



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL CASE NO. 44 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

MOKI MASINGA.....ACCUSED

J U D G M E N T

1. **Moki Masinga**, the Accused, 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**. Particulars of the offence are that on the **8th** day of **September, 2013** at **Itiko Village, Itiko Sub-location, Mutito Location, Mutito District** within **Kitui County** murdered **Kithiki Munyitya** (deceased).

2. Facts as presented by the Prosecution are that the Accused and Deceased were employed by PW3, **Michael Nyamae** and they resided at his place of residence. On the **8th** day of **September, 2013** they were off duty therefore went on a drinking spree at the local market. They returned home while drunk. They had an altercation prior to retiring to their respective houses. PW1, **Triza Mbithe Michael** and PW2, **Anita Mwendu Nyamae** who were present were ordered by the Accused to lock themselves up in the house. They complied but rung PW3 whom they informed what was transpiring. He went home to find the Deceased lying in a pool of blood. The matter was reported to the police who arrested the Accused. An autopsy was conducted on the body of the Deceased by **Dr. Christopher Wahinya** who formed an opinion that the cause of death was severe head injury, and a depressed skull fracture.

3. When put on his defence the Accused who gave sworn evidence explained that he left their place of work in the morning with the Deceased. They went to a nearby club where they drank alcohol from **4.00 p.m.** until **6.00 p.m.** The Deceased became chaotic, fought with another patron at the club and they were ordered to leave. On arrival at home they found PW1 and PW2. Between the two (2) was a stool, chair and a jug. They sat on the furniture. PW1 stood and entered the house. They (Accused and Deceased) stood and started arguing. The Deceased hit him and he retaliated. They fought, having been overpowered by the Deceased he hit him with a stool and ran away. He slept in the bush. He went elsewhere and secured a job. He worked until he was arrested by members of the public. He denied having intended to kill the Deceased.

4. Counsel for the Accused did not make any submissions at the close of the defence case, he chose to remain silent.

5. To prove the instant case the Prosecution had a duty to prove:

1. That the Accused committed an unlawful act/omission that resulted into the death of the Deceased.

2. That the act/omission was done with malice aforethought.

6. The Accused admitting having committed the act that resulted into the death of the Deceased denied having acted with malice aforethought.

Malice aforethought is established if evidence adduced proves any one 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) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.” (See Section 206 of the Penal Code).

It was established that the Accused person was under the influence of alcohol when the offence was committed. Intoxication as a defence is provided for by **Section 13** of the **Penal Code** which states:

“(1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.

(2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and—

(a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or

(b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.

(3) Where the defence under subsection (2) is established, then in a case falling under paragraph (a) thereof the accused shall be discharged, and in a case falling under paragraph (b) the provisions of this Code and of the Criminal Procedure Code (Cap. 75) relating to insanity shall apply.

(4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.

(5) For the purpose of this section, “intoxication” includes a state produced by narcotics or drugs.”

7. From the above, it is apparent that intoxication may raise a doubt to a criminal intent (mens rea) that is integral in committing the offence of murder. The Accused gave an account of what transpired from the time they left the bar upto when he committed the act that resulted into the death of the Deceased. Denying that he had the intent to kill the Deceased he said he went into hiding because he feared the Deceased, suggesting that at the point of leaving his employer’s homestead he had no knowledge that the Deceased had died. What was not suggested was the insinuation that he may have been deprived of his senses. His sanity at the point of hitting the Deceased was not in question.

8. According to eye witnesses a struggle ensued between the Accused and the Deceased. PW1 heard the Accused alleging that the Deceased had impregnated his girlfriend. This would imply that the Accused was provoked by the action of the Deceased. Provocation is defined in **Section 208** of the **Penal Code** as:

“(1) The term “provocation” means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of selfcontrol and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.

(2) When such an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any such relation as aforesaid, the former is said to give to the latter provocation for an assault. (3) A lawful act is not provocation to any person for an assault.

(4) An act which a person does in consequence of incitement given by another person in order to induce him to do the act and thereby to furnish an excuse for committing an assault is not provocation to that other person for an assault.

(5) An arrest which is unlawful is not necessarily provocation for an assault, but it may be evidence of provocation to a person who knows of the illegality.”

9. The Accused and Deceased fought as a result of a wrongful act that provoked the Accused therefore the charge of murder cannot stand. He is guilty of **Manslaughter**. In the result, I reduce the charge of **Murder** to **Manslaughter** and I convict the Accused of **Manslaughter** contrary to **Section 202** as read with **Section 205** of the **Penal Code**.

10. It is so ordered.

Dated, Signed and Delivered at Kitui this 18th day of August, 2016.

L. N. MUTENDE

JUDGE