



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL CASE NO. 41 OF 2015

REPUBLIC PROSECUTOR

VERSUS

MUTHANGYA KALIVU..... ACCUSED

J U D G M E N T

1. **Muthangya Kalivu**, “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 being that on **14th day of March, 2014** at **Kyondoni Village, Kyondoni Sub-location, Kitui West District** within **Kitui County** murdered **Mwanzia Kalivu** (deceased).
2. Facts of the case are that the deceased and the accused were brothers. On the **14th day of March, 2014**, the deceased was drinking alcohol at the **Karina Bar, Kyondoni** from **5.00 p.m.** The accused went to the bar at about **8.00 p.m.** The accused told the deceased he had to go home. With the help of one **Mwaniki Kangani** they took him outside the bar. The following day the deceased was found dead some approximately two (2) kilometers away.
3. To prove the case the prosecution called seven (7) witnesses. PW1 **Onesmus Maingi** a bar attendant at the stated bar testified that he saw the accused and one **Mwaniki**, his customers take the deceased outside the bar urging him to go home.
4. PW2 **Jenifer Mule Wafula Kitabi** was passing by **River Mukoe** when she heard someone groaning. She checked and found a person lying down. She ran back and notified people at a nearby home.
5. PW3 **Rose Munange Kaleli** found the deceased, her brother already injured. She caused him to be taken to hospital where he died.
6. PW4 **Joel Sammy Muvati**, the Assistant Chief, **Kyondoni Sub-location**, got a report from the village elder after the deceased was found injured. he notified the police who visited the scene.
7. PW5 **Doctor Patrick Mutuku**, performed an autopsy on the body of the deceased. He found the body having sustained multiple cuts on the head and neck. The skull was fractured on the left temporal area. The left parietal area had a fracture. There was extensive brain damage with bleeding into the brain cavity. He formed an opinion that the cause of death was severe head injury secondary to assault.
8. PW6 **Cornelia Mwaniki Kangangi** was at the bar from **7.30 p.m. to 9.00 p.m.** While leaving the bar she saw the deceased who was drunk sleeping on a seat next to the counter. The accused was in the bar with him. Inside the bar were other drunkards.
9. PW7 **No. 49320 Corporal Charles Wahome** visited the scene at **Makoe River Bank** where he found the deceased who had multiple cuts on his head. He took him to **Kitui District Hospital** where he was admitted in a serious condition. He passed on thereafter.
10. When put on his defence the accused stated that on the material date he was at the bar. He drunk a beer and went home at **7.30 p.m.** The deceased was at the bar with other patrons and he left him there. The following day he received a call from his sister who told him that the deceased was

injured. He went and found him having fallen down. He denied knowing how his brother ended up where he was found. He assisted the police in taking him to hospital. He denied having inflicted the injuries the deceased sustained on his person. He denied having walked out of the bar with the deceased. He denied having been armed. He concluded his testimony by stating that he used a motor-cycle as means of transport when he went back home.

11. Issues to be determined are:

- Whether the accused caused the death of the deceased.
 - Whether the act that resulted into the deceased's death was committed with malice aforethought.
12. The fact of death of the deceased was proved by evidence of the autopsy report. The Doctor who performed it, PW5, opined that the deceased was assaulted, an act that left him seriously injured whereafter he succumbed to the injuries sustained.
13. There was no direct evidence as to who caused the death of the deceased. No one was seen inflicting injuries that the deceased sustained on his body. Therefore evidence adduced against the accused is circumstantial. In the case of **Mwita v. Republic (2004) 2KLR 6** the Court of Appeal stated that:

“It is trite that (sic) in a case depending exclusively upon “circumstantial evidence” the court must, before deciding upon a conviction, find that the inculpatory facts are incomparable with the innocence of the accused and incapable of explanation upon any other hypothesis than the guilt.”

14. In another case, **Mwangi & Another (2004) 2KLR 32** the Court of Appeal stated this of circumstantial evidence:

“In a case depending on circumstantial evidence each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation on any other reasonable hypothesis except the hypothesis that the accused is guilty of the charge”

15. According to PW1 the deceased was at the bar from **5.00 p.m.** drinking alcohol. At about **8.00 p.m.** two brothers, **Mwaniki Kangangi** and **Mutile Kangangi** went to the bar and drunk for about one (1) hour then left. The accused entered the bar and went out. The second time he entered the bar he urged the deceased to go home. With the help of **Mwaniki Kangangi** they supported him and took him outside. However, he could not tell where they went.
16. PW6 on whose farm the deceased was found was at the bar on the material date. According to him he was drinking alcohol with his brother from one of the rooms from **7.00 p.m.** to **9.00 p.m.** He left the deceased sleeping on a seat next to the counter with other drunkards. He also saw the accused at the bar.
17. PW1 was questioned by the police. The action that was taken by the police to charge the accused was based on the information they obtained from the witness. PW7 the police officer said that he established that the accused was drinking alcohol with the deceased and they left together. PW1 denied having seen the accused take any alcohol. On cross examination he stated that it was PW6 who was drinking with the deceased on the fateful night. The source of information was PW1.
18. The question to be posed is why PW1 told the police that PW6 was the one drinking with the deceased but concealed the information from the court.
19. In his defence the accused admitted having been at the bar drinking alcohol but alleged that he left alone at **7.30 p.m.** Other than the allegation that the deceased was assisted to leave the bar by the accused and another; none of the witnesses stated how the accused left the bar precincts. This means that it was suspected that the accused must have left with his brother.
20. In the case of **Sawe vs. Republic 2003 KLR 364** the Court of Appeal stated thus:

“Suspicion however strong cannot provide the basis of inferring guilt which must be proved by evidence beyond doubt.”

21. The Prosecution had a duty of proving the fact that the accused left with the deceased and there were no intervening fact that would absolve him from having been with the accused up to the point where he was found injured.
22. None of the witnesses called could state with certainty how the deceased left the precincts of the bar. None of the witnesses could explain how PW4 was drinking with the deceased left the bar and later it turned out that the body of the deceased was on his farm. The circumstantial evidence adduced does not irresistibly point at the accused as the person who could have injured the deceased.
23. In the premises, the Prosecution has failed to prove the case against the accused beyond doubt. He is not guilty of the charge of murder and is acquitted of the same. He shall be released forthwith unless otherwise lawfully held.

Dated, Signed and Delivered at Kitui this 9th day of December, 2015

L. N. MUTENDE

JUDGE