



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NO. 106 OF 2014

REPUBLIC..... STATE

VERSUS

PETER MWARERI MWANGI.....ACCUSED

JUDGEMENT

The accused **PETER MWARERI MWANGI** faces a charge of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE.**

The particulars of the charge were that

“On the 8th day of October, 2014 at Tausi Bar Njoro town in Njoro Sub-county within Nakuru County murdered JOSEPH MAINA KAMITHI”

The prosecution led by the learned State Counsel called a total of eight (8) witnesses in support of their case.

PW3 PETER NJOROGE told the court that on 8/10/2014 he went to Tausi Bar to have a drink. As he arrived at the bar he found the deceased lying naked outside the bar. The accused who was the proprietor of the bar was beating the deceased. After the deceased fell down. The accused began to jump on his stomach. **PW3** phoned the relatives of the deceased to inform them of the incident. He then left the bar and went home. The following day **PW3** heard that the deceased had succumbed to his injuries and died.

PW1 SIMON NGANGA KAMITHI was a brother to the deceased. He told the court that on 8/10/2014 he received a call about his brother. **PW1** went to Tausi Bar where he found the deceased lying outside totally naked. The deceased who was badly injured and was in great pain informed **PW1** that he had been beaten in the stomach by the accused. **PW1** questioned the accused who stated that the deceased had failed to settle a debt of Ksh 50/= for Keg Beer he had consumed. Accused said he would cater for all the deceased's medical bills.

PW2 PAUL GITHUKU MUIRURI also told the court that on 8/10/2014 he received a call from one 'James Nganga' informing him that his nephew was being beaten at Tausi Bar. **PW2** rushed to the scene. He found the deceased lying outside the bar totally naked and badly injured.

PW1, PW2 and others dressed the deceased and took him to Njoro Police Station in order to report the assault. The deceased was complainant of great pain in his stomach. He was unable to walk upright. After making the report the witnesses took the deceased to a nearby clinic. There he was attended to and given pain killers.

By the following day the condition of the deceased had deteriorated and he was taken to Nakuru PGH. The deceased was admitted in the hospital but succumbed to his injuries and died whilst undergoing treatment.

Police commenced investigations into the incident after which the accused was arrested and arraigned in court on this charge of murder.

At the close of the prosecution case the accused was found to have a case to answer and was placed onto his defence. The accused gave a sworn defence in which he denied having assaulted the deceased on the material night. The accused further denied that he was the proprietor of Tausi Bar.

Having received all the evidence this court must now analyze that evidence and make a determination as to whether the charge of murder has been proved beyond reasonable doubt as required in law.

The offence of murder is defined by **Section 203 of the Penal Code Cap 61 Laws of Kenya** as follows

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

In order to prove a charge of murder the prosecution must tender evidence sufficient to prove beyond reasonable doubt the following three (3) ingredients of the charge

(i) Proof of the fact as well as the cause of death of the deceased.

(ii) Proof that the deceased met his death as the result of an unlawful act or omission on the part of the accused – this constitutes the ‘actus reus’ for the offence of murder.

(iii) Proof that said unlawful act or omission was committed with malice aforethought – this form the ‘mens rea’ of the offence.

Regarding the fact and cause of death of the deceased there can be no controversy. **PW1, PW2** and **PW3** all told the court how they found the deceased lying badly injured outside Tausi Bar. The deceased was doubled up due to pain in his stomach and could not even walk upright.

PW5 VIRGINIA WAMBUI a sister of the deceased narrated the efforts made by the family to access medical treatment for the deceased. She confirms that the day after the incident the condition of the deceased deteriorated and the family took him to Nakuru PGH where unfortunately the deceased succumbed to his injuries and died.

PW5 later identified the body of the deceased to the doctor who performed the autopsy. All these witnesses who were relatives of the deceased and knew him well identify him as ‘**Joseph Maina Kamithi**’.

Evidence regarding the cause of death was tendered by **PW7 DR. TITUS NGULUNGU** the consultant pathologist who performed the autopsy on the body of the deceased. **PW7** told the court that upon examining the body he noted some bruises on the abdomen.

Upon an internal examination of the body **PW7** noted that some of the intestinal loops had been ruptured and there was seen a mixture of blood and digested material in the abdominal cavity. As a result of his examination **PW7** formed the opinion that the cause of death was ‘**abdominal organ injury attended with blood loss and peritonitis due to multiple abdominal trauma**’.

The doctor filled and signed the post-mortem report which he produced in court as an exhibit **P exb 1**.

