



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL CASE NO. 2 OF 2013**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**ANTONY NGUGI KIRORO.....ACCUSED**

**JUDGMENT**

1. **Anthony Ngugi Kiroro**, the accused herein stands charged with the offence of murder contrary to section 203 as read with section 204 of the Penal code. The particulars are that the accused on the night of 24<sup>th</sup> and 25<sup>th</sup> day of December, 2012 at Buffalo Bar and Restaurant in Wangige Market of Kikuyu District within Kiambu County, jointly with others not before the court murdered **Robert Njuguna Ndungu**.

2. The prosecution case was premised on the evidence of ten (10) witnesses. **PW1 Japheth Matanji** a watchman at Buffalo club Wangige reported on duty on 24<sup>th</sup> December, 2012 at 6 pm. He switched on the lights and generally checked around the bar. The Buffalo club has three (3) rooms i.e. the butchery, nyama choma place and then three (3) bars. Outside of the building is a parking.

3. It was his evidence that on this material night at 11 pm as he came downstairs, he met his colleague John (PW5), who notified him of people who were fighting outside. He rushed there and found Ngugi and Sammy beating the deceased. He identified the accused as the Ngugi he was talking about. He was quick to add that he had not known them before but he came to learn they were drivers. He stated that he saw the accused and another beating the deceased using bottles, kicks and punches. He was not able to stop them from beating him and was even threatened.

4. He ran to PW8's house and reported to him what was happening, and the latter called the police. He was asked to go back to the scene which he did and found the deceased already dead while the culprits had taken off.

5. He saw the deceased bleeding from the mouth and nose, foaming at the mouth, and he had been tied with ropes. He confirmed knowing the deceased as a regular customer at the Buffalo bar. The police officers came to the scene the next day at 6.00 am. He was interviewed and went to the police station to record his statement accompanied by PW5 and two others. In cross examination, he said there were lights all over the parking and it was bright in the parking and building. This enabled him to clearly see what was happening.

6. **PW2 Moses Kariuki Ndungu** a brother to the deceased, identified the body for the conduct of the postmortem on 28<sup>th</sup> February, 2012. He said the body had an injury at the back of the neck.

7. **PW3 P/No. 960323 Cpl. Charles Mwangi** stated that on 25<sup>th</sup> December, 2012, he received instructions from Chief Inspector of Police Ephantus Ndirangu, to go and apprehend a murder suspect. The said suspect was aboard a matatu from Wangige to Nairobi through lower Kabete. A description of how the suspect was dressed had been given to him and APC Simon Maina. They stopped the matatu at Kingeza junction and he pointed out at the accused who wore a jacket and a cap and had a paper bag. They asked the accused to alight.

8. When the officer pointed at the accused, he retorted, "*sio mimi niliua*" meaning "*it's not me who killed*". He was then arrested and was so scared to the point that he passed out. He was taken to the DCIO Kikuyu, for further action.

9. **PW4 Paul Hariri Gikaru** was a casual worker at Buffalo bar in Wangige Kabete. On 24<sup>th</sup> December, 2012 he reported on duty at 8 am. He went to sleep at 10 pm in a room within the bar. While there, he heard noise from outside and on checking, he saw a man being hit by two people. He knew the victim as "**Babu**". He was being beaten near the butchery on the ground floor. He went to assist the victim and he was injured on the left hand middle finger in the process.

10. He further testified that after the injury, he went to the dispensary and thereafter to a club seven restaurant to buy some food. By that time, Babu was badly injured and was just lying on the ground. Upon his return, he found Babu's hands tied and a stone placed on him and

he was dead. He had witnessed Babu being hit with bottles, blows and kicks. He identified the stone used to hit Babu plus the rope he was tied with as Exhibit 5 and 6 respectively. He also identified a bundle of photos Exhibit 3 (A-J) showing the state in which he saw the deceased that day.

11. The witness confirmed that the people fighting had been drinking at the bar and he knew them as drivers. He knew the accused's nickname as "*Kisomething*" and he even took the police to his home but found he had moved. A person showed them where he had moved to. He assured the court that he had seen the accused "*live live*" beating the deceased.

12. In cross examination, he insisted on what he had stated in his evidence in chief. The place where the accused lived was referred to as "*Kwa-Tito the Catholic priest*".

