REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL CASE NO. 56 OF 2011

REPUBLIC..….....PROSECUTOR

VERSUS

PETER NJUGUNA KAMAU…....….....ACCUSED

JUDGMENT

1. On the night of 3rd April 2010, Paul Ng'ang'a (hereafter *the deceased*) was selling alcohol to customers at Junior Pub, Eldoret. Someone appeared from behind a curtain and hit him on the head with a plank of wood. The assailant took off. The deceased was rushed to hospital. He died a few days later. The State brought information to the High Court charging the accused with the murder. The particulars are that on the night of 3rd April 2010 at Junior Pub, Eldoret Township, in Uasin Gishu District of the Rift Valley Province, he murdered Paul Ng'ang'a.

2. The accused pleaded *not guilty*. The prosecution lined up seven witnesses. At the close of their evidence, the court found that the State had established a *prima facie* case against the accused under section 306 (2) of the Criminal Procedure Code. The accused elected to give unsworn evidence. He did not call any witness.

3. PW1 was working with the deceased that night. He testified that at about 10:00pm two young men came into the bar. One was the accused. He knew him as Peter; the other was Mabangi. They were then joined by a third person. A quarrel erupted between them over the ownership of a jacket. They started fighting. Peter (the accused) and Mabangi started beating the other man. The deceased tried to separate them. He was assisted by another employee, Bosco (PW3), to eject the persons who were fighting from the bar.

4. PW1 testified that the accused didn't go away but lurked at the entrance. He said he saw him draw the curtain and hit the deceased with a plank of wood on the head. The accused disappeared into the darkness. The deceased fell down; he was in pain. They procured a taxi that took him to hospital. PW1 said there was a fluorescent light inside the pub and a security light outside.

5. PW1 said the accused was wearing a jacket and *Reebok* sports shoes. She identified the plank of wood (MF1). It had one nail. Upon cross-examination, PW1 said there was only one entrance to the pub. She had known the accused for approximately two to three years. He said he was at the bar counter when the curtain opened and someone hit the deceased. PW1 said it happened in an instant. He said he was sure it was the accused.

6. That narrative was largely confirmed by Bosco (PW3), another employee at the pub. He was at the bar during the incident. He also knew the accused as Peter. He had known him for about seven months. On cross-examination, he said that he found the accused at the bar. The argument and fight over the jacket later ensued. He assisted the deceased to eject the accused from the bar. He testified that the accused returned to the bar armed with a plank of wood; it had a nail. He hit the deceased and fled. PW3 was then at the bar-counter taking stock. The counter is about ten metres from the door. He said there is a curtain at the door. The deceased was standing inside the bar near the curtain or net. He said he saw the accused hit the deceased.

7. PW2 was the proprietor of the bar. He never witnessed the incident. He visited the deceased at the hospital. He found him unconscious. He could not remember for how long the deceased was hospitalized before he died.

8. PW4 was Dr. Walter Nalianya. He produced the postmortem report (exhibit 2) on behalf of Dr. Francis Ndiangui. The latter is a pathologist at Moi Teaching & Referral Hospital. The report was made on 10th April 2010. There was a sutured wound on the right side of the skull. Internally there were multiple fractures on the right side of the skull and a surgical cut on the same side. There was blood on the surface of brain. In the opinion of pathologist, the cause of death was raised intracranial pressure due to subdural bleeding. It resulted from a blunt trauma. The body was identified by Daniel Kariuki and Simion Mwangi.

9. PW5, Police Constable Mutembei, and another officer arrested the accused on 22nd August 2011 at Eldoret. The accused was loading or unloading luggage near Kogo Plaza. The two officers were tipped off by a member of public. Upon cross-examination, he said that was the accused's ordinary employment.

