



## REPUBLIC OF KENYA

### IN THE HIGH COURT OF KENYA

#### AT NAIVASHA

#### CRIMINAL CASE (MURDER) NO. 24 OF 2016

REPUBLIC.....PROSECUTOR

-VERSUS-

KAMITI MBURU.....ACCUSED

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

1) The Accused is charged with Murder contrary to Section 203 as read with Section 204 of the Penal Code. The information states that on the 26<sup>th</sup> day of September, 2015 at Maiella Township in Naivasha Sub-County within Nakuru County, he murdered **Duncan Kamau Muchiri**. The Accused denied the charge and was represented by Mr. Marube.

2) The prosecution case was that the Accused and deceased were residents of Maiella. They were known to each other. On the night of 26<sup>th</sup> September 2015 the two men separately visited the bar christened “**Sinyora**” and operated at the local center by **Stephen Karanu (PW4)**. Seemingly the two left the bar by 9.00pm, the deceased going out first, followed by the Accused. In a matter of minutes the deceased and Accused were locked in combat on the street; the Accused who had pinned down the deceased demanding of the latter “**why do you harass me constantly?**”, or words to similar effect.

3) Presently, the deceased was heard to cry out in words to the effect “**Kamiti (accused) you have stabbed me!**” It appears that it took this cry for onlookers including **Samuel Ngure Kioi (PW2)** and **(PW4)** to intervene. The deceased succumbed within hours of the stab wound to the left abdomen. The police were called in and commenced investigations. Meanwhile, the Accused escaped from Maiella and was traced a year later in Dagoretti. He was arrested.

4) In his unsworn defence, the Accused stated that he was having a beer at **Sinyora** bar when the deceased, the local guitar entertainer came in. He requested patrons including the Accused to pay him some money so that he could play songs, but nobody obliged. The deceased grabbed the Accused’s beer bottle causing a commotion. The bar attendant intervened and ejected him from the bar. At about 10.30pm the Accused left the bar. The deceased who apparently skulked outside the bar in wait, grabbed him and drew a knife. A scuffle ensued and the two men fell down. Members of the public intervened. The Accused went home and then returned to his place of work at Dagoretti. He denied killing the deceased.

5) The court has considered the evidence on record and submissions. There can be no dispute that the Accused and deceased were at PW4’s bar on the material night; that the Accused drank beer; that the deceased left the bar before the Accused, and that eventually the two men were engaged in a fight outside the bar. The court must determine whether of malice aforethought the Accused stabbed the deceased, and thereby caused his death.

6) Both eye witnesses **PW2** and **PW4** gave similar accounts of the incident that occurred outside the bar between the Accused and deceased. According to these witnesses, the Accused had managed to overpower the deceased who had a knife, pinning him on the ground. That while the two men were so engaged in combat the deceased cried out that he had been stabbed by the Accused.

7) The stab injury was confirmed by **Dr. Ngulungu (PW3)** during post mortem to be the cause of death. Thus, it cannot be true as the Accused stated in his evidence, that he did not stab the deceased even though he confirmed that the deceased had been armed with a knife during the admitted scuffle. **PW2** and **PW4** confirmed too that the deceased was armed with a knife during the fight. The reason why he fled Maiella was the knowledge that he had stabbed the deceased, rather than routine work schedule in my opinion. After all, from the Accused’s evidence, the deceased had offended him earlier in the bar by grabbing his beer bottle and smashing it on the floor when the bar attendant, one **Wangechi** intervened.

8) Both **PW2** and **PW4** testified that the Accused while tussling with the deceased demanded to know why the deceased harassed him continually. It is a pity that the police did not record **Wangechi**’s statement. She would have been a valuable witness on the events in the bar that preceded the fight. As for **PW4** he denied that any quarrel occurred in the bar between the two men prior to the fight outside.

9) To my mind, that is quite unlikely given the time within which the fight erupted after the departure of the two men from the bar. I am, on the evidence available satisfied that the Accused stabbed the deceased during the fight outside **Sinyora** bar. However, the circumstances of the fight to my mind tend to negate any malice aforethought on the part of the Accused person.

10) The proven facts of this case compare quite well with those in the case of **Nzuki -Vs- Republic [1993] eKLR** which the defence has cited in support of its submissions. In Nzuki's case the Court of Appeal found that the prosecution had failed to establish malice aforethought on the part of the Appellant who, seemingly unprovoked, pulled the deceased outside a bar and stabbed him to death.

11) In allowing the appeal the court observed that:-

**“Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused:-**

**(i) The intention to cause death;**

**(ii) The intention to cause grievous bodily harm;**

**(iii) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts. It does not matter in such circumstances whether the accused desires those consequences to ensue or not and in none of these cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed. The mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder.(see **Hyman -Vs- Director of Public Prosecutions, [1975] AC 55**”. (emphasis added)**

12) **The Court of Appeal substituted the conviction for Murder with one for Manslaughter in Nzuki's case after stating that:**

**“Other than observing that the appellant viciously stabbed the deceased and in so doing intended to kill or cause him grievous harm, the trial court did not direct itself that the onus of proof of that necessary intent was throughout on the prosecution and the same had been discharged to its satisfaction in view of the circumstances under which the offence was committed. Having not done so, we are uncertain whether malice aforethought was proved against the appellant beyond any reasonable doubt. In the absence of proof of malice aforethought to the required standard, the appellant's conviction for the offence of murder is unsustainable. His killing of the deceased amounted only to manslaughter”.**

13) Similarly in this case, I am of the considered view that the ingredient of malice aforethought has not been proved to the required standard. In the proven circumstances of this case, I do find that the prosecution has established the offence of Manslaughter Contrary to Section 202 as read with Section 205 of the Penal Code against the Accused. He is accordingly convicted for such offence.

**Delivered and signed in Naivasha this 20<sup>th</sup> day of December, 2017.**

In the presence of:-

Mr. Mutinda for the DPP

Mr. Mburu for Mr. Marube for the Accused

Accused - present

Court Assistant – Barasa

**C. MEOLI**

**JUDGE**