



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT CHUKA**  
**HCCR NO. 35 OF 2015**  
**(FORMERLY MERU HCCR NO. 67 OF 2015)**  
**REPUBLIC.....PROSECUTOR**  
**VERSUS**  
**PETER KITHAKA KIRIGA.....ACCUSED**

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

1. This is a case of murder where **PETER KITHAKA KIRIGA**, the accused herein is charged with the said offence contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence as per the information presented reads that the accused herein murdered **ALICANGEL MUGAO MAKARA** (hereinafter to be referred to as the deceased herein) on the 6<sup>th</sup> day of September, 2014 at Nkondi market, Tharaka South District within Tharaka Nithi County.
2. When the accused person was presented to court to take plea, he did not deny causing the death of the deceased herein but clearly pleaded that he did not intend to do it. This court then sitting in Meru nevertheless entered a plea of not guilty. The prosecution called a total of five witnesses to support their case against the accused person.
3. In summary the prosecution presented the following evidence.

**Alex Njiru Rukungi (PW1)** testified that on the 6<sup>th</sup> September, 2014 (material date) at around 12.30 pm he was standing outside his house when he saw the accused person running towards where he was with a knife dripping with blood. According to him, the accused cleaned the knife using a heap of ash which was nearby and he thought that in his mind that perhaps the accused was from slaughtering a chicken. He then saw people running away in all directions and thought that the police had come because the place was a drinking den where illicit brew was often sold. He further added that when the accused had finished wiping the knife he uttered these words:-

**"nimemaliza kasia"** loosely translated to mean he had extinguished the fool. According to PW1, the accused then left without uttering any other word. The witness told this court he joined the crowd that had gathered at the scene and found the deceased who was his friend lying on the ground bleeding. He tried to help and called for his brother who later arrived when the deceased had already passed on. The witness identified the knife (murder weapon) reportedly used though he conceded that he did not witness the murder and could not tell if there was a fight prior to the incident as the bar (scene of crime) was behind his house and could not have been in a position to

see what was happening inside.

4. The 2<sup>nd</sup> witness summoned to testify was **Jane Makena** (PW2) who testified that on the material date and time he was at the scene of crime going about her business when she saw a stranger walk into a bar with a knife and walking stick. According to her the manager of the bar stopped him at the door and asked him to surrender the knife which he did. The witness also added he later identified the stranger as Mugao, the deceased herein and that after a short while, the accused person also entered the bar after surrendering a panga he had at the reception. According to her witness the accused and the deceased fought whereupon the accused stabbed the deceased. The witness conceded under cross-examination that she was actually inside the bar taking beer in the company of the deceased and that the accused called the deceased to where he stood before the two wrestled and fought.

5. **Geoffrey Nyaga Mucee** (PW4) an employee of the club where the incident occurred testified that he was busy selling alcohol to patrons on the material date when he heard customers shout, "**stop! stop!**". He added that when he turned over to see what was happening he saw the accused person and the deceased wrestling and fighting. He then saw the accused leave the premises through the back door and the deceased left through the front door and fell down outside the bar and it was then that he noticed that he had been stabbed. He added that the police were called and that they arrived when the deceased had already passed on.

6. The investigating officer, **Corporal Henry Namada** (PW5) gave evidence on the actions he took after receiving the report about the murder on 6<sup>th</sup> September, 2014 at around 5 pm. His evidence mainly centred around the investigation he carried out and according to him the accused and deceased had quarreled and fought over a woman **JANE MAKENA** (PW2) at Arithi Kawedo Bar within Ngondi market. He also took statements from witnesses after taking the body to the mortuary. He further added that the accused was apprehended and handed over to him by administration Police Officers from Nkondi D.O.'s Office. Who also gave him a knife recovered at the scene. He produced the knife recovered from accused as P Exh 1. He told this court that as soon as the deceased was stabbed all those present at the bar took off and that is why he was reportedly unable to get eye more witnesses. He told this court that he accompanied the relatives on 11<sup>th</sup> September, 2014 to Meru Level 5 Hospital mortuary where one Dr. Noor performed postmortem on the body of deceased.

