



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL CASE NO. 103 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

JOSPCHAT MUSUNGU AMANI ALIAS JOSPCHAT MUKHONYI ... ACCUSED

JUDGMENT

1. The accused, **Josphat Musungu Amani** also known as **Josphat Mukhonyi**, is charged with murder, contrary to S. 203 read with S. 204 of the Penal Code, in that on the 26th September 2014 at Keroka township Masaba South District Kisii County, jointly with others not before court murdered Charles Onchari Gisebe.
2. Under S.203 of the Penal Code, a person who of malice aforethought causes the death of another by an unlawful act or omission is guilty of murder which carries a sentence of death under S.204 of the Penal Code.
3. The case for the prosecution against the accused was that on the material date at about 10.00pm a brawl involving revelers erupted at a night club known as “Club 7” within Keroka town. Thereafter, **Michael Mayaka Yakwara (PW 1)**, spotted a person outside the club bleeding profusely. He did not know the person but heard him telling a watchman that he had been assaulted.
4. **Samuel Moseti (PW 2)**, a watchman at a school called Brilliant Academy was on duty when he heard noises nearby. He checked and spotted a person assaulting another. He called the area chief who dispatched members of the village policing unit to the scene. They found that the victim of the assault had suffered fatal injuries. The body was removed to the mortuary by police officers who arrived at the scene.
5. **Cpl. Moses Mbogori (PW 3)**, and his colleagues proceeded to the scene of the brawl after the necessary report was made to them. They found the night club or bar closed and returned to the police station. Later, at about midnight, the watchman (PW 2) reported to them that there was a dead body near his work place where a fracas involving unknown persons had occurred.
6. The police officers proceeded to the scene and removed the dead body to the mortuary and commenced investigations.
- Cpl. Joseph Mogusu (PW 4)**, later took over the investigations from a colleague who was transferred and noted that the allegation against the accused was that he assaulted the deceased together with others and thereafter set him on fire in an incident which occurred in the night.
7. A post mortem was carried out and a report compiled by a doctor (P.Ex 1) was produced by Cpl.

Mogusu (PW 4), who also produced a mental assessment report (P.Ex 2) indicating that the accused was mentally fit. He was arrested by members of the village community policing unit and eventually charged with the present offence.

8. The defence raised by the accused was a denial and a suggestion that he was arrested and charged merely on account of his ethnic community. He admitted having been at the material club which was known to him as "Tureti" when a fight erupted between revellers. He was in the process injured on the head with a bottle.

9. He left the club in the company of two good Samaritans and proceeded to the police station where he made a report but was told to go to the hospital first. He returned to the police station on the following day but on his way a group of people confronted him at Keroka town and said that he was one of those who were fighting in the night club.

10. The group apprehended and took him to the police station where he was charged with the present offence. He contended that he was a cook by occupation and was in Keroka to perform his work although he hailed from Emuhaya in Vihiga County. He also contended that he was arrested simply for being a person from a different ethnic community.

11. From all the foregoing evidence which clearly lays out both the case for the prosecution and the defence as well as the final submissions by the accused through the learned counsel, **Mr. Okenye**, it is apparent that the deceased was assaulted and fatally injured.

The cause of death as per the post mortem report (P.Ex 1) was cardiopulmonary arrest due to brain damage due to head injury.

12. It is without doubt that those who assaulted the deceased had a clear intention to kill him and therefore directly responsible for the offence of murder.

The accused vehemently denied such responsibility. It was therefore incumbent upon the prosecution to establish his alleged guilt on a standard of proof which is beyond any reasonable doubt.

13. There was no obligation on the part of the accused to establish his innocence (see, **Kioko Vs. Republic (1983)KLR 289**).

In this case, not even one of the prosecution witnesses implicated the accused. Michael (PW 1) never mentioned him at all and this also applied to the watchman (PW 2) who in particular did not say that he identified the accused as one of the people involved in a fracas near his place of work or as the person who was assaulting another.

14. The role of Cpl. Mbogori (PW 3) was simply to act on the reports made to him and his colleague on the material night and to receive the accused at the police station after his arrest. He never mentioned that prior to his arrest, the accused had also reported an unlawful assault against himself.

15. Unless the report was made to another officer, the accused indicated that he was assaulted at the material night club and thereafter made a report to that effect to the police.

Cpl. Mogusu (PW 4), merely took over investigations from another officer. He could not really say why it was necessary to charge the accused with such a serious offence yet there was no scintilla of evidence against him from the relevant witnesses. He only appeared in court to summarize what is contained in the relevant police investigation file. His evidence in that regard did not assist the prosecution case.

16. In sum, the prosecution failed to discharge its burden of proof against the accused and could not clearly do so on the basis of the evidence adduced herein by its witnesses.

Consequently, it is the finding of this court that the accused is found NOT GUILTY as charged and is

accordingly acquitted.

[Delivered and signed this 12th day of April 2017]

J.R. KARANJAH

JUDGE

In the presence of

CC Mohe/Dorothy

State Counsel – Ms. Mbelete

Mr. Okenye for accused

Accused