



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 36 OF 2011

REPUBLICPROSECUTOR

VERSUS

ZACHARY GITONGA KIGUU ACCUSED

JUDGMENT

Zachary Gitonga Kiguu is charged with the offence of murder contrary to **Section 203 as read with Section 204 of the Penal Code, CAP 63, Laws of Kenya**. The particulars of the charge are that on 19/6/2011 at Kamarandi Sub Location in Tharaka District, murdered **Njeru Nyaga**. The case proceeded to full hearing with the prosecution calling a total of 6 witnesses. When called upon to defend himself, accused gave a sworn testimony. The prosecution was led by Mr. Musyoka and Mr. Muchochi while the defence was led by Ms. Nelima.

PW1 Jospeter Mbiti, a resident of Kiriani recalled that on 19/6/2011, he had brewed local liquor and people were at his home drinking it. They started drinking about 3.00 p.m. till about 5.00 p.m.; that accused was amongst the people present and so was the deceased, Daniel Njeru; that accused stood up from where he was seated and went where Joseph Kirimi, the deceased's son was seated and beat him twice and the said Kirimi left; that accused then went to ask deceased whether he had relayed the message he had asked him to tell the son; that accused removed his shirt and hit Njeru with it and Njeru stood up and wanted to leave because he said that their clans (of accused and deceased) never fight but accused saw a knife in the deceased's trouser, took it and stabbed the deceased with it; that Njeru looked back and told accused that he had killed him and he fell; that accused ran off with the knife. PW1 denied knowing the message that deceased was supposed to deliver to Kirimi.

PW2 Paul Mwiti of Kamarandu village recalled that he was taking liquor at the home of Mbiti (PW1) with other people who included PW1, accused, Daniel Njeru (deceased) and Joseph Kirimi, the deceased's son; that accused asked Daniel Njeru whether he had warned his son as accused had sent him to; that accused went and kicked Kirimi twice and then turned to Daniel Njeru (deceased), and hit him with fists; that Daniel said that their clans never fight and stood up to leave but accused followed Daniel, took a knife from Daniel and stabbed him on the neck; that Daniel asked accused why he was killing him, fell and started bleeding; that when Daniel fell, people ran off including accused, with the knife. PW2 is one of those who remained and called the Chief who in turn called the police.

PW3 Sammy Gitonga Kioji also testified that he was taking alcohol with accused, deceased and others at PW1's home when accused stood and went where Kirimi was and told him that he had warned him not to come to the village; that accused then went to ask Njeru (deceased) whether he had warned Kirimi and he said he had done so; that accused went and kicked and slapped Kirimi, then went where Njeru was, hit

Njeru with his T-shirt which he had removed; that Njeru stood up to leave as he said their clans do not fight; that accused took a knife which was on Njeru's trouser belt and stabbed him and Njeru asked why accused had killed him and accused ran off with the knife.

PW4 Josphat Nyagah, is the deceased's brother and on 28/6/2011, he identified the deceased's body before post mortem was done by **Dr. Nicholas Nkonge (PW5)**, of Chucka District Hospital who found a penetrating wound that severed left subclavian artery; that the cause of death was cardio pulmonary arrest due to severe blood loss secondary to severed left subclavian artery.

IP Peter Mukisi (PW6), then of Marimanti Police Station learnt of the murder and proceeded to the scene at the home of Peter Mbiti where they found a body in a pool of blood; that on 7/7/2011, PW6 received a call from OCS, Muranga that he had arrested accused and on 8/7/2011 he sent an officer to collect the accused and took him to Marimanti Police Station.

