



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 23 OF 2015**

**REPUBLIC.....PROSECUTION**

**-VERSUS-**

**ANTHONY NYAGA MUTEGL.....ACCUSED**

**J U D G M E N T**

1. The accused person is charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. It was alleged that on the 26<sup>th</sup> June 2015 at Kiangungi market in Embu County, he murdered Phinus Kinyua Njiru. The accused pleaded not guilty to the charge.

2. The prosecution called seven (7) witnesses in this case. Precisely, the evidence was that on 26/06/15 at around 8.30 pm PW1 was walking from his house going to the market to buy paraffin. As he passed outside a bar, he saw the accused and the deceased fighting. The fighting followed a quarrel between the two men inside the bar. The following morning, the body of the deceased was found lying about 50 metres from the bar.

3. The postmortem report showed that the deceased died of a ruptured spleen as a result of a blunt abdominal injury. Further evidence was to the effect that, the deceased had been assaulted and sodomized as well.

4. The accused person was later arrested and charged with the offence. Dr. Thuo examined the accused and found him fit to plead.

5. In his unsworn statement of defence, the accused, said that he was not at the scene at the time of the incident. He said he was in Chuka where he was harvesting timber.

6. Both parties filed submissions in support of their arguments. The prosecution relied on the evidence of PW1, PW2, PW3 who testified on the fight between the accused and the deceased and also on the spotting of his dead body the following morning.

7. It was argued that the evidence of those witnesses was corroborated by that of PW5, Dr. Shavulimo who performed the postmortem. He found that the cause of death was consistent with the injuries sustained. It was further argued that the alibi was not raised at the earliest opportunity as required. Being an after thought, it was dislodged by the overwhelming evidence of the prosecution. The prosecution said that the evidence on record proves the case beyond any reasonable doubt.

8. The defence argued that the cause of death was not conclusive in that there was no visible abdominal injury and no evidence of bleeding. It was further argued that the prosecution did not adduce sufficient evidence of identification of the accused at the scene of crime. The actus reus was not proved by the prosecution. Similarly, there was no evidence of a planning or premeditated attack.

9. The defence of alibi was not verified by the prosecution and therefore lost the opportunity accorded to them under Section 309 of the Criminal Procedure Code.

10. The issues for determination in a case of murder are twofold:-

(a) *Whether the prosecution proves death of the deceased as a fact and its cause.*

(b) *Whether it is established that the act or omission causing death was by the accused person.*

(c) *Whether malice aforethought has been established on part of the accused.*

11. The evidence of PW1 was that he found the accused and the deceased fighting outside a bar. It was around 8.30pm as PW1 was going to the shops. He said that outside the bar was a security light housed in a fluorescent tube which lighted the scene. The said light aided him

to see the two men at the scene fighting. He said he saw the accused beating the deceased with his fists. He talked to the bar watchman to find out why the two people were fighting. When PW1 returned from the shop, he did not find them there.

12. PW3 told the court that he was attending to customers in his bar called "club 14" around 8.30pm when a quarrel ensued between the accused and the deceased who were his regular customers. The deceased used to work for PW3 collecting empty glasses and washing them. He was not taking beer but the accused was doing so. As the deceased passed next to the table where the accused sat, he accidentally knocked the accused's beer bottle which fell down pouring the beer. The accused became violent and the deceased ran out followed by the accused.

13. After a short while, the accused returned to the bar and told PW3 that he had slapped the deceased a few times and ordered him to go home. It was the following morning that the deceased was discovered dead about 50 metres from the bar. The deceased may have been dragged to that spot during or after the assault.

14. From the evidence of PW3 there was a small squabble between the accused and the deceased. The accused became violent after the deceased accidentally knocked down his beer. PW3 did not follow the accused and the deceased outside but PW1 happened to be passing there a short while later. He found the two men fighting. PW1 said he knew the accused well for he was his neighbour. The deceased was PW1's elder brother. PW1 did not intervene because his assessment was that it was not a serious fight. On his way back PW1 did not find the accused and the deceased at the place he had left them. He saw the deceased lying dead near the bar the following morning.

15. Regarding identification, PW1 testified that there was a security light outside the bar that lighted the scene. He recognized the two men whom he knew well with the aid of the said light. The defence argued that PW1 did not give the distance of the light to the scene or the distance of the scene to where he was. However, PW1 said he talked to the watchman of the bar and that he had at first entered the bar and came out shortly afterwards. From this description of the scene, it is clear that the fight took place outside the bar where there was a security light. Due to the lighted scene, PW1 was able to recognize the people fighting and also identify the bar watchman.

16. This description brings PW1 outside the bar where the scene of the fight was. Given the circumstances at the scene, the witness was in a position to see the accused and the deceased and what was happening even without giving the actual distances.

17. The evidence of PW1 is supported by that of PW3 who had witnessed the events in the bar that led to the accused becoming violent. The time given by PW3 of the squabble in the bar and that given by PW1 for the fight outside the bar was the same leading to the conclusion that the fight took place a short while after the accused followed the deceased outside the bar. The evidence of PW3 is that the deceased was fleeing from the accused who had turned violent against him.

18. There was no evidence that the deceased met or came into confrontation with anyone else but the accused after he walked outside the bar. PW3 further testified that when the accused returned to the bar, he stayed for about 10 minutes taking his beer and then left. The accused was the last person seen fighting the deceased before he was found dead. The evidence of PW1 and PW3 was corroborative and direct as to the beginning of the squabble that developed an assault that turned fatal.