7. When placed on his defence based on his plea and the evidence herein, the accused chose to give sworn statement of defence and he unequivocally admitted causing the death of the deceased herein. He testified that on the material date, he was going to the bar at Ngondi market to have a drink when he was stopped at the entrance and told to surrender a panga he was carrying and a walking stick by the bar manager which he complied. He further added that as he was enjoying his drink, the deceased approached him with a request for a drink and that upon declining the deceased forcefully took his drink and drank it. According to the accused this did not go down well with him as he was not amused. They quarreled and before long a fight ensued resulting into what the accused described as '**accidental**' stabbing of the deceased. He denied having planned to kill him adding that both the deceased and himself were drunk at the time. He conceded under cross-examination that he stabbed the deceased once with the knife that the deceased allegedly had and which he had used to threaten him as they wrestled.

8. In his written submissions made through learned counsel PM Mutani Advocate, the accused contended that the fatal injury inflicted on the deceased was accidental and was never intended to kill. It has been submitted that in the absence of medical evidence proving the cause of death, there was no credible evidence to prove or establish that the stabbing caused the death of the deceased. The accused has submitted that the death could have been accidental or caused as a result of self-defence and this in his view shows that the prosecution's case has left some doubts whose benefit should go to the accused.

9. The defence has also submitted that the drunken state of the accused at the time negated any malice aforethought.

10. The accused has alternatively urged this court to find that the deceased was stabbed because of the fight and that the accused had no option but had to disarm a dangerously armed person. This in his view

showed that he caused the death of the deceased out of self defence.

11. The prosecution on the other hand relying on their submissions earlier made on no case to answer has contended that the accused person from the beginning admitted that he stabbed the deceased person even after being cautioned. The prosecution has submitted that even in the absence of the medical evidence on the cause of death, the evidence tendered has proved their case beyond reasonable doubt. In this regard the prosecution relied on the decisions in **DORCAS JEBET KETTER & ANOR -VS- REPUBLIC [2013] eKLR** and **NDUNGU- VS- REPUBLIC (1985) KLR 487** where the Court of Appeal observed in part that where the deceased clearly dies in the hands of an accused person conviction can still be found in the absence of a postmortem report.

12. The state has also contended that they have established that the accused had malice aforethought as he was heard saying "*nimemaliza kasia*" shortly after stabbing the deceased. This in their view showed that the accused was contended with what he had accomplished. It is submitted that the evidence adduced by the prosecution had prove beyond reasonable doubt that the accused person committed the offence.

13. This court has considered the evidence and the submissions made by the prosecution through the Director of Public Prosecution. I have also considered the defence offered and the submissions made by defence counsel. The accused herein is charged with the offence of murder and the key ingredients in the charge against the accused are:-

(i) The act of murder (normally referred to as "*Actus reu*")

(ii) Malice aforethought (mens rea)

The prosecution had the onus of not only establishing the two elements but they had the burden to prove them beyond reasonable doubt.

14. Now let me begin with the first element of "*actus reus*". The defence contention that this element was not proved because the prosecution failed to tender medical evidence to show exactly what caused the death of the deceased would have been significant as in cases such as this, medical evidence is indeed crucial because the bottomline is, an accused is being accused for causing death through acts of commission or omission. It follows therefore that the cause of such a death in the first place must be established beyond reasonable doubt. That is the reason why medical experts are normally called to shed light on the actual cause of death.

15. The facts obtaining in this case however are that the need for medical evidence was negated by the admission by the accused himself that he committed the act that led to the death of the deceased. When the accused was presented to this court for plea, he admitted the charge but added that he did not intend to kill. That perhaps informed the court's decision to enter a plea of not guilty. This court heard testimonies of all the five witnesses called by the prosecution but certainly the plea made by the accused weighed majorly in the decision by this court to place him on his defence. If the plea had been different, certainly the direction of the decision on whether there was a case to answer, would have been totally different.