10. PW6 was Chief Inspector Shadrack Wachira. He received the suspect on 29th August 2011. He recorded a statement under inquiry from suspect. The defence objected to the statement for want of compliance with section 25A (1) of the Evidence Act. In that statement, the accused had stated that when he was pushed outside the bar, he fell outside. He found a piece of timber and hit the deceased. He went away. After three days he heard the deceased died. He disappeared to Bungoma until January when he returned to Eldoret. PW6 said when the statement was statement was recorded, it was only him and the accused who were present. He denied coercing the accused to record the statement. PW6 produced the requisite certificate. I will return to the matter of admissibility of the statement shortly.

11. PW7, Police Sergeant Purity Wanjiru, took over the investigations from CPL Wamai. She escorted the accused for mental assessment at Uasin Gishu District Hospital. The opinion of the doctor, as per exhibit 4, was that the accused was fit to stand trial. The accused was then charged for this offence.

12. As stated earlier, the accused gave unsworn testimony. He denied committing the offence. He conceded that a fight erupted between his friends and the operator of the bar. He left. He was drunk. On the way, his employer called him and asked him to report for an early assignment. He was picked up in the morning by his employer's truck for Busia. He stayed there for three days. He said after a year and eight months, he was arrested by CPL Wamai.

13. I have considered the evidence. The learned State counsel and the learned counsel for the defence did not make final submissions. They both sought to rely on their earlier written submissions filed under section 306 of the Criminal Procedure Code.

14. Section 203 of the Penal Code provides that *any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder*. There are three key ingredients that *must* be present in the offence of murder: first, the prosecution must prove beyond reasonable doubt the *death* of the deceased and the *cause* of that death; secondly, that the accused *committed* the unlawful act that led to the death; and, thirdly, that the accused was *of malice aforethought*.

15. Malice aforethought is the *mens rea* or the *intention* to kill another person. Section 206 of the Penal Code defines it as follows;

"206. 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."

16. The first key question in this case relates to identification. PW1 and PW3 were *eye witnesses*. They both knew the accused for a long time as their customer. PW1 had known the accused for two to three years; PW3 for about seven months. They clearly identified him as the person who came to the bar and sat with his two friends. A quarrel erupted between them over the ownership of a jacket. They started fighting. Peter (the accused) and Mabangi started beating the other man. The deceased tried to separate them. He was assisted by PW3 to eject the unruly persons from the bar.

17. PW1 testified that the accused did not go away but lurked at the entrance. He saw *someone* draw the curtain and hit the deceased with a piece of wood (MFI 1). That was confirmed by PW3. PW3 said it happened in *a flash*. The deceased was standing inside the bar but near the door or curtain. PW1 and PW3 were ten meters away at the counter facing the door. There was only one entrance. It was at night. But there was a fluorescent lamp casting sufficient light in the bar. There was a security light outside the pub. PW1 and PW3 were emphatic that the accused is the person who appeared from *behind* the curtain or net and hit the deceased. Like I said, they had known the accused for many months before.

18. In *Wamunga v Republic* [1989] KLR 424**,** the Court of Appeal held as follows-

"It is trite law that where the only evidence against a defendant is of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from the possibility of error before it can safely make it the basis of a conviction."

19. In *Republic v Turnbull & others* [1976] 3 All ER 549, the court held that mistakes can be made even in cases of recognition; and that an honest witness may nonetheless be mistaken. In *Kiarie v Republic* [1984] KLR 739, the Court of Appeal had this to say-

"It is possible for a witness to be honest but mistaken and for a number of witnesses to all be mistaken. Where the evidence relied on to implicate an accused person is entirely of identification, that evidence should be watertight to justify a conviction."

20. There is a plethora of authorities on the subject of identification. See for example *Joseph Ngumbao Nzaro v. Republic* [1991] 2 KAR 212, *Richard Gathecha Kinyuru & another v Republic* Nairobi High Court Criminal Appeal 290 of 2009 [2012] eKLR, *Obwana & Others v Uganda* [2009] 2 EA 333.