19. The defence relied on two cases on identification. I wish to cite the Court of Appeal case that of **PAUL ETOLE & ANOTHER VS REPUBLIC [2001] ECLR** which compared recognition and visual identification. It was held that:-

*"It is true that recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the court should remind itself that mistakes in recognition of close relatives and friends are sometimes made."*

20. The court observed that mistakes may occur in recognition and put emphasis on the need for the court to warn itself before convicting the accused. In this case, PW1 knew not only the accused, but both the accused and the deceased. He knew the accused his neighbour so well in that he even knew his nickname among his peers which was "Ndonyo". I am convinced that the lighting at the scene was sufficient to aid him to see the accused.

21. The evidence of recognition was corroborated by that of PW3 who witnesses the confrontation and saw the two men go outside the bar with accused fuming with rage. The deceased was to be found dead the following morning about 50 metres from the bar.

22. I find this evidence of recognition not only credible but also reliable. It is based on evidence of two eye witnesses PW1 and PW3 and pegged on more than one stint of identification. This court has closely examined the circumstances in which the recognition occurred leaving no doubt that no mistake could have occurred.

23. The defence argued that there was no visible injury on the deceased and as such the cause of death was not conclusive.

24. PW1 told the court:-

*"I found the accused beating the deceased with his fists."*

25. The doctor formed the opinion that the cause of death was a ruptured spleen caused by a blunt abdominal injury.

26. A ruptured spleen according to the doctor was caused by the blunt abdominal injury. A fist is a blunt object which the accused used to hit the deceased. PW1 said he left the deceased still being assaulted and went away. There is a possibility that the fist was used severally on the deceased and thus caused the blunt injury. A fist is a blunt object. Being on a soft area namely the stomach, the injury may not have been

visible for there were no abrasions or soft tissue wounds. The ruptured spleen caused bleeding from the anal canal for there was no other injury sustained by the deceased.

27. The doctor in cross-examination ruled out allegations of sodomy having been committed on the deceased. She said that:-

*“The examination did not support history of sodomisation.”*

28. This rules out the argument of the defence that the cause of death was not conclusive. The doctor added:-

*“The only injury was a ruptured spleen caused by a blunt injury on the stomach.”*

29. This blunt injury was not visible from the outside of the stomach as the doctor explained. The cause of death was therefore conclusive and well explained by PW5.

30. The issue of the alibi defence was raised. It was argued that the prosecution did not rebut it because they never verified its truth. The respondent argued that the defence was an afterthought. I have perused the evidence of the key witnesses including the investigating officer and noted that the alibi was never put to any witness in cross-examination. It was raised during the unsworn defence as a general statement.

31. It was held in Mombasa **Criminal Appeal No. 50 of 2007 ALI MKARO MWERO VS REPUBLIC** that:-

*“An alibi is a specific defence. It must be clearly and specifically stated by the Appellant. It does not entail a destination at large. In the present case, the Appellant could not clearly state the actual lodging accommodation he alleged to have been sleeping in at the night of the alleged offence. There are many lodging accommodations in Maua and without specifying the particular lodging he spent the night, it would be onerous to expect the prosecution to dislodge the so called alibi. The claim did not constitute an alibi in law which the prosecution could be obliged in law to check and unravel.”*

32. The statement of the accused does not amount to a specific alibi that the prosecution could verify. It was no doubt incapable of being verified due to its ambiguity. Furthermore, it was raised at a very late stage in the proceedings. That notwithstanding, the defence could not stand in light of the overwhelming evidence of the prosecution. The accused was seen and recognized by PW1 and PW3 who knew him before the incident. Their evidence put the accused squarely at the scene of crime.

33. I have considered the alibi and I hereby reject it as a mere defence that does not shake the prosecution's case.

34. The accused was seen in the bar chasing the deceased towards the outside as a result of a small squabble. There is evidence that the accused was in a rage and was seen assaulting the deceased immediately afterwards outside the bar. The deceased was found dead near the bar the following morning. This was within the vicinity of the area of the fight as gathered from the evidence of PW1 and PW3. The doctor confirmed the cause of death as the ruptured spleen.

35. I find that the prosecution have established that the accused caused the act that led to the death of the deceased, the *actus reus*.

36. The prosecution have a duty to prove malice aforethought. The term is described under 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;*

37. The deceased is said to have accidentally knocked the beer bottle as he was passing. This infuriated the deceased who followed him outside the bar. He assaulted the deceased and caused fatal injuries that led to his death.

38. Although the assault was not planned, the accused used excessive force on the deceased thus inflicting fatal injuries on him. The accused from his violent act and use of excessive force was possessed of the knowledge that this act would cause death or grievous harm to the deceased. This is malice aforethought as described in Section 206 (b) of the Penal Code.

39. It is my finding that the prosecution have established malice aforethought on the part of the accused person.

40. The prosecution have proved the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.

41. I find him guilty of the offence and convict him accordingly.

42. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 29TH DAY OF MAY, 2018.**

**F. MUCHEMI**

**JUDGE**

**In the presence of:-**

**Mr. Gitau for Gachuba for accused**

**Ms. Mate for State**

**Appellant present**