REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 73 OF 2008

REPUBLIC ..... PROSECUTOR

V E R S U S

JULIUS MURIIRA ..... 1ST ACCUSED

PAUL MWITI MURIUNGI ..... 2ND ACCUSED

SILAS GITONGA MURIUNGI ..... 3RD ACCUSED

GERVASIO GIKUNDI KAUNI ..... 4TH ACCUSED

JUDGMENT

The four accused, **Julius Muriira, Paul Mwiti Muriungi, Silas Gitonga Muriungi** and **Gervasio Gikundi Kauni** face a charge of murder contrary to **Section 203 as read with Section 204 of the Penal Code.** The particulars of the charge are that on 22/9/2009 at Thuti Village, Thangatha Location in Meru North, jointly murdered **Joshua Kangeria Bundi**. The accused denied the offence and the case proceeded to full trial with the prosecution calling a total of five witnesses. Mr. Mulochi was the Prosecution Counsel while the accused 1 and 3 were represented by Mr. Igunda Advocate and Mr. Otieno represented accused 3 and 4.

The accused testified on oath in their defence and did not call any other witness.

PW1 Sabena Mukoiti is the wife of the deceased. She recalled that on the evening of 22/9/2001, she came from the market where she used to sell bananas while the husband sold goats. They found 4 people at their gate – accused 1-4, whom she knew by before as relatives; that the 4 demanded money from her husband but he denied having any; that they started beating the husband; that Silas was armed with a *panga* while the others had walking sticks; she started to scream and her father-in-law Bundi (PW3) came and so did Kaberia (PW2) – deceased's brother. By the time they arrived, the husband Joshua had died; Kaberia went to call the police and accused 3 (Silas) was arrested on the same evening. They went to report to Mikinduri Police Station and upon return, found Mwiti and Gikundi had been arrested and the deceased's body was removed to the mortuary. PW1 identified accused 1 as his brother-in-law, accused 2 and 3, Mwiti and Silas as bothers and Gikundi (accused4) as belonging to his father-in-law's clan. She also testified that the 4 accused used to relate well with her and her husband and even used to assist them with work in her home. She denied that deceased owed the accused any money and she observed that the accused were drunk because they were from a celebration.

PW2, David Kaberia, a brother of the deceased, told the court that on 22/9/2001 he heard screams emanating from the direction of his brother's home; he ran there, found Sabena and Genesio Bundi (PW3); that somebody was lying down and he noticed it was his brother Joshua who was bleeding from the nose and mouth; that on enquiring who injured him, Sabena mentioned Muriira and others. He reported at AP Camp and they went to look for Muriira and company. PW1 and 3 were arrested in somebody's house on the same day by Police at Mikinduri; He described accused 1 as a brother from another clan while accused 2, 3 and 4 are his paternal uncle's children.

Genesio Bundio (PW3) is the father of the deceased. He recalled that it was about 6.00 p.m. when he heard the deceased's wife screaming; he went where she was and found Joshua already dead. He said that the accused were at the scene. He identified accused 1 as his brother's son (nephew); that the 4 ran away after he arrived there and that one was armed with a club. He identified accused 1 and 2 by name but could not recall accused 3 and 4's names though he saw them at the scene and that they are all family members; he recalled that they all used to relate well even with the deceased. He did not see any of the accused assault the deceased.

Cpl Antony Leiborke (PW4), took over the investigations of this case from **Cpl Wangila** who has left service. He basically relied on the report booked by the said Cpl Wangila as to what investigations he carried out.

PW5 Dr. Koome of Meru Level 5 Hospital produced the post mortem report which was prepared by **Dr. Gichere** who conducted the post mortem (PEX. NO.1). The doctor observed that there was dried blood from nose and mouth; edema around the eyes, depression on left frontal region, which had multiple fractures and there was free movement of the neck. The doctor formed the opinion that the cause of death was head injury secondary to blunt trauma to the head.

In his defence, accused 1 testified on oath that on 21/9/2001 he left his home about 10.00 p.m. for a celebration at David Murithi's home, where there were many people including his cousin accused 2 and PW1. He took alcohol till 5.30 p.m.. He left for home with accused 2 and 3; they reached his brother's gate and that Paul Mwiti and accused 2 started asking for his Kshs.200/= which he owed, but he did not have it. A fight broke out and that Joshua arrived and tried to intervene; that it is then he took a club and wanted to hit accused 2 but instead, he hit Joshua on the head and that Sabena started to scream; that the father came and he ran off. He said that they had a good relationship with deceased. He denied having planned to kill deceased.