In his sworn testimony, accused said that his grandmother was a sister to the deceased. He recalled that on the fateful day at about 5.00 p.m., they were taking alcohol at Mbiti's (PW1) home with many other people. He had started drinking at 2.30 p.m. and at 5.00 p.m., he stood up to leave but Njeru (deceased) asked why he was in a hurry but instead Kirimi, deceased's son replied that it was not because accused was in a hurry but because his wife had sat on him and that he might be beaten by the wife; that Kirimi asked if the wife was a Kikuyu prostitute and he (accused) told him that even if she was a prostitute, she was his wife; that Kirimi poured alcohol on his face and he removed his shirt to wipe it; that Kirimi attacked him and a fight broke out; that Njeru then stood from where he had been sitting and slapped him and he hit him with the shirt; that deceased got hold of accused and removed a knife; they started struggling with deceased so that deceased could not stab him, they fell and it is then he heard deceased say that he had been stabbed. Accused got up and ran. He denied having had any dispute with deceased and that he was drunk when it all happened. He denied having had any dispute with any of the witnesses who testified.

After close of the defence case, Ms. Nelima, Learned Counsel for the accused submitted that the witnesses, PW1-3 had drunk from 3.00 p.m. upto 5.00 p.m. when the incident occurred and that they were therefore drunk; that there were contradictions as to what happened at the scene because of the drunkenness; she further submitted that malice aforethought has not been proved as there was a struggle between deceased and accused; that the knife which was used to stab deceased belonged to deceased and that accused was drunk; that malice aforethought cannot be attributed to accused. Counsel relied on the decisions of *Nzuki v Rep (1963) KLR 171* where the court reduced a charge of murder to manslaughter where one had been drinking before the offence. In *Mugwika v Rep (1993) KLR 159* the defence of intoxication was raised and the court held that malice aforethought was not proved because the mind had been influenced by alcohol.

On the other hand Mr. Mulochi, Learned Counsel for the State submitted that the prosecution had proved its case to the required standard; that PW1, 2 and 3 saw the accused stab the deceased; that deceased was leaving the scene to avoid a conflict but accused followed him and that accused knew exactly what he was doing because he ran off on hearing the deceased say he had been stabbed. He described the defence as a sham.

It a murder charge, it is the duty of the prosecution to prove the following ingredients beyond reasonable doubt:

1. **The death of deceased;**
2. **That accused caused the death through an unlawful act or omission;**
3. **That accused had malice aforethought.**

The post mortem was performed on the body of the deceased by **Dr. Nkonge, PW5**. He found the cause of death to be cardio pulmonary arrest due to severe blood loss resulting from severing of sub clavian

artery. PW4 who attended the post mortem observed that deceased was injured on the left side of the neck. PW2 and 3 both said that accused stabbed deceased on the neck. PW2 and 3's evidence tallies with the findings of the Doctor. The accused has admitted that the deceased met his death at Mbiti's home after an altercation with him. The death is not in issue.

It is not in dispute that this offence took place at a beer drinking den. It is not denied. Many people were present who included PW1 to 3, accused, deceased and one Joseph Kirimi, the son of deceased. The incident took place during day time about 5.00 p.m. It is also not disputed that those present at the scene are people who knew each other very well and in fact, some were relatives. The accused said that deceased was his relative, a brother to his grandmother; PW3 said that the accused is his in-law and deceased was his father. Apart from the accused claiming to have sent the deceased to his son Joseph Kirimi to warn him, none of the witnesses knew of any other dispute or grudge between the accused and deceased. Infact, in his defence, accused denied having any grudge with any of the witnesses.

I have considered all the evidence on record. PW1, PW2 and 3's evidence was consistent in all material particulars save for some minor discrepancies. All the three told the court that it all started with the accused asking the deceased if he had warned his son Joseph Kirimi because the accused had sent him to do so. All the three witnesses also told the court that accused went to hit, kick or slap Kirimi before he turned to the deceased. All the three witnesses also told the court that in fact, the deceased stood up to leave the place arguing that his clan could not fight with that of the accused before accused snatched deceased's knife and used it to stab deceased. All these details in the testimonies of the three as to what transpired at the scene before deceased was stabbed cannot be trumped up. I am satisfied that accused was the aggressor.