16. When the accused person was placed on his defence he testified on oath and unequivocally admitted to killing the deceased herein. This prompted this court to have the charge read afresh again over to him in Kiswahili and he stated thus;

***"I have heard the charge being read to me. I accept that I killed."***

The accused appeared resolute in admitting that he killed the deceased. He explained what transpired on the fateful day and I find that his explanation largely fits the evidence tendered by PW2 (**Jane Makena**) and **Geoffrey Nyaga Mucee** (PW4) eye witnesses called to testify. The witnesses were in agreement that the accused went to the bar while carrying a panga and a walking stick all of which he was told to surrender at the entrance which he did. He explained that he was from working in his farm and that

explained why he had a panga on his hands. When trouble started inside the bar, the accused did not rush to get the panga he had left at the entrance which clearly shows that the fight that occurred was not premeditated but perhaps before I delve further on that aspect let me address the failure by the prosecution to avail medical evidence and whether that failure is fatal in this case particularly in regard to the element of *actus reus*.

17. As I observed in the ruling in the stage of whether there was a case to answer, I do not find given the circumstances of this case that failure to produce post mortem report was fatal to the prosecution case. The accused himself admitted that he stabbed and killed the deceased. The deceased died in his hands. My position was and is still informed by the decision in the cited case of **NDUNGU -VS- REPUBLIC** which was also referred in the Court of Appeal decision in **DORCAS JEBET KETTER & ANOR -VS- REPUBLIC [2013] eKLR**. The court noted that in some cases death can be established without medical. The court in quoting a decision in **REPUBLIC -VS- CHEYA (1973) EA 500** observed as follows:-

*" of course there are cases for example where the deceased was stabbed through the heart or where the head is crushed, where the cause of the death is so obvious that the absence of a post mortem report would not necessarily be fatal."*

The court however added that at times evidence of medical experts on effect of such obvious and grave injuries should be adduced as opinion of experts support the evidence as to the cause of death.

18. In this instant case, the prosecution failed to avail the evidence of the doctor who performed post mortem examination claiming that the doctor could not be traced. It is nevertheless my finding that with the admission by the accused person that he stabbed the deceased the result of which the deceased died, leaves no doubt in my mind that the element of *actus reus* has been proved beyond reasonable doubt notwithstanding the absence of post mortem report. It is my considered view that when an accused person admits committing an offence, the burden is discharged from the prosecution and a court properly directing its mind to the law and seeking to do justice cannot ignore such admission. The admission by the accused person that he stabbed the deceased with a knife, was to me a game changer in this case in so far as the element of *actus reus* is concerned. I find that the element has been proved beyond reasonable doubt by the prosecution.

#### 19. Mens rea

The accused person testified that the deceased person provoked him by demanding a drink from him and taking by force the drink he was taking when he declined to buy the drink. The prosecution has submitted that the cause of the fight was a woman or **JANE MAKENA (PW2)** in particular while this court has not found any evidence to lend credence that fact the evidence by the said **JANE MAKENA** was unclear on whether she knew either or both the deceased and the accused herein. She was also not forthright whether she witnessed the fight clearly because at one time she said she was seated at some distance away and the bar was crowded while on the other hand she stated that she saw the accused pull out a knife before stabbing the deceased person. It is difficult to tell therefore whether there was more than she revealed between her and either or both the accused and the deceased herein.

20. What came out clearly from the evidence of PW2, PW4 and the accused himself was that there was a quarrel between the accused and the deceased which quickly degenerated into a fight. The prosecution witnesses were all in agreement on the state of mind of both the accused and the deceased person. They were both drunk at the time. The accused person in his defence stated that he had taken 20 cups of "**Nguzo**" (which is a local brew commonly brewed illicitly). The accused person struck me from his demeanor in court to be an honest person which explains why he insisted despite the apparent discomfort of his counsel that he actually stabbed the deceased. He added that he accidentally did so as he swayed his hands (with one hand holding the knife) from side to side. It was his evidence that he snatched the knife from the deceased and was in the process of walking away when he was held by the waist by the deceased and that it was in the process of struggle that he stabbed the deceased albeit accidentally.