13. PW5 worked at the Buffalo club as a security guard with PW1 from November, 2012 – August, 2013. On 24<sup>th</sup> December, 2012 he reported at 6 pm and found PW1 already there. While PW1 took a customer upstairs he saw people fighting outside the keg club. He asked PW1 to go and check as he did his rounds. When he was through, he saw the deceased lying down near the butchery. He went to the place and found PW1 and PW4 there, and learnt that the deceased had stolen Sammy the matatu driver's phone.

14. He later found the deceased having been tied with a rope. He appeared not sure if he found the accused at the scene or not.

15. **PW6 Dr. Joseph Maundu** did a mental assessment for the accused. He found him to be mentally stable and fit to stand trial. He signed the P3 which he produced as Exhibit 4.

16. **PW7 P/No. 231162 Cpl. Ernest Maringa** is a scene of crimes officer vide gazette notice No. 5858 of 6<sup>th</sup> August, 2001. He testified that on 25<sup>th</sup> December, 2012 at 6.50 am, he was shown by Chief Inspector Jeremiah Musyoki the deceased's body which lay outside a building outside a butchery. He had injuries and blood stains on the head, bruises and the hands and legs were tied with a rope. There was blood on the floor and wall, with stones near his legs. The witness took ten photos of the scene and he produced them as Exhibit 3 (a-j) plus a certificate and report (Exhibit 5).

17. **PW8 Michael Gichuki Muiru** is the proprietor of Buffalo bar storey building. He was asleep at home in his house on the same building on 24<sup>th</sup> December, 2012 at 11 pm when his watchman (PW1) called him and informed him of people fighting outside the bar over a phone. He told him to go and sort it out. PW1 returned after a short while and asked him to call the police since the fight had escalated. He called a police officer by the name of Kasalu but when the police finally came, the injured person was already dead.

18. **PW9 P/No. 231338 Supt. Jeremiah Musyoki** received a report of the murder from OCS Chief Inspector Joshua Arende on 25<sup>th</sup> December, 2012 at 4 am. He boarded a motor vehicle to Wangige market with Cpl. John Mwangi and PC Joseph Ouma and they found the deceased's body lying near Buffalo bar and restaurant popularly known as Kwamaiko. They corded off the scene and he called Cpl. Ernest Maringa in charge of scenes of crime who came and took photos.

19. PW9 drew a sketch plan of the scene (Exhibit 4). He retrieved a stone (Exhibit 5) and a rope (Exhibit 6) from the scene. The rope had tied the deceased's body. He recorded statements from witnesses, as he investigated the case. From his investigations, he learnt that the deceased had been beaten to death by the accused and one Sammy both drivers on the Nairobi-Wangige route and they had been seen drinking that day. The accused was arrested by two police officers and on 27<sup>th</sup> December, 2012 he was taken to court but Sammy has not been arrested to date.

20. **PW10 Dr. Dorothy Njeru** is the doctor who performed the post mortem. She testified that she conducted a post mortem on the body of Robert Njuguna Ndungu on 28<sup>th</sup> December, 2012. She found the body to have the following injuries;

- Abrasions/bruises on the face, scalp, shoulders and upper limbs measuring 4 x 6cm – 18 x 12cm.
- Extensive bleeding on the skin covering the head.
- Bleeding into the head (subdural hemorrhage).

21. She formed the opinion that the cause of death was head injury due to force trauma. She produced her post mortem report (Exhibit 7). In cross examination, she denied making any other report besides Exhibit 7. She explained that the handwritten report DExhibit 1 was the same as Exhibit 7, since the requisition comes in 3 copies. The first is handwritten and sent for typing where an original and carbon copy are generated and both are signed. She stressed that the report is made of the findings and not the Forms.

22. The accused when placed on his defence elected to make an unsworn defence. He said he has been a driver since 1996 and is a widower with four (4) children. That on 24<sup>th</sup> December, 2012 he was on duty at Warukana Sacco whose vehicles ply route No. 118 Kabete/Nairobi. He was driving a Nissan matatu KAV 2195. He worked the whole day and closed at 11.45pm.

23. He testified that he was with the conductor when he parked the motor vehicle in front of Wangige, market near Buffalo Bar and Restaurant. He entered the bar to buy some beer and cigarettes and he was the last customer to be served joining about ten (10) others who were in the bar. One of them was "Sammy" (a fellow driver) and Robert (conductor). Within a short while, they were through with the drinks and they left as a group. He walked behind Sammy and Robert who both walked to the urinal. He entered the urinal as the two left.

