.m sharp, a neighbouring son Joel went by a motorbike and called PW-2 loudly and sharply. He told PW-2 that they were holding his son and were killing him. When PW-2 woke up and joined the said Joel, Joel told him that he was told by a tout called *Mwangi* that *Kevin* was being beaten at Farmers Bar by the Bar owner together with many other people. Joel suggested to PW-2 that he should not visit the scene a he may overreact and be attacked as well. He advised him to send the deceased's mother and aunt to go and plead with the assailants to stop beating the deceased, promising to pay whatever amount of debt they were demanding. He did as advised but followed them behind. He as well called his cousin to accompany him. They got to the bar and entered therein. Women workers at the place were cleaning blood from the floor. When he

was going out he met a neighbouring girl known as Carol, who told him that *Mwangi* had attacked *Kevin Wafula* and she wondered whether he'll survive. She as well said they had pulled him to the rear side. He asked her why he was attacked and she said he took beer worth Kshs.150 and he could not pay. PW-2 went to the rear side and found *Kevin Wafula* on fire. He put the fire off. He was not dead. He reported the matter at Moi's Bridge police station. He was assigned a vehicle and three police officers. They went to the Bar and found the rear door closed. Police ordered it be opened. A lady went to where *Mwangi* was and got the key. The deceased was picked. When they got near Cherangani hospital he went quiet. They decided to get therein and confirm whether he was still alive. They entered and confirmed that he

was dead. The body was taken to Kitale District Hospital mortuary.

At the scene they had recovered a blood stained knife. On 26<sup>th</sup> December 2013 post mortem was done. The body had five stab wounds.

At this juncture the prosecution were unable to avail any other witness within the time allowed by the court and closed their case. The court has therefore to determine as to whether the evidence establishes a prima facie case against the accused persons, so as to warrant them be placed on their defence.

Whatever evidence is available points to the 1<sup>st</sup> accused person as a suspect and not at all to the 2<sup>nd</sup> accused person. None of the four witnesses alleges to have seen the 2<sup>nd</sup> accused at the scene when the deceased was allegedly killed. It is not clear how he was picked as a suspect and charged together with the 1<sup>st</sup> accused.

The evidence against the first accused is that he was the owner of Farmers Bar where the deceased was allegedly killed. PW-4 said on the material night he found the 1<sup>st</sup> accused fighting a young man. The 1<sup>st</sup> accused went for a club from the watchman as PW-4 left the bar. PW-3 who alleged was an eye witness to the incident stated he saw 4 persons beating another. 1<sup>st</sup> accused was one of them. He then sent another for petrol when it was availed poured it on the victim and lit him. I however find this witness evidence unreliable. As he was giving evidence about the assailants he was not mentioning the first accused by name. He was referring to him as "One" of the four assailants. If he had confidence on his identity he would surely have referred to him as *Mwangi* throughout, and not only towards

the tail of his evidence in chief. He as well claimed to have known the 1<sup>st</sup> accused for about a year and recognized him by his voice. However, on cross examination he said he had not heard *Mwangi* (the first accused) speak before then. It is therefore doubtful how he was able to recognize his voice if he had not known it. This is also a witness who was difficult during cross examination as he resisted to answering questions put to him by the Advocates. It was to an extent where the court declared him a refractory witness and placed him in custody for a period of 7 days. Credibility of his evidence is in doubt.

Prosecution, closed their case prematurely. The investigating officer, officer who filled the post mortem report, arresting officer and other crucial mentioned witnesses in the case did not give evidence. The actual cause of death to the deceased is not known. The allegedly recovered knife was not availed in court. The case is incomplete. There is no reliable evidence that it is the accused persons who murdered the deceased. The suspicion against the 1<sup>st</sup> accused, established by the prosecution witnesses, cannot form basis of establishing a prima facie case. I accordingly find the evidence inadequate to warrant both accused be placed on their defence and are therefore acquitted of the offence under *Section 210 of the Criminal Procedure Code*.

**S. M GITHINJI**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 23<sup>rd</sup> day of May, 2019.**

**In the presence of:-**

Accused

Miss Tum holding brief for Mr. Magare for 1<sup>st</sup> accused, and Mr. Miyianda holding brief for Mr. Mathai for the 2<sup>nd</sup> accused.

Ms. Kagali for state /prosecutor

Ms Sarah - Court Assistant