



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 65 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

EDWARD MBURU KAMAU.....1ST ACCUSED

ANTHONY KANURI WAHOME.....2ND ACCUSED

RULING

The prosecution has prosecuted this case against the two above named accused persons. Seven witnesses in total have testified in this case. The charge the two accused persons are facing is murder. It is brought under Section 203 as read with Section 204 of the Penal Code. The offence is alleged to have been committed on the night of 21st July 2014 at Jua Kali Village in Embakasi District within Nairobi County. The victim is Julius Kabaiku (deceased).

The facts of this case are straight forward. On 21st July 2014 the deceased left his home at about 9.30pm after telling his wife Mary Nduta Njeri (PW1) that he was going to attend a funeral meeting in the neighbourhood. In the course of that evening he joined other revelers at Otamba Pub near his home and started taking alcoholic drinks. The Pub was operated by Alice Wambui (PW2). She used to be assisted by the two accused persons in running the bar. The two were not her employees but volunteers. On that evening the two joined her and started serving customers who included the deceased, Caroline Chebet (PW3), John Mwangi (PW4) and a customer identified as Waweru (not a witness).

It is said that the deceased ordered one alcoholic drink called “Identity” and took it. He then asked Waweru to buy him another bottle of “Identity”. Waweru asked the deceased how many bottles of “Identity” he could take and the deceased said he could take four. Waweru and the deceased placed a bet that if the deceased could take four bottles of “Identity” then Waweru would give him Kshs 200. Waweru then bought for the deceased four bottles of “Identity” drink which the deceased took in quick succession (some witnesses said he took 20 minutes to drink the four bottles). Evidence shows that immediately he finished taking the four bottles he started drooling on the mouth, sweating profusely and dozing. He asked for water. Other customers told the two accused persons to take the deceased outside the Pub to get some fresh air. They carried the deceased and took him outside and left him there. It seems that the other revelers continued drinking until the time to close the Pub around 1.00am. No one seemed to have remembered to check on the deceased. He was still at the same place he had been placed the following morning but he had died. He did not seem to have any visible injuries but he had blood stains on the nostrils.

The matter was reported to the police at Embakasi Police Station. Police visited the scene, collected the body and took it for preservation at the City Mortuary. The two accused persons and the other revelers

including Caroline Chebet were arrested. After investigations the two accused were charged with this offence.

The body of the deceased was examined on 25th July 2014 by Dr. Peter Muriuki Ndegwa (PW7). His findings are captured in the post mortem form produced in evidence as exhibit 3. According to Dr. Ndegwa, the deceased died as a result of head injuries due to blunt force trauma.

Procedural law under Section 306 of the Criminal Procedure Code requires that an accused person be acquitted at the conclusion of the prosecution case if the evidence presented in court does not disclose that he/she has committed the offence. It also requires that the accused person be called upon to defend himself if the court considers that there is evidence that the accused person or any one or more of several accused persons has/have committed the offence.

I have carefully considered the evidence by the prosecution. The evidence is circumstantial and speculative. There is no doubt that the deceased was drinking some alcoholic drink called "Identity". He took a total of five bottles of the stuff in a very short time. His reaction to this drink, drooling, sweating and dozing, necessitated his being taken outside by the two accused persons. The police did not investigate the effect of the consumption of alcohol by the deceased and whether this could have adversely affected his health. The doctor found that the deceased had sustained head injuries which probably caused his death. The doctor's evidence on the cause of death is not conclusive. The doctor found the deceased dehydrated, pale and the liver was fatty. He explained during cross-examination as follows:

Dehydration is caused by hot alcoholic drinks or by failure to consume water or fluids. Paleness is due to being anemic. Not eating well could cause anemia. Fatty liver is associated with alcohol consumption over a long period of time. He had been consuming alcohol over a long period of time. Death could have been caused by alcohol. But I found injuries on his head which was an immediate cause of death. The head injury facilitated the cause of death. I did not pursue the line of alcohol poisoning because I was able to see injuries on the head.

The doctor also said that falling and getting injured is blunt trauma.

I have no evidence to show that the two accused persons or any of them hit the deceased on the head. I do not have evidence to show that they or any of them followed the deceased and injured him on the head. Their act of taking the deceased outside, at the behest of other customers, was done in good faith without ill-motive to cause the deceased any harm in my view. There is no evidence to point to any intention of the part of the two accused persons to cause harm to the deceased.

The deceased was left outside over-night. It was a public place and anything could have happened to him. Besides, falling and hurting himself is not ruled out or even being hit by anyone else. The consumption of alcohol and probable poisoning from alcohol was not examined to rule out the possibility that this, too, could have contributed to the cause of his death.

For an accused person to be found guilty basing the case on circumstantial evidence the evidence against him must point irresistibly to the accused person to the exclusion of any other person and at the same time there must be on other co-existing circumstances that could weaken or destroy the inference of guilt on the part of the accused person. In this case, there is a still unresolved issue of possibility of alcohol poisoning, or falling and hurting his head or any other person hitting him and inflicting head injuries on him. The evidence does not irresistibly point to the accused persons to the exclusion of any other person. There are other possibilities.

There is no other evidence expected. The accused persons are not required under the law to fill the gaps left by the prosecution and short of them confessing or admitting causing the death of the deceased, there is no other evidence expected to tie up the loose ends.

My considered view in this matter is that the prosecution has failed to establish a prima facie case against

each of the accused persons. In compliance with the law, it is my duty to find that the accused persons or any of them have no case to answer. As required under Section 306 (1) of the Criminal Procedure Code, it is my finding that there is no evidence that the accused or any one of them committed this offence and consequently I hereby record a finding of not guilty and hereby enter acquittals against each accused person. They shall be free to enjoy their liberty unless for any lawful cause they are held in custody.

Orders shall issue accordingly.

Delivered, signed and dated this 27th September 2017.

S. N. Mutuku

Judge