24. While in the urinal which was along a long corridor, he heard somebody hit the wall. He came out of the urinal and found Sammy holding Robert (deceased) by the colour of his jacket and trying to hit his head against the wall. He ran to assist and held Sammy asking

what it was. Sammy said he wanted his wallet which the deceased and others had stolen during the day. He refused to release the deceased and continued hitting him. The accused held him tightly until he let go of the deceased but this was short lived as he caught him again.

25. The said Sammy hit the deceased with an empty bottle on the head. PW2 intervened and was even injured on his little finger which broke and he did not see him again. Sammy again threw the broken bottle at the deceased injuring him on his face. Fearing for his life, he moved away and took a boda boda and left. Present at the scene was the watchman, who also tried to separate those fighting.

26. The next morning, he woke up with a swollen hand and could not work. He took the vehicle to another driver and was on his way home when he was arrested at Kinyiro junction. Four of them were arrested and he is the only one who was charged while the others are key prosecution witnesses.

27. **Mr. Oduor** in his written and oral submissions told this court that the prosecution had failed to prove its case beyond reasonable doubt. He submitted that there were contradictions in the evidence by the prosecution witnesses, who were at the scene. He pointed out the evidence of PW4 and PW9.

28. He also submitted that the post mortem report PW10 produced in court was different from the one the defence was served with. That Exhibit 7 was signed but not dated and what they had was signed and dated. It was his submission that the prosecution were bent on forcing a conviction.

29. He further submitted that the accused's alibi was not challenged. That there was no evidence to show that the accused was fleeing from the scene or that he was a flight risk. He cited the case of **Solomon K. Murukaria –vs- Republic High Court Criminal Appeal No. 46 of 2011 (Meru)** which he relied on.

30. **M/s Mwaniki** for the State in her written and oral submissions stated that the cause of death as found in the post mortem report (Exhibit 7) has not been challenged. That as stated by PW1 and PW4 there were two men who were beating the deceased. The accused placed himself at the scene saying he was trying to assist and so this cannot be an alibi defence.

31. She further submitted that it was PW4 who led PW3 to arrest the accused. The said accused passed out upon arrest which was not the conduct of an innocent person. The accused had also disappeared from the scene. Counsel summed up the accused's defence as a lie which should be dismissed.

32. Referring to the authority cited by the defence, she submitted that in that case, there was no witness account as was the case of the present one.

33. The accused person is facing a charge of murder which is defined under section 203 of the Penal Code as;

***“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder”***

For this charge to be proved, the prosecution has the duty to establish the following;

- a) The fact of death;
- b) The act of killing by the accused, (*actus reus*); and
- c) The intention to kill or malice aforethought or *mens rea*.

***(a) The fact of death***

34. PW1, PW4, PW7, PW8 and PW9 all attested to the fact that they saw the deceased's body lying on the ground. PW2, a brother to the deceased confirmed that he was one of those who identified the deceased's body to the pathologist for post mortem. PW10 who conducted the postmortem gave the cause of death as “*head injury due to blunt force trauma*”.

35. **Mr. Oduor** for the accused raised an issue on the authenticity of the post mortem report produced by PW10 as Exhibit 7. What the defence had was marked as DMFI 1 but was never produced as an exhibit by the defence. In any event, PW10 explained herself well on the issue. I therefore find that the fact of death has been elaborately proved by the witnesses, even if the post mortem report had any issues.

***(b) Did the accused kill the deceased?***

36. Pw1 and PW4 both employees of PW8 at Buffalo bar, were at the premises on this material night. Their evidence is clear that they knew the deceased by name but they were not sure of the names of the two people who were assaulting him though they knew them as matatu drivers. PW4 knew the accused up to where he lived and it's him who led the police to his home.

37. The accused in his defence gave a detailed explanation of his movement on 24<sup>th</sup> December, 2012. He has confirmed that indeed on this date at around 11.45 pm, he was at the scene of incident. According to him, it is Sammy who was assaulting the deceased and he was the good neighbor who tried to separate them. He confirmed seeing PW1 and PW4 at the scene.