21. There are two distinct *phases* to the *identification* in this case. I have no doubt that PW1 and PW3 saw the accused when he *first* came to the bar; or, when he and Mabangi started beating up the other man. The accused and the two others were ejected from the bar. PW1 said he was at the bar counter when the curtain or net opened and *someone* hit the deceased. PW1 said it happened in *an instant*. PW3 said it happened in *a flash*. The bar was ten meters from the entrance. PW3 was taking stock. He was at the counter with PW1. Although there was sufficient light, the assailant appeared from *behind* the net or

curtain and hit the deceased with a plank of wood. The deceased was standing *inside* the bar near the curtain or net. PW1 or PW3 did *not* state categorically that they saw his *face*. PW1 said the accused was wearing a jacket and *Reebok* sports shoes. PW1 did not clarify whether he saw those items of clothing in the first phase I referred to or when the assailant hit the deceased.

22. The opinion of PW1 and PW2 may have been coloured by the earlier events at the bar. They both saw the assailant hit the deceased for a *fleeting moment*. It raises an element of *doubt* on identification. Applying the principles in *Wamunga v Republic* [1989] KLR 424 and *Kiarie v Republic* [1984] KLR 739 I cannot say with conviction that PW1 and PW3 positively identified the accused as the person who emerged from behind the curtain or net and hit the deceased on the head. The piece of timber or wood with a nail was not produced in evidence. It had earlier been marked for identification.

23. The legal burden of proof lay throughout with the prosecution. See *Woolmington v DPP* [1935] AC 462, *Bhatt v Republic* [1957] E.A. 332, *Abdalla Bin Wendo and another v Republic* (1953) EACA 166, *Kaingu Kasomo v Republic*, Court of Appeal at Malindi, Criminal Appeal 504 of 2010 (unreported).

24. There is no dispute about the death. The deceased died three or so days after the attack. The injuries to the deceased amounted to *grievous harm*. Doubt is removed by the pathologist's report. He found there was a commuted skull fracture. There was blood on the surface of brain. In the opinion of pathologist, the cause of death was bleeding in the brain due to a blunt trauma to the skull. That corroborates the evidence of PW1 and PW3 that the deceased was hit on the head with a piece of timber.

25. I have said there are lingering doubts whether accused was positively identified by PW1 and PW3. The doubt must be interpreted in favour of the accused. I cannot then say that the accused had *an intention to cause the death of the deceased or to commit grievous harm to him.* I cannot say he had malice aforethought as defined by section 206 of the Penal Code. Fundamentally, the *actus reus* is in doubt. The defence proffered by the accused may be self-serving or *unbelievable*. For example, the accused said he was drunk; but it was self-induced intoxication. It would not afford a defence. See *Kupele ole Kitaga v Republic*, Court of Appeal, Nakuru, Criminal Appeal 26 of 2007 [2009] eKLR. But the point is that he was presumed *innocent*. He was entitled to remain mum. He had no obligation to seal the loopholes left by the prosecution.

26. It is quite tempting to place reliance on the *statement under inquiry* made to PW6. Regrettably, the confession was *not* admissible. The officer possessed the requisite rank: *but* he took the statement in the absence of a third party of the accused's choice. Obviously, the statement was not made before a judicial officer. It was thus taken in contravention of section 25A (1) of the Evidence Act. The section provides the conditions under which a confession is admissible. It states as follows:

> *"A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of Police and a third party of the person's choice.*"

27. The law can be an ass. Here is a confession in which the accused admits hitting the accused with a piece of timber; and, disappearing from Eldoret on learning of the death. But the law itself has set tight safeguards for admission of such incriminating evidence. The confession could not be admitted or proved in this case. In the face of doubtful identification by the eye witnesses, it left the prosecution's case hanging on a thin thread.

28. In the end, I find that the prosecution failed to *prove* beyond reasonable doubt that the accused, *of malice aforethought caused the death of Paul Ng'ang'a by an unlawful act.* It must follow as a corollary, that the accused is not culpable. I accordingly enter a finding of *not guilty*. The accused is hereby acquitted.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 29th day of October 2015.

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

Accused.

Mrs. Mwaguni for Mr. Nyambegera for the accused.

Ms. R. N. Karanja for the State.

Mr. J. Kemboi, Court clerk.