



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIVASHA
CRIMINAL CASE (MURDER) NO. 44 OF 2015

REPUBLIC.....PROSECUTOR

-VERSUS-

JORAM KASURA.....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. In that on the 4th day of July, 2015 at Kisiriri area in Narok North Sub-County within Narok County, he murdered **Francis Waweru**. The Accused denied the charge and was represented by Mr. Kamwaro.

2. The prosecution case was as follows. The deceased whose local nickname was “*Karanga*” or “*Karanga Chapo*” lived at Kisiriri Narok. Although his home of origin was at Kisiriri he had been accommodated by the Accused, a friend residing near the trading centre. On the material evening, the deceased and the Accused were seen together close to the trading centre by **Peter Thiong’o** (PW3) a nephew of the deceased. They were involved in a tussle as the Accused assaulted the deceased with a stick, the former demanding a radio from the latter. Presently, the Accused pushed the deceased on a bench and struck him on the head. The Accused’s wife whose name was given as **Joyce** intervened and the two men then left together towards the Accused’s house.

3. On the next morning however the deceased was found lying in an open area behind Kisiriri centre with blood oozing from the mouth and nose. Though still alive he could not speak. Relatives and the local chief **Johnson Ole Tada** (PW6) were notified. The deceased was taken to Narok Hospital and later referred to Kenyatta National Hospital where he died after 9 days.

4. The Accused had already been arrested and charged with assault. Post mortem results revealed that death was caused by severe head injuries and bleeding over the brain. The Accused was then charged with murder.

5. When placed on his defence, the Accused gave a sworn statement, and called two witnesses, his minor son **Leshau Kasura** (DW1), his wife **Joyce Kasura** (DW2) and **Sameri Waraka Sameri** (DW3) a resident of Kisiriri. The defence case was that the Accused resided at Kisiriri and that the deceased was a neighbor and friend and to him. At the material time the deceased was accommodated at the Accused’s home. The Accused’s wife operated a shop at the trading centre. She ordinarily slept there to guard the shop while the Accused stayed at their home, some 200 metres away.

6. On the material date in the morning, the Accused was interrupted by his son **DW1** while at work. Because **DW1** complained of illness, the Accused took him to Enaibelbel Hospital, but left the deceased with the key to his home so that he could gain access thereto. On returning, early in the night, he left his

son at the family shop with **DW2** and proceeded home, where he found the deceased, seated. He was drunk.

7. Because his only radio was usually at the shop, the Accused asked to use the deceased's small radio. It was then that the deceased discovered he had left it at the centre. He left for the centre swearing to get it back but he never returned. The Accused was subsequently confronted by **PW6** and informed that he was a suspect in the matter involving the assault on the deceased. He denied assaulting the deceased and said he had no reason to do so as he had assisted the deceased with accommodation.

8. There is no dispute that the Accused and the deceased were friends and that they lived at Kisiriri. The Accused admitted that he hosted the deceased at his home in the material period. And that early on the night of 4th July 2015 the deceased was with the Accused but the question is where and what happened. It is admitted the deceased was drunk on the fateful night. There is no dispute that on the next day, the deceased was found lying at an open place at the trading centre. He had sustained injuries to which he succumbed while undergoing treatment. The cause of death is not in dispute.

9. The court must determine whether the Accused with malice aforethought inflicted the fatal injuries on the deceased. The sole prosecution eye witness **PW3** testified that the Accused assaulted the deceased with a stick on the material night. The witness said that he first heard a bang against the "mabati" wall of the shop and on going outside found the Accused assaulting the deceased. He was demanding a radio from the deceased. **PW3** said the Accused's wife **Joyce** (**DW2**) intervened.

10. **PW3's** evidence suggests that the assault occurred at the shopping centre close to his mother's shop which is in the same location as the shop admittedly run by **DW2**. **PW4** while admitting that she never got out of the shop where she had been with **PW3** before he got out, confirmed what **PW3** told the court namely, that the wife of the Accused (**DW2**) could be heard urging the Accused not to assault the deceased 'further' over "the radio".

11. **PW3** and **PW4** were not shaken during cross-examination. In his submissions, Mr. Kamwaro challenges the identification evidence by **PW3** citing *inter alia* the cases of **Wamunga -Vs- Republic [1989] KLR 424** and **Maitanyi -Vs- Republic [1986] KLR 198** as cited in **Joseph Munyoki Kimatu - Vs- Republic [2014] eKLR**. In the latter case, he quoted the passage of decision of the Court of Appeal to the effect that:

"(1) Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the condition favouring a correct identification were difficult.