38. A number of things from his statement of defence confirm what PW1 and PW4 told the court in their evidence, namely;

- (i) The accused is a public service vehicle (matatu) driver;
- (ii) The accused and Sammy were at the scene at the time of incident;
- (iii) Sammy was one of those assaulting the deceased;
- (iv) Sammy is also a public service vehicle (matatu) driver; and
- (v) PW1 and PW4 witnessed the incident.

39. The only point at which the prosecution and defence don't agree is the role played by the accused in this incident. The prosecution through PW1 and PW4 states that the accused and Sammy were beating the deceased while the accused exonerates himself and says he was only separating them.

40. It has clearly come out from the accused's defence that the accused and Sammy were matatu drivers while the deceased was a conductor. It's not clear whose conductor he was but the allegation was that him and others had stolen Sammy's wallet and phone.

41. The evidence of PW1 and Pw4 is very consistent on the occurrence. They both insist that the deceased was beaten by two people and not one. That the second person is the accused herein. I have not seen any reason and neither has the defence cited any reason as to why PW1 and PW4 would lie against the accused person.

42. Secondly, when PW3 pointed out to the accused as the person they wanted from the matatu, the accused quickly retorted, "*sio mimi niliwa*" meaning "*it is not me who killed*". No one had told him why he was required by the police and neither had anyone at that point accused him of the killing. This utterances clearly show he knew what had happened. Upon his arrest, he got scared and even passed out. Surely, all this cannot be the conduct of an innocent person.

43. The issue of a defence of alibi, does not arise since the accused admitted being at the scene. My finding is that the accused and another beat up the deceased on the night of 24<sup>th</sup> December, 2012 and caused him fatal injuries. This killing was unlawful.

**(c) Was there the intention to kill?**

44. Section 206 of the Penal Code gives circumstances under which malice aforethought can either be proved or inferred. It provides 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;***

***(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.”***

45. What has come out as the reason for the beating by the accused and his friend, Sammy, is that the deceased was suspected of stealing a phone and a wallet belonging to Sammy. Secondly, the accused, deceased and Sammy had been at the bar drinking. It's not clear for how long.

46. It is not clear whether the accused and Sammy had sat and agreed on what to do to the deceased. PW1 and PW4 were attracted by the noises from outside and found him already being beaten.

47. In the case of *Njogu –vs- Republic [2007] KLR 123* which had almost similar facts to the present one, the Court of Appeal held thus;

***“1. Under Section 21 of the Penal Code (Cap 63), when two or more persons from a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose of offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.***

***2. On the evidence, the appellant had been properly identified as one of the people who had assaulted the deceased and he had also been mentioned by the deceased before he died.***

***3. The beating of the deceased was a spontaneous act and there was no evidence that the people involved had met and agreed to attack him. In those circumstances, it could not be said that the killing had been done with malice aforethought.***

**4. the appellant should have been found guilty of the lesser charge of manslaughter contrary to section 203 as read with section 205 of the Penal Code.”**

48. Further, in the same Judgment at page 128, line 4 – 10 the Court said;

**“There was no evidence that the people who beat the deceased, whoever they were, met together and agreed to attack the deceased. It was a spontaneous act. In those circumstances, although as Mr. Kaiga said, the appellant did not heed entreaties to stop further beating of the deceased, we are unable to read malice aforethought in this action. The evidence shows an unruly mob attacked the deceased. In those circumstances it cannot be said the circumstances support the finding that the killing was with the necessary malice aforethought.**

49. There is no evidence on how these three people (accused, Sammy and deceased) met and how the beating started. It is the anger of that losing a phone and wallet that led to all this. The element of a premeditated intention has not clearly come out from the evidence adduced. The three people had also been drinking at the Buffalo bar. Their level of sobriety is unknown.

50. Duly guided by the above authority, I find that the accused and another inflicted on the deceased injuries that led to his death. The killing was however not pre-meditated.

51. I therefore reduce the charge of murder contrary to Section 203 of the Penal Code as read with Section 204 of the Penal Code to manslaughter Contrary to Section 202 of the Penal Code as read with Section 205 of the Penal Code and convict the accused accordingly.

It is ordered.

**Dated, signed and delivered** this 31<sup>st</sup> day of **January** 2018 in open court at Nairobi. Judgment

**H I ONG’UDI**

**HIGH COURT JUDGE**