



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

CRIMINAL CASE (MURDER) NO. 72 OF 2015

REPUBLIC.....PROSECUTOR

-VERSUS-

SAMUEL KIMANI WANGUI.....ACCUSED

J U D G M E N T

1) The Accused was charged with Murder contrary to Section 203 as read with Section 204 of the Penal Code. In that on the 10th day of October, 2014, at Magumu Trading Centre within Nyandarua County, he murdered **Julius Njoroge Mugai**. He denied the charge and was represented by Mr. Gichuki.

2) The prosecution case was as follows. The deceased was a resident of Magumu and was in the material period in a love relationship with **Ruth Njoki (PW2)**. The Accused also lived at Magumu. The deceased came home drunk on the night of 9th October, 2014 and while the two were in bed, a fight broke out between the deceased and his lover **PW2**. **PW2** was assaulted and she raised an alarm. Several of her relatives came to her aid including her sisters as it appears that her family resided in the same compound. As she ran out of the house, she heard the deceased utter a threat to the effect: “if you are a man enough, wait for me”.

3) It would seem that at some point **PW2** hid herself in a toilet, before eventually spiriting herself to the house of a Good Samaritan, where she spent the night. Meanwhile it appears that having emerged from his house, the Accused got engaged in a fight or scuffle with some members of public, the Accused being among them.

4) During the scuffle **Julius Kirui Juma (PW3)** witnessed the Accused strike the deceased with a fork *jembe*. It is not clear how the deceased got back to his room because on the next morning, **Francis Kareu (PW1)** a brother-in-law to the deceased found him lying in his house with severe head injuries. He was pronounced dead on arrival at the hospital. Meanwhile, the Accused had reported to police that the deceased had assaulted him.

5) A post mortem examination revealed that the deceased had a head fracture with bleeding as well as multiple bruises. Death was as a result of severe “**head injury attended by skull (fracture) and epidural haematoma from multiple blunt trauma.**” The Accused was arrested and charged.

6) In a sworn defence statement, the Accused stated that he was a resident of Magumu. After work on the material date, which on all accounts is 9th October 2014, he had visited **Braza bar** at the local centre and took some drinks before going home. He had barely retired when screams from **PW2’s** house about 50 metres away rent the air. He decided to go out to inquire. Claiming that he was related by marriage to **PW2**, the Accused said that he stood at the (barbed) wire fence separating the compound where he lived from the plot where **PW2** lived. He allegedly challenged the Accused in words to the effect that women should not be assaulted.

7) That on hearing this challenge the deceased came forward while armed with a fork *jembe* while uttering threats. He came close enough to aim a blow at the Accused which, the Accused successfully deflected but was injured on the leg. He reported to police on the same night, carrying the fork *jembe* with him. He said that among the persons gathered at the scene as he left were **PW1** and **PW3** who were allegedly ‘pulling’ at the deceased the latter who was drunk.

8) On the next day he travelled to Nakuru and later learned that the deceased had died. He said he did not strike or fight with the deceased, and that **PW3** bore a grudge against him from a family dispute.

9) There is no dispute that the deceased and the Accused were known to each other being residents of Magumu. Both had been at **Braza bar** imbibing alcohol before the fatal events of the night of 9th October, 2014. There is no dispute that later in the night an altercation occurred between the deceased, his wife (**PW2**) and the Accused, possibly at different times. The cause of the first altercation between **PW2** and the

deceased appears implausible as **PW2** claimed that the couple were arguing over a blanket; that the Accused had on several occasions pulled the blanket from **PW2** as they slept.

10) And whereas **PW2** claimed not to know the Accused, the Accused was keen to claim her as an ‘aunt’ to his wife but could not give the names of **PW2**’s husband. For her part, **PW2** narrated events prior to the material incident in an evident bid to explain why she had gone to a bar prior to the material and while there diverted by a man called Johanna to go on another errand. It seems to me possible that the real cause of conflict between the Accused and the deceased was **PW2**’s attention, as the investigating officer **PC Mutuku** asserted in his evidence.

