

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL CASE NO.8 OF 2008

REPUBLIC.....PROSECUTOR

VERSUS

SAMUEL NJERU NJOKI.....ACCUSED

JUDGMENT

SAMUEL NJERU NJOKI, the accused herein, is before this court on the information of the Hon. Attorney General dated 29th January, 2008 and substituted on 9th April 2008 to be tried for the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence are that on 6th January 2008 at Kiratina Village in Kirinyaga District of Central Province the accused is alleged to have murdered **SAMUEL MWANGI BENSON**.

The prosecution's case is supported by the evidence of eight witnesses. Two of those witnesses namely **Symon Mwangi Kimani** (P.W.1) and **John Gitari Njiri** (P.W.1) were summoned to testify as eye witnesses. The duo i.e P.W.1 and P.W.2 said that on 6/1/2008 they visited Franza pub to have a drink. Inside that pub, they found Samuel Njeru Njoki. At about 8.30pm, P.W.1 and P.W.2 were joined in the pub by Samuel Mwangi Benson (deceased). The accused left the pub leaving the trio behind. P.W.1 said he had known the accused for more than three years as his neighbour at Kiratina Village. At 9.00pm P.W.1, P.W.2 and the deceased left the pub for their homes. When the trio reached a bridge, a Kilometre away from the pub, they were acosted and ordered by three people who were ahead of them to kneel down. P.W.1 and P.W.2 complied with the '**order**' but the deceased defied. P.W.1 said the deceased was hit on the head making him to fall down. P.W.1 stated that the assailants fled the scene when he flashed his torch since it was dark. P.W.1 claimed he saw the accused hit the deceased when he flashed his torch. He also claimed he saw one Peterson Njeru to be among those people who ordered them to kneel down. P.W.1 did not report the incident to the police save that he said he sought the assistance of the village elders. P.W.1 and P.W.2 later learnt that the deceased was taken to hospital where he thereafter passed on. P.W.2 was categorical that he did not see who hit the deceased because it was dark and that P.W.1 flashed his torch after the deceased had been assaulted. On 7/1/2008, P.W.1 informed Francis Njiru (P.W.3) that his brother, the deceased had been assaulted the previous night. P.W.3 was prompted to visit the deceased's house where he and the family made arrangements to take him to Kirira Hospital. The deceased was referred to Embu Hospital where he unfortunately passed away. Another key witness is **Peterson Njiru Muthike** (P.W.5). Apparently, P.W.5 had initially been jointly charged with the accused for the same offence. The prosecution entered a *nolle prosequi* on 13/02/2008 thus paving way for him to be the prosecution witness. It is the evidence of Peterson Njiru Muthike that on 6th January, 2008 at about 8.30pm he was heading back home when he saw four people ahead of him next to a bridge. He heard one person who was coming from the opposite direction order three of those people to kneel down. Two of them complied and one defied. P.W.5 claimed he recognised the voice of the person who made the '**order**' to be that of the accused. P.W.5 said he heard screams and shortly he saw the people rise up and flash a torch prompting the assailant to run away. P.W.5 said he just proceeded with his journey. P.W.5 claimed it was not dark hence he was able to see. **Dr. Njau Mungai** (P.W.7) produced the post mortem he prepared in which he formed the opinion that the deceased died as a result of head injury due to assault.

When placed on his defence the accused gave sworn testimony without summoning independent witnesses. The accused denied committing the offence. He said he was at Franza bar from 6.00pm until 9.00pm when he left for home. He said he walked for twenty (20) minutes and shortly he noticed people running away forcing him to lie down. In a few minutes, he saw a torch being flashed. Someone

screamed and a torch was flashed on that direction. The accused further averred that he saw someone rise and walk away. He proceeded home where he slept until the next day when he went to harvest rice. The accused said that on 12/01/2008, he went to have a drink at a joint in Kiratina when at between 9.30pm, the police raided that joint and arrested him together with other people. He said he was kept in police custody without being told the reason why he was being held. He was told he was a suspect for murder when he protested. The accused said he heard the voice of one Peterson Mburu that night. The accused stated that he did not know the deceased. He said there were many people at Franza pub including Samuel Mwangi and Symon Gitari.

At the end of evidence, learned counsels from both sides were invited to make final submissions. I have carefully considered those submissions and the evidence in detail. In order for the offence of murder to be proved, two ingredients must be established.

(i) Actus reus- wrongful act must have taken place.

(ii) Mens rea- malice aforethought must manifest itself.

There is no doubt that Samuel Mwangi Benson (deceased) passed away on 12th January 2008. The cause of death is indicated to be head injury due to assault. A critical examination of postmortem report shows that the deceased suffered multiple injuries. It is clear in my mind that those injuries are the actual cause of death since the pathologist noted that there was no definite anomalies or stigmata of disease. I therefore, find the ingredient of *actus reus* was established. However, there is need to determine whether or not that can be attributed to the accused. I have already analysed the evidence in detail. It is the evidence of P.W.1, P.W.2 and P.W.5 that the accused was seen assaulting the deceased. It is therefore a question of establishing whether the evidence of identification were positive and free from error. The offence is said to have been committed between 8.30pm and 9.30pm. All the three witnesses i.e P.W.1, P.W.2 and P