



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL CASE NO. 33 OF 2011

REPUBLIC.....PROSECUTOR

VERSUS

BONIFACE IMBOVA BUTIA.....ACCUSED

JUDGMENT

Bonface Imbova Butia is charged with the offence of murder contrary to Section 203 as read with Section 204 of the penal code. The particulars of the offence are that on the 8th day of May, 2011 at Soy Trading Center within Uasin Gishu of the Rift Valley Province murdered James Kioko.

EVIDENCE

The background to the prosecution's case is that on the 7th day of May, 2011 between 7.00 and 8.00 p.m. the accused together with the deceased and PW3 Loice Thuku were at Soy market where they were drinking alcohol at Mavericks Bar. Both the deceased and the accused were close friends whereas the deceased was a cousin to PW3. As they sat together the accused offered to buy the deceased and PW3 drinks. Incidentally, the accused had developed an interest in PW3. When they left the bar he wanted to go with her to have sex. PW3 unfortunately was not interested in the accused. While the three of them were walking home the accused started pulling PW3 so that he could go with her to his house. PW3 had stepped out of the bar ahead of the accused and the deceased. He was followed by the deceased while the accused ran behind them but later caught up with them. Being angry that he had bought the deceased and PW3 alcohol and PW3 having refused to go home with him, he asked both of them to refund the money he had used in buying them alcohol and food. In anger he pulled PW3 and felled her to the ground. The deceased intervened and PW3 fled. PW3 left the two wrestling. She rushed to a neighbouring home belonging to one Christopher Kibet to whom she reported what had happened. Christopher and other neighbours rushed to the scene but by this time the accused had left and only the deceased was lying down. He was bleeding from the nose. They tried to raise him up and talk to him but he could not respond. PW3 rushed to a nearby petrol station where she found some guards who helped to carry the deceased home on a bicycle. Incidentally, after the guards arrived at the scene PW3 went home. Unfortunately, as the guards (watchmen) were preparing to take the deceased to hospital he passed on. PW3 thereafter reported the matter to Soy Police Station on the following day (8th May 2011). The police then sought the accused and he was arrested and charged accordingly.

PW1, James Kipsang was the owner of Maveras Bar and he recalled that on 7th May, 2011, at about 8.50 p.m. the accused, deceased and PW3 were in his bar where they drank alcohol. He personally bought the accused some alcoholic drink. At about 9.50 p.m. the three left the bar to an unknown place. He received information the following morning at 9.00 a.m. that the deceased had died. On the same date he was called by a police officer who requested him to identify one of the men who were drinking in the bar

the previous night. He accompanied the police to Lukuyani bus stage where the accused was arrested. PW1 was well acquainted with the accused who was a boda boda rider.

PW2, Police Constable Wilfren Nyaisanga testified as one of the arresting officers. He recalled that on 8th May, 2011 PW3 reported to him and another officer that the deceased had died. According to him, the reporter who was PW3 was in the company of both the accused and the deceased the previous night. As they trio went home the accused insisted on going home with PW3 who declined the offer. That is when a fight ensued as a result of which the deceased and the accused fought but the deceased sustained fatal injuries. The accused left the deceased at the scene of the fight. PW3 then sought help from some watchmen to take the deceased to hospital. Unfortunately, he died before he could be treated. PW2 was accompanied by other 2 police officers namely PC Baluwe and PC Makeo as well as the area chief and PW1. They arrested him at Lukuyani Trading Centre.

PW3, Loice Thuku corroborated the evidence of PW1 and PW2. Her further evidence was that herself and the deceased arrived at Mavericks' bar together. The accused then invited the deceased for a drink. As at that time PW3 was not known to the accused. But the deceased referred to him as Bonnie. The accused offered to buy them supper. When time came to go home from the bar the deceased again invited them to take some alcoholic drink. As they drunk the accused requested the deceased to allow him to go home with her. She declined and the deceased informed the accused as much. After they had finished their drink, PW3 left the bar followed by the deceased and later the accused who caught up with them on the road. Her evidence was that the accused insisted that she and the deceased refunds him the money he had spent in buying them supper and alcohol. He also grabbed her in an attempt to force her to go home with him. That is when the deceased intervened and a fight ensued which resulted in the death of the deceased.

PW4, Daniel Kipkoech Chepsirwo testified that on 8th May, 2011 he was woken up by neighbours namely Christopher Kibet and Alex Agamera. Christopher informed him that there was a man on the road who was screaming. They proceeded to the scene where they found the deceased lying on the ground and bleeding from the nose. PW3 who was also at the scene narrated to them what had taken place. Himself and others who had also come to the scene escorted PW3 home leaving the deceased with Alex Agamera. On the following day he learnt from Christopher that the deceased had died.

PW5, Dr. Paul Kipkorir Rono of Moi Teaching & Referral Hospital produced the postmortem form on behalf of Dr. Nalianya a Pathologist who conducted the postmortem. The same was done on 16th May, 2011 at the Moi Teaching & Referral Hospital mortuary in the presence of Samson Charo Musembi and James Mutua Nzuii. According to the postmortem form the cause of the death of the deceased was severe hemorrhage due to assault.

PW6, Chief Inspector Patrick Lumumba was the then Acting OCS of Soy Police Station. He partly investigated the matter and in his testimony summed up the evidence of all the prosecution witnesses.