According to the witnesses, the knife that caused the fatal injury was the deceased's knife. The accused snatched from the deceased's trouser when he stood to leave. All the witnesses denied that there was any struggle or fight between the accused and deceased or anybody else. Indeed, there were no other injuries noted on the deceased. I find the testimonies of the prosecution witnesses consistent in all material particulars and very convincing and I have no doubt that they told the truth. The accused did confirm that he knew of no reason why the witnesses would make up the charge against him. If they had, at least the cross examination should have revealed it. Accused's defence that deceased and his son attacked him came as an afterthought and is not believable in view of the unshaken testimony of PW1, 2 and 3. I am satisfied beyond any doubt that it is the accused who stabbed the deceased after he snatched a knife from deceased.

Whether the prosecution has proved malice aforethought: Malice is defined under **Section 206 of PC** as an intention to do grievous harm or kill. In his defence, the accused claimed to have been drunk because he had drunk from about 2.30 p.m. All the three prosecution witnesses PW1-3, did confirm that they were taking alcohol when this incident occurred. For one to avail himself the defence of intoxication, he must bring himself under **Section 13 (2) (3) and (4) of the PC** because of its narrow application. The defence of intoxication cannot avail **under Section 13 (2) (a)** because the accused has not told the court that the intoxication had been caused without his consent. He had been drinking voluntarily. **Under Section 13 (2) (b)** the accused has to demonstrate that he was so drunk that he was driven to temporary insanity or that he did not know what he was doing or that it was wrong. In the case of **Chamingwa v Rep EACA CR 450/1055** the East African Court of Appeal said as follows:

“It is of course correct that if the accused sets up a defence of insanity by reason of intoxication, the burden of establishing the defence rests upon him in that he must at least demonstrate the probability of what he seeks to prove. But if the plea is merely that the accused was by reason of intoxication incapable of forming the specific intention required to constitute the offence charged, it is a misdirection if the trial court vary the onus of establishing this upon the accused”.

Again in **Kupele ole Kitaiga v Rep (2009) KLR CRC 26/2007** the court said:

“A clear message must also go out to these of the appellant's ilk who deliberately induce

drunkenness as a cover up for criminal acts. Unless a plea of intoxication accords with the provisions of Section 13 of the PC, it will not avail an accused and does not avail the appellant in this particular case.”

The defence Counsel relied on the decision of Mugwika (supra) where the Court of appeal held:

“We have considered the evidence and find that taking into account all the circumstances of the case before the trial judge and considering what took place where the deceased and the appellant were drinking, it seems that the appellant’s mind was affected by drink as to negative the inference of intentional killing. The Judge omitted to address his mind on this and equally failed to draw the attention of the assessors to the legal consequences of drunkenness.”

In the instant case, the accused has stated in detail what supposedly took place before the death occurred but I have not believed him. I prefer the testimony of the prosecution witnesses. The accused’s account of the events of the day is not that of a person who did not know what was happening. He was quite alert. There is evidence that the accused had sent the deceased to warn his son Joseph Kirimi about something which the witnesses did not know. It seems that that the accused had some score to settle with deceased’s son. On the other hand, it is on record that these people had been drinking from 3.00 p.m. to about 5.00 p.m. when the offence occurred. Even though no evidence was led as to how much liquor the accused had consumed, it is possible that the consumption of alcohol may have influenced his mind and affected his capacity to control himself which led to commission of the offence.

For all the above reasons, I find that malice aforethought was not proved. I will find that accused may have committed the offence under the influence of alcohol. The offence of murder is not proved. Instead, I will find accused guilty of the offence of manslaughter contrary to **Section 202 as read with Section 205 of the Penal Code**. I convict him accordingly.

DATED, SIGNED AND DELIVERED THIS 17TH DAY OF MAY, 2016.

R.P.V. WENDOH

JUDGE

17/5/2016

PRESENT

Mr. Mulochi for State

Ms. Thibaru Holding Brief for Ms. Nelima for Accused

Peninah/Ibrahim, Court Assistants

Present, Accused