(2) When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light, available conditions and whether the witness was able to make a true impression in description.

(3) The Court must warn itself of the danger of relying on the evidence of a single identification witness. It is not enough for the Court to warn itself after making the decision. It must do so when the evidence is being considered and before the decisions is made.

(4) Failure to undertake an inquiry of correct testing is an error of law and such evidence cannot safely support a conviction."

12. **PW3** told the court that he knew the Accused, **DW2** and the deceased well. Thus it was a case of recognition. While it is true that the court must consider with care even evidence of recognition the court stated in **Anjononi -Vs- Republic [1980] KLR 59:-**

".....recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because, it depends upon the personal knowledge of the assailants

in some form or other”.

13. **PW3** said it was dark, but not too dark and that there was moonlight. Besides drawing close to the scene of the scuffle he said he heard the wife of the Accused (**DW2**) state in an attempt to restrain the Accused that:

“Joram, do not assault Karanga further”

And that after the assault, the two men headed towards the home of the Accused. The shop of **PW3**'s mother where **PW4** remained during the incident and that of **DW2** were admittedly close. **PW4** who was manning the former shop and remained in the shop stated that she heard **DW2** plead with the Accused saying:

“Joram do not beat Karanga any more.”

14. Concerning identification by voice , the Court of Appeal stated in **Choge –Vs- Republic [1955] IKLR** as follows:-

“Evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances carry as much weight as visual identification. In receiving such evidence, care would be necessary to ensure it was the accused’s voice, that the witness was familiar with it and recognised it and that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who said it.”

15. **PW3** said that the Accused was both a neighbor and customer and he had on several occasions spoken to him. It is believable that **PW4** by virtue of operating a shop close to **DW2** knew her voice well and recognised it when she spoke to the Accused, addressing him by the name **“Joram”**. The trading centre was seemingly a small place where most of the witnesses knew each other. The fact that there was sufficient light and opportunity for **PW3** and **4** to appreciate what was going on at the trading centre is also confirmed by **DW3** who admitted that he saw the deceased at the centre while **DW3** was at the shop of **DW2**. And that this was after the Accused had arrived **“from hospital”** which would have been at about 7.00 – 7.30pm. He also claimed that the deceased was dancing at the centre at the time.

16. Taking the entire evidence on this aspect, it seems to me that **PW3** and **PW4** were well placed to identify the Accused and witness what was going on at the time. Further the Accused person, when confronted by **PW6** asserted that he had **“threatened”** the deceased concerning a radio. The fact that this matter was not in **PW6**'s statement does not render it unbelievable as a police statement is only a summary of the evidence of a witness. Besides **PW3** also mentioned the demand of the radio as having been made by the Accused while assaulting the deceased.

17. In his defence, the Accused, though giving the question a twist as to place and circumstances admitted that the matter of a radio was discussed between him and the deceased. A conversation between him and **PW6** concerning the murder was admitted by the Accused in his statement. All the prosecution witnesses agreed that the Accused and the deceased were good friends. On their part the prosecution witnesses had no grudge or differences with the Accused. It is difficult to understand why they would swear false testimony against him.

18. This is true of **PW3** and **PW4** even if they were related to the deceased. It came out in evidence that the deceased was a habitual drunkard whose family appeared to have given up on. Indeed **PW4** seems to have reacted with indifference when she heard the words spoken by **DW2**. She did not go out to inquire. As for the deceased's sister **PW2**, she did not think much of **PW3**'s subsequent report that the deceased had been assaulted by the Accused.

19. I have reviewed the defence offered by the Accused. While the burden of proof always lies on the prosecution, the defence tendered raised many questions as to its credibility. It appeared to me that the

defence was crafted solely to create the impression that the deceased wandered away in a drunken state at night and met a mysterious death and was not assaulted by the Accused. The last person seen with the deceased alive and walking on the material night was the Accused. This according to **PW3** was after the blow to the head, consistent with the autopsy report.

20. Although the Accused's statement and the evidence of **DW2** suggests that the Accused did not meet the deceased at the trading centre before proceeding home, his witness (**DW3**) stated in cross-examination that:

“Deceased was dancing at centre then even when the Accused arrived” (from hospital)

The Accused stated in his evidence that on arrival he took his son to **DW2's** shop before proceeding home alone.

21. **DW2** said that deceased had been at the centre much earlier **“in day time”** and she did not see him in the evening. That means that when she further asserts that she heard him complain about his missing radio, it was in day time and not as the Accused stated, at night. It also could mean that if, as she states, she and **DW1** went home at 8.00pm, the deceased was not at her home. Thus **DW1's** assertion that on arrival he met the deceased at his home rather than the trading centre cannot be accurate.

22. Indeed during cross-examination **DW1** conceded that he did not know what happened at home because he remained at the shop with his mother **DW2** upon returning from hospital. The same witness earlier told the court that after his alleged arrival from hospital:

“I stayed at shop then I went home. When I saw deceased, he was outside mother's shop making noise saying: “Give me my radio. I do not want to know” He left for Kisiriri centre.”

This suggests the deceased was at the trading centre.

23. **DW3** also referring to the same time, namely after **DW1** and Accused allegedly returned from hospital said that, the deceased was dancing at the centre. If **DW3** was shopping at **DW2's** when witnessing the dancing of the deceased and arrival of the Accused, it is surprising that **DW2** did not also witness the same thing. Or at least see the deceased who was apparently making a scene at the trading centre. Equally the Accused cannot be believed when he says he first met the deceased at his (Accused's) home, rather than the trading centre.

24. I have highlighted these matters because the defence was riddled with serious contradictions even concerning very obvious matters. For instance, while **DW2** and the Accused stated, like **PW3** and **PW4** that the deceased lived at the Accused's home, **DW1** said the deceased lived at the home of one **“Mama Mothukia”** and had never lived with his family. **DW3** said the deceased lived at the home of his sister **Joyce Wangechi** (**PW2**) but changing the version later during cross-examination.

25. As for the **Sonitec** radio tendered as an exhibit by the defence, the Accused claimed to have bought it at Narok town while **DW2** said she bought it at a market, and moreover, that the Accused had a small radio that he used in the house while she kept the **Sonitec** radio in the shop. This makes it difficult to understand why then on the material evening the Accused asked to use the deceased's small radio. Besides the Accused and that it was after he unlocked the door to his house that he noted the deceased's small radio missing. Was it the deceased's radio or his? And is it believable that the Accused had allowed the deceased earlier in the day to keep keys to his (Accused's) home when the Accused also asserted that the deceased's family evicted deceased from home for stealing and drunkenness. And further that its disappearance provoked rage in the deceased who went in search of it.

26. The Accused's defence does not stand up to scrutiny. It is contrived to conceal the fact that the Accused assaulted the deceased at the shopping centre before going with him to his home. And I so find. Only the Accused can explain why a mortally wounded deceased person was next found in a field behind the Kisiriri centre on the next day. Likely, the Deceased's condition deteriorated gradually as explained

by the doctor (PW8) concerning the head injury and the Accused decided to remove him and therefore any blame from his home. And then to make the implausible claim that the deceased wandered off in the night, never to return.

27. Section 111 of the Evidence Act states:-

“(1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.

(2) Nothing in this section shall-

(a) prejudice or diminish in any respect the obligation to establish by evidence according to law any acts, omissions or intentions which are legally necessary to constitute the offence with which the person accused is charged; or

(b) impose on the prosecution the burden of proving that the circumstances or facts described in subsection (1) of this section do not exist; or

(c) affect the burden placed upon an accused person to prove a defence of intoxication or insanity.”

28. I find that the prosecution evidence is overwhelming and displaces the contradictory and obviously false denials put up by the defence. The Accused caused the injuries that led to the death of the deceased.

29. Regarding *mens rea*, Section 206 of the Penal code states:-

“Malice aforethought shall be deemed to be established by evidence proving any one or more 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.”

30. The Accused according to PW3 struck the deceased with a stick on the head. The matter leading to the assault related to a radio perhaps suspected to have been stolen from the Accused. The Accused was a friend to and had accommodated the deceased in the material period. The deceased was certainly drunk

on the material date. As for the Accused, I think that the long-winded narration about spending all day in hospital with **DW1** was intended to conceal the fact that he had possibly spent a good part of the day with the deceased and both had taken alcohol. And that likely, the Accused's small radio described by **DW2** vanished during the revelry. And that the Accused suspected the deceased to be the culprit.

31. Although he did not visit his friend in hospital even after news of his hospitalization broke out, the Accused remained at his home at Kisiriri and did not flee. In the circumstances, I would agree with the defence submission that the facts of this case appear to negative malice aforethought. I find that the prosecution has established the charge of Manslaughter Contrary to Section 202 as read with Section 205 of the Penal Code beyond reasonable doubt, and will enter a conviction against the Accused for such lesser offence.

Delivered and Signed at Narok this **29th day of September, 2016.**

In the presence of:

For the DPP : Mr. Koima

For the Accused : Mr. Kamwaro

Accused : Present

CC : Barasa

C. MEOLI

JUDGE