The evidence of **PW7** was expert medical opinion evidence. It was neither challenged nor controverted by the defence. As a result I find as a fact that the deceased met his death due to multiple blunt force trauma to the stomach or in laymans been assaulted on or about the stomach.

Having proved the fact and cause of death, the prosecution is required to adduce evidence to prove that it was the accused who unlawfully assaulted the deceased causing him to sustain the fatal injuries.

PW3 told the court that he witnessed the attack on the deceased. The witness told the court that on the material night he had gone to Tausi Bar to have a drink. When he got there he found the deceased lying totally naked and being assaulted by the accused at the entrance (door) of the bar. In his evidence in chief **PW3** stated as follows:

“I found the deceased Maina outside the bar being beaten by the accused. The accused stepped on the deceased. When the deceased fell the accused began to jump on his stomach. I saw all this with my own eyes.....”

After witnessing the incident **PW3** phoned a brother to the deceased to alert him of the same. **PW1** the brother of the deceased confirmed in his evidence that the witness did indeed phone him to inform him that the deceased was being assaulted at Tausi Bar.

I am mindful of the fact that **PW3** is the only eye witness to the incident who testified before the court. However, it is trite law that a fact in issue may be proved by the evidence of a single witness. All the court is required to do is to carefully interrogate that evidence and satisfy itself that the evidence is reliable.

PW3 gave clear and consistent evidence. He remained unshaken under cross-examination by defence counsel. He had gone to Tausi Bar as a patron. He told the court that he witnessed these events as he arrived at the bar. The incident occurred at the entrance to the bar. Undoubtedly there was sufficient light since obviously the bar could not have been operating in darkness.

PW1 knew both the accused and the deceased very well. He told the court that the deceased was like him a regular customer in Tausi Bar whilst he knew the accused as the proprietor of the bar.

In his defence the accused denied that he was the owner of Tausi Bar. The accused produced a licence **P. exb 3** to prove that in 2010 the proprietor of the Bar was one ‘**Mbuthia Kimundu**’.

However this court is not seeking to determine the question of ownership of the bar. That is neither here nor there. The court in this case is seeking to determine the identity of the person who fatally assaulted the deceased. The fact that the accused was not the owner of the bar does not mean that he could not have assaulted the deceased. The accused could well have been employed to run the bar by the registered

owner. This aspect of the defence is of no relevance to the present case.

PW3 has identified the accused as the person whom he saw beating the deceased and later jumping on the deceased's stomach. **PW3** had no reason or motive to tender false evidence against the accused. He was not related to the deceased at all. There was no suggestion of a pre-existing grudge between **PW3** and the accused. **PW3** explained that the accused had been angered by the failure of the deceased to pay Ksh 50/= owed for Keg Beer he had drunk and this is what led to the assault. **PW3** told the court that he offered to pay the Ksh 50/= on behalf of the deceased, but the accused declined to accept this offer.

PW3 was clearly an independent observer to the events. He acted to phone the relatives of the deceased to alert them of what he had seen after which **PW3** went home to sleep. I was able to observe the demeanour of this witness as he testified and he struck me as an honest and unbiased witness. I am convinced that what he told the court was exactly what he himself saw at Tausi Bar.

The evidence of **PW3** is corroborated by the other witnesses who although they did not witness the actual assault arrived at the scene shortly thereafter. **PW1** and **PW2** a brother and uncle to the deceased respectively both told the court that they rushed to Tausi Bar upon being alerted of the incident. Both witnesses state that they found the deceased lying on the ground totally naked. The deceased was badly injured and could not get up. He complained of pain in his stomach. Both witnesses stated that they questioned the deceased who was still able to talk and he identified the accused as the man who had assaulted him. In his evidence **PW1** stated

“The deceased said Peter had hit him in the stomach.....” he (deceased) told me accused kicked him in the stomach....”

On his part **PW2** in his evidence stated

“The deceased was holding his stomach in pain. He told us that he had been beaten by Peter the owner of Tausi Bar”

PW5 was a sister to the deceased. She did not herself go to the scene but she told the court that she visited the deceased in hospital and she spoke to the deceased. In her evidence **PW5** stated as follows

“The deceased told me accused slapped him and he fell down. Then accused removed all his clothes. Then accused jumped on his stomach”

PW6 PC JOHN CHACHA was the officer who was at the police station when the deceased was escorted there to make his report. **PW6** told the court that the deceased told him that he had been assaulted at Tausi Bar in Njoro Township **PW6** went on to the state that

“He (deceased) named one ‘Peter’ the owner of Tausi Bar as his assailant.... The deceased was complaining of pain in the stomach. He said, the accused had stepped on his abdomen severally....”