11) And that, the gratuitous disclaimers by the Accused and **PW2** on their relationship are motivated by the desire to conceal that fact. Although it seems that the Accused, the deceased and **PW3** were drinking at **Braza bar** earlier in the night, it is not clear just how the fighting between the Accused and deceased started. It may well be that the deceased found the Accused in a compromising situation with **PW2**, or that the Accused had suspicion of their relations and assaulted his wife. The former possibility in my view seems more plausible in light of the fact that only the Accused engaged the deceased and was therefore admittedly injured despite the presence of other people that night.

12) Whatever the case, the Accused and the deceased, both of them drunk had scuffled. The scuffle involved a fork *jembe* which according to **PW3** was used to strike the deceased. This evidence is consistent with injuries found on the deceased at post mortem. The Accused in his evidence attempted to involve **PW1** in the fight but he did not make such a suggestion to **PW1** while cross-examining him. As regards **PW3**, the Accused alleged some vague grudge which too was not put to **PW3** in cross-examination. Both statements to my mind are an afterthought.

13) The Accused’s conduct on the material night consequent to the incident, and on the next day is telling. Not only did he rush to report he had been assaulted by the deceased but he also left Magumu for Nakuru on the next day. Surprisingly he did not obtain a P3 form or produce any medical chit for his alleged injury sustained in the admitted fracas. The Accused was, by reporting to police trying to cover up for the severe assault on the deceased which he did not report. He seems to have made up a series of stories to cover up for his behaviour at each critical moment.

14) There is no doubt in my mind that he struck the deceased with a *jembe* following a dispute, most likely over **PW2**. **PW2** conveniently told the court what she considered adequate to place herself in good light as a responsible mother and victim of wanton violence from the deceased.

15) That the Accused caused death of the deceased is proven by evidence before me. However, the circumstances of the assault cast doubt as to the presence of malice aforethought, which is defined in Section 206 of the Penal Code as follows:-

“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) 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.”

16) In the case of **Bonaya Tutu Ipu & another -Vs- Republic [2015] eKLR**, the Court of Appeal sitting in Malindi stated about malice aforethought that:

“In this appeal, it cannot be and it is not disputed that the death of the deceased was caused by the unlawful action of the appellants. The real question is whether the appellants caused the death with malice aforethought so as to constitute the offence of murder under section 203 of the Penal Code. “Malice aforethought” is the mens rea for the offence of murder and it is the presence or absence of malice aforethought, which is decisive in determining whether an unlawful killing amounts to murder or manslaughter. Whether or not malice aforethought is proved in any prosecution for murder depends on the peculiar facts of each case. (See *MORRIS ALUOCH -Vs- REPUBLIC CR. APP. No 47 of 1996*).

.....;

It is in rare circumstances that the intention to cause death is proved by direct evidence. More frequently, that intention is established by or inferred from the surrounding circumstances. In the persuasive decision of *CHESAKIT -Vs- UGANDA, CR. APP. NO. 95 OF 2004*, the Court of Appeal of Uganda stated that in determining in a charge of murder whether malice aforethought has been proved, the court must take into account factors such as the part of the body injured, the type of weapon used, if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person. Earlier in *REX -Vs- TUBERE S/O OCHEN (1945) 12 EACA 63*, the former Court of Appeal for Eastern Africa stated thus on the issue:

It (the court) has a duty to perform in considering the weapon used and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily an inference of malice will flow more readily from the case, say, of a spear or knife than from the use of a stick...”

17) In the circumstances of this case, I do find the accused guilty and convict him for the offence of Manslaughter Contrary to Section 202 as read with Section 205 of the Penal Code.

Delivered and signed in Naivasha this **15th** day of **February, 2018**.

In the presence of:-

Mr. Mutinda for the DPP

Mr. Wairegi holding brief for Mr. Gichuki for the Accused:

Accused – present

CC – Quinter

C. MEOLI

JUGDE