21. The prosecution has submitted that the stabbing was premeditated and urged me to invoke the

provisions of **Section 206** of the **Penal Code** in finding that the elements of *mens rea* had been established particularly given that there was a witness (PW1) who overheard the accused utter the following;

*"nimemaliza kasia"* while still holding a knife which was still dripping with blood.

However given the state of the mind of the accused person at the time I am unable to make a positive finding that the accused person really harboured ill intentions against the deceased person based on evidence of a single witness. This is because in the first place he was unarmed when he went to the bar and nothing prevented him from running to fetch his panga to cause serious harm to the deceased when the fight broke out.

Secondly, no evidence was placed before me that the accused and the deceased had earlier quarreled before prior to the date of the incident.

22. Having said that I am not persuaded that the accused acted out of self defence in stabbing the deceased and causing his death. Neither am I persuaded that he was too intoxicated not to know the consequences of his action but I am persuaded that the act was accidental and never intended as pleaded. This court finds that the accused person was being truthful and honest because really there was nothing preventing him from getting away with this charge by simply denying it. I, on the basis of his own defence find that he was provoked sufficiently enough because as he says he was already set to walk away after being prompted to do so by the Bar Manager but the deceased held tightly on his waist and as he struggled to get free he swayed his hands from side to side as he clearly demonstrated in court how at the hearing he was provoked and as provided under **Sections 207 and 208** of the **Penal Code** provocation is a defence to a charge of murder. This is the position held in the cited case of **ROBA GALMA WARIO -VS- REPUBLIC [2015] eKLR**.

23. The provision of **Section 207** of the **Penal Code** provides as follows:-

*"When a person unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined and before there is time for his passion to cool, he is guilty of manslaughter only."*

Although I do not find that the kind of provocation the accused received is strictly within the definition assigned to provocation under **Section 208** of the **Penal Code**, this court finds that the term provocation can be expanded to cover such instances where the passion is heightened through intoxication like was obviously in this case. The accused says the deceased took his drink by force and drank it without his consent and after the fight ensued, he drew a knife, which the accused quickly snatched and as he was getting away he was held behind by the deceased. That in my view amounted to provocation which offers the accused herein a defence and the basis by this court to find that while he is not guilty of the main charge of murder, he is certainly guilty of a lesser charge of manslaughter.

In the premises and for the reasons above this court finds that the accused person is not guilty of the charge of murder but I found him guilty of the lesser charge of manslaughter under contrary to **Section 202** as read with **Section 207** of the **Penal Code** and for that he is hereby convicted accordingly.

**Dated and delivered at Chuka this 22<sup>nd</sup> day of November, 2017.**

**R.K. LIMO**

**JUDGE**

22/11/2017

Judgment signed dated and delivered in open court in the presence of Mutani Advocate for the accused

and Ndombi for state.

**R.K. LIMO**

**JUDGE**

**22/11/2017**

**Ndombi:**

The accused person is a first offender with no previous criminal record.

**Mitigation:**

**Mutani:**

I pray that this court exercises leniency on the accused. He is a first offender. the accused is extremely remorseful. He is an honest person that is why he admitted the charge. He has been in remand for 3 years. I ask that that period being taken into account. I pray for a short custodial sentence. The accused is 35 years old. He had a wife who has since ran away.

**Court:**

This court has considered the mitigating circumstances advanced but the offence committed is a serious offence. The accused person ought to have exercised self control because his uncalled for action led to loss of life.

He is hereby sentenced to serve 7 years imprisonment. Right of appeal 14 days.

**R.K. LIMO**

**JUDGE**

**22/11/2017**