All these witnesses who spoke with the deceased shortly before his death told the court that the deceased gave them each a similar account of the events leading to his fatal injuries and to each witness the deceased named the accused as his assailant.

Given that statements made by the deceased to **PW1**, **PW2** and **PW5** regarding the identity of his assailant, were made shortly before his death they amount to ‘dying declarations’

Section 33(a) of the **Evidence Act Cap 80, Laws of Kenya** provides

“33 Statements written or oral of admissible facts made by a person who is dead, or who cannot be found or who has become incapable of giving evidence or whose attendance cannot be procured without an amount of delay or expense, which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases –

(a) When the statement is made by a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question and such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death and whatever may be the nature of the proceedings in which the cause of her death comes into question”.

The courts have over the time in various cases given guidelines regarding the level of reliance to be placed on such dying declarations. In **DZOMO CHAI Vs REPUBLIC Mombasa HCCrim Appeal No. 256 of 2006**, it was held thus

“A statement by a dead person as to the cause of his death or as to the circumstances of the transaction which resulted in his death in cases in which the cause of death of the person comes in question is admissible under Section 33(a) of the Evidence Act. Although the court can in law solely rely on such evidence, there is however a rule of practice that a dying declaration must be satisfactorily corroborated to justify a conviction”.

In **CHOGE Vs REPUBLIC Nakuru HCCrim Appeal No 69 of 1984**, the Court cited the case of **MIGEZO MIBINA Vs UGANDA [1965] E.A 71** where it was stated as follows

As regards the probative force of a dying declaration the court said

“Although there is no rule of law that to support a conviction there must be corroboration of such statements, it is generally, recognized that it is very unsafe to base a conviction solely on them”

Therefore the general rule of thumb is that for dying declaration to have full prohibitive value it must be supported by other corroborative evidence.

In this case the declarations were made by the deceased barely a day before he died. Thus the statements made by the deceased to **PW1**, **PW2** and **PW5** do qualify to be termed dying declarations. Secondly the evidence of **PW3** properly corroborates the dying statement of the deceased. **PW3** who was present at the scene confirmed that he saw the accused attack the deceased and jump on his stomach.

Further corroboration for the dying declaration is provided by the evidence of the doctor and the post-mortem report **P. exb 1**. The cause of death was found to be ‘**abdominal organ injury due to multiple abdominal trauma**’. The act of jumping on a man’s stomach as he lies on the ground certainly amounts to multiple abdominal trauma. The feet landing on the stomach constitute the blunt force. It is quite easy to see how this type of injury would cause the deceased’s intestines to rupture as was noted by the doctor in his evidence.

From the above I am satisfied that the dying declaration made by the deceased has been properly corroborated.

In his defence the accused totally denied having assaulted the deceased. The accused further denied that he was the one manning Tausi Bar on the night in question. The accused denied having visited Tausi Bar on the night in question. This defence is nothing but a mere denial. There is no reason why all the witnesses would name the accused if he was not even at the bar on the night in question. As stated earlier there was no evidence much less a suggestion of any motive why the witnesses would want to frame the accused. None of them had a grudge against him.

The accused further claimed that police at Njoro police station beat him up; injured him and tore his pullover after his arrest. The accused gives no reason why police would have wanted to assault him. More importantly the accused did not raise this issue of the alleged assault when cross-examining the **PW6** who was the investigating officer. This allegation only came up during his defence. All in all I am persuaded by the defence of the accused and I dismiss the same in its entirety.

From the evidence available I am satisfied that it was the accused who fatally assaulted the deceased by jumping on his stomach several times and I do so find.

The *actus reus* for the offence of murder has been satisfactorily proved.

The final ingredient requiring proof in a murder case is that of ‘*mens rea*’. In law *mens rea* which is defined as ‘**malice aforethought**’ is defined by Section 206 of the Penal Code as follows

“206 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)

(c)

(d)

By assaulting the deceased felling him on the ground, stripping him naked and jumping onto his stomach there can be no doubt that the intention of the accused was at the very least to cause grievous harm or to cause the death of the deceased.

The malice on the part of the accused is further evidence by the fact that the assault was committed due to the failure of the deceased to pay a mere Ksh 50/= for beer he had consumed at the bar. A trifling Ksh 50/= did not warrant vicious an assault. I am satisfied that malice aforethought has been established on the part of the accused. The *mens rea* for the offence of murder has been proved.

Based on the foregoing I am satisfied that this charge of murder has been proved beyond reasonable doubt. Accordingly I convict the accused under Section 203 of the Penal code.

Dated and delivered in Nakuru this 17th day of October, 2017.

Mr. Kabita for accused

Maureen A. Odero

Judge