At the close of the prosecutions' case the accused was put on his defence. He gave a sworn statement in which he denied committing the offence. He admitted that on the night of 7th May, 2011 he was at Mavericks' Bar together with the deceased where both drunk alcohol. He also conceded that he bought the deceased some alcohol as he was his close friend. He however stated that he did not see PW3 in the bar. He stated that he left the bar at 9.20 p.m. after a customer called him to take him to Turbo where he spent the night. On the following day, he left for Soy with passengers. While at Soy at about 8.00 a.m. he was confronted by 3 police officers who asked him where a Mr. Brown was. He identified a man he knew by the name Bonnie who resided at Malaba. He took the police officers to malaba where the man was arrested. The police were also accompanied by a lady. The lady told the police that they had arrested the wrong person and she pointed to them another man called Bajuka. Bonny was released. They then rode to a place called Sheiwa where one Tanda was arrested. As they headed back to Soy the lady pointed to another man who was arrested and Tanda was released. The police also released him (accused). At about 3.00 p.m. he was confronted by the same lady who had accompanied the police earlier in the day together with the same police officers. At the time he was in company of two other colleagues who were also boda boda riders. They asked them who among them had visited the bar the previous night. The accused owned

up and he was arrested. He was locked up at Soy Police Station and on 10th May, 2011 escorted to Eldoret Police Station where he remained until he was charged.

EVALUTION OF EVIDENCE

There is no doubt as to the fact of the death of the deceased person. On record is a post mortem form which was produced by PW5 which also clears the doubt as to what caused the death of the deceased. What the court should grapple with is the question of whether it is the accused who killed the deceased. All the evidence summed up together clears doubt that prior to the death of the deceased the accused and the deceased had had a fight. At the time of the fight PW3 was present and was therefore an eye witness; her evidence is therefore direct as incriminating the accused. Although the accused distanced himself from the fight, it is apparent that when the fight between himself and the deceased persisted, PW3 rushed from the scene to go and call neighbours to come and rescue the deceased. As fate had it, when PW3 and the neighbours returned to the scene the accused had already fled leaving the deceased helpless on the ground. He was then profusely bleeding from the nose. It is also factual that one of the neighbours being PW4 was woken up by a Mr. Christopher Kibet and told that there was a man screaming on the road. Incidentally, PW4 was one of the neighbours from whom PW3 had sought help. As such, it is only correct and factual to state that the deceased could only have been screaming owing to the fighting that was going on between himself and the accused. And although it was at night, the accused had been earlier drinking alcohol with PW3 and the deceased. He had confronted PW3 and the deceased demanding for a refund of the costs he had incurred in entertaining them. He attacked the deceased on realization that he had lost both his money and the woman (PW3) who he wanted to sleep with. His identification was therefore not a mistake. Coupled with the results of the post-mortem which showed that the deceased died from assault, was sufficiently corroborative of PW3's evidence that the deceased died from the fight. I have no doubt in my mind then that the deceased sustained the fatal injuries as a result of the assault meted against him by the accused. What then remains for this court to determine is whether the accused was possessed of malice aforethought when he fatally injured the deceased.

From the evidence of PW3 it is clear that immediately the accused reached where she and the deceased were, after demanding for money he pulled her apparently with the intention to go with her. That is when the deceased intervened as he wanted to protect his cousin who did not want to sleep with a stranger. A struggle which culminated into a fight ensued. Further, according to PW3, the deceased was too drunk and was over powered by the accused. That is how the accused wrestled him to the ground leaving him for the dead. In as much as the confrontation finally led to the death of the deceased, I am unable to make a conclusion that the accused intended to kill the deceased. In my view, he was angry that he had spent money with the hope that it would be returned with favour by the deceased allowing him to sleep with his cousin. Furthermore, both the accused and the deceased having drunk alcohol for a substantial part of the night were not in a position to make rational decisions on how to sort out their differences. In view thereof, although the deceased died, my view is that the accused in those circumstances did not intend to kill him. I am therefore unable to fathom that he was possessed of malice aforethought which is a key ingredient for the offence of murder. Although the accused denied the offence and distanced himself from the company of both the deceased and PW3, there is no doubt that it was as a result of his fight with the deceased that the deceased succumbed to death. Furthermore, he did not call any evidence to challenge the strong prosecution evidence that he was culpable. His defence failed to ouster the water tight case for the prosecution that he contributed to the death of the deceased. It is only that it appears that he was stronger than the deceased and the deceased's strength was weakened by alcohol that he overpowered him(deceased). He must also have fled the scene on realization that he had badly injured the deceased.

Finally, let me comment on the arrest of the accused. According to his defence he was placed in police custody for three weeks. He alluded that he was charged on 8th June, 2011. The record however shows that he was charged on 17th May 2011. Having been arrested on 7th May, 2011, means that he was incarcerated in police custody for about 10 days which, anyway, was beyond the 24 hours provided by the Constitution. Although the issue has been raised too late in the day, the accused is at liberty if he so wishes seek redress against the person responsible for his incarceration at a different forum.

In the end, I find that the prosecution did not discharge their burden in proving their case for the offence

of murder beyond all reasonable doubt but have proved beyond all reasonable doubt that the accused without malice aforethought caused the death of the deceased. I find the accused guilty of the offence of manslaughter under Section 202 of the Penal Code and I convict him accordingly. It is so ordered.

DATED AND DELIVERED at ELDORET this 15th Day of April, 2016.

G. W. NGENYE MACHARIA

JUDGE

DELIVERED IN THE PRESENCE:-

- 1. Mr. Mitei for the Accused**
- 2. M/s Mukua for the State**