DW2, Paul Mwiti reiterated what DW1 said, that they attended a celebration and they took alcohol till 5.30 p.m. when they went back home; that at Joshua's gate, he asked for his money from DW1; a fight broke out and that Sabina and Joshua arrived then; that Joshua intervened and accused 1 took a stick, wanted to hit him but instead hit Joshua. He later learnt that Joshua died but he had no intention of killing Joshua because they lived in peace.

DW3, Silas Gitonga testified on oath that he too went to a party where they drunk alcohol till 5.00p.m. when they left for their home and that a fight broke out between accused 1 and 2 over money and deceased arrived and attempted to separate them but instead, accused 1 picked a stick and hit deceased.

DW4 Gervasio Gikunda was at the party where accused 1-3 were and they left together to go home. He said he was present when a fight broke out between accused 1 and 2 and how deceased was injured when trying to intervene in the fight; that he ran home on seeing deceased. He said PW3 is his uncle and so deceased was his cousin and they related well.

There is no doubt that the deceased was injured and met his death in broad daylight at about 6.00 p.m. PW1, 2 and 3 testified to that fact and accused persons did admit having been at the deceased's gate about 5.00 p.m. to 5.30 p.m.

There is also no dispute on identification. PW1 identified all the accused as relatives, people she knew very well. PW3 confirmed that fact and the accused persons have all agreed that indeed PW1 and the

deceased found them at their gate. All the accused were present at the scene where the deceased met his death. The question that needs to be answered is whether the deceased met his death as stated by PW1 or it was accidentally caused by DW1.

As noted above, the incident was in the evening at about 5.30 to 6.00 p.m.. PW1 is the only eye witness to the incident. PW3 did not witness the assault. He found when the deceased had already fallen down and according to him, the assailants were running off. So the only eye witness to the incident is PW1. PW1 was candid and categorical as to what happened, that on arriving at their gate with the deceased, accused 1 demanded money from them but on denying deceased having money, the accused became harsh and that it is accused 1 who first hit the deceased on the neck with the stick he had; that she tried to intervene but Mwiti stopped him and hit her and she retreated; that all the accused got hold of the deceased and assaulted him. She said that though accused 3 had a *panga*, he did not cut the deceased with it but merely used it to hit deceased. PW1's evidence is corroborated by the findings of Dr. Gichere who performed the post mortem (PEX. NO.1). According to the accused, he only hit the deceased on the head once, one blow was meant for accused 2. However, the injuries found on the deceased tell a different story. The doctor found that there was edema of the face, edema around the eyes, depression on the left frontal region (forehead), cervical spine was not intact, it was freely mobile, multiple fractures of the frontal bone, blood under the skin. The injuries were obviously more than one. The multiple injuries and fractures are consistent with PW1's evidence that the deceased was assaulted by more than one blow to the head. The Doctor's findings were also consistent with PW1's evidence in that she told the court that the accused persons used blunt weapons (walking sticks and *panga)* to assault the deceased but he was never cut anywhere.

In his defence, accused 1 claimed to have been fighting with accused 2 at the deceased's gate when the deceased tried to intervene and that when he wanted to hit accused 2, by mistake hit the deceased. All the accused claimed that this is what happened. However, I have observed earlier that the defence is totally at variance with the injuries found on the deceased. The injuries found on the deceased are consistent with the evidence of PW1. Besides, PW1 was cross examined and at no time was it put to PW1 that accused 1 and 2 were fighting or that the deceased merely tried to stop the fight. Their line of defence is a total afterthought and not believable. PW1's testimony is more convincing.

The other bone for contention is whether the accused had a common intention to kill the deceased. **Section 21 of the Penal Code** defines what constitutes a common intention. It reads:

> ***"Section 21.When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."***

In **Solomon Mungai v Rep (1965) E.A. 363**, the Court of Appeal held that in order for this section to apply, it must be shown that the accused had shared with the other perpetrators of the crime a common intention to pursue a specific unlawful purpose which led to the commission of the offence charged.

In **Njoroge v Rep (1983) KLR 197 at p. 204**, the Court of Appeal stated that:

> ***"If several persons combine for an unlawful purpose and one of them in the prosecution of it kills a man, it is murder in all who are present whether hey actually aided or abetted or not endeavours to effect the common object of the assembly."***

As to proof, referring to its earlier decision in **Rep v Tabulayayenka s/o Kirya (1943) EACA 51**, the court continued to state that:

> ***"The common intention may be inferred from their presence, their actions and the omission of either of them to disassociate himself from the assault."***
>
> ***As we have stated, common intention does not only arise where there is a pre-arranged plan or***

joint enterprise. It can develop in the course of the commission of an offence. In *Dracaku s/o Afia v Rep (1963) E.A. 363* ***where*** *"there was no evidence of any agreement formed by the appellants prior to the attack made by each"* ***it was held that:***

"that is not necessary if an intention to act in concert can be inferred from their actions" ***like*** *"where a number of persons took part in beating a thief."*

In this case, PW1 told the court that the 4 accused were together, all took part in assaulting the deceased as per PW1's evidence which I have believed. When PW3 arrived at the scene, the accused were escaping from the scene. They inflicted serious injuries on the deceased which was a direct consequence of the prosecution of their purpose, i.e., to get money from the deceased but he declined to give them. There is no evidence that any of them did anything to disassociate himself from the crime. If it were true that it is accused 1 and 2 were fighting and accused 1 accidentally hit the deceased, his cousin, the prudent thing they would have done would have been to help the deceased get help from a hospital. Instead, they all fled. In any event, that defence was totally dislodged by PW1's evidence and the post mortem results.

Accused 1-4 are people known to PW1. PW1, 2 and 3 told the court that they are all related and lived at peace and related well before this incident. Indeed, the accused did confirm that they lived at peace. There is therefore no reason why PW1 would lie that the accused accosted and assaulted the deceased and fatally injured the deceased.

In a murder charge, the onus rests on the prosecution to prove beyond any doubt:

1. The death of the deceased;

2. That it is the accused who caused the death through an unlawful act or omission;

3. That accused persons possessed malice aforethought or an intention to cause grievous harm or death.

The death of the deceased is not disputed. From my earlier analysis, I am satisfied that it is the accused persons who attacked the deceased person at his gate and assaulted him when he did not meet their demands for money.

Whether the prosecution has proved malice aforethought: PW1 testified that the accused persons were drunk. Later in re-examination, she said that the accused were drunk because they were from a celebration and that PW1 had been at the said celebration. PW1 knew the accused persons well. Though she did not go further to explain to the court how she knew the accused were drunk, PW1 must have seen their behavior on that day in order to come to such conclusion.

In their defences, the accused also claim to have drunk alcohol at the celebrations from the time they arrived there upto 5.30 p.m. when they left. Generally, intoxication is not a defence in a criminal case unless certain conditions set out in **Section 13 of the Penal Code,** are met. The Section provides as follows:

"13. (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 (b) the provisions of this Code and of the Criminal Procedure Code 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."

It is clear that the defence of intoxication is very narrow in its application. Section 13 (4) has to be read together with Section 13 (1) (2) (a) and (b). In the case of ***Cheminingwa v Rep, EACA CR 450/1955*** the East African Court of Appeal stated 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) eKLR, CRC 26/2007** the court said as follows:

"A clear message must also go out to those of the appellants' 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 Penal Code, it will not avail an accused and does not avail the appellant in this particular case."

In the instant case, there was no attempt to demonstrate that by reason of intoxication, the accused were temporarily insane at the time of assaulting the deceased or that intoxication was caused without their consent or by malicious or the negligent act of another. However, even PW1 who knew accused talked of them as having been drunk and having known the accused, it must have been noticeable so that the court cannot ignore such evidence. In the end, I am persuaded to find that the accused caused the deceased's death but their judgment may have been impaired due to alcohol and hence, malice aforethought cannot be imputed against them.

In the end, I am satisfied that the 4 accused caused the death of the deceased while under the influence of alcohol and I will find them guilty of the **lesser charge of manslaughter** contrary to **Section 202 as read with Section 205 of the PC** and I convict them accordingly.

DATED, SIGNED AND DELIVERED THIS 29TH DAY OF SEPTEMBER, 2016.

R.P.V. WENDOH

JUDGE

29/9/2016

PRESENT

Mr. Mulochi for State

Mr. Kaumba Holding Brief for Mr. Otieno for 3rd and 4th Accused

Mr. Kaumba Holding Brief for Mr. Igweta for 1st and 2nd Accused

Peninah, Court Assistant

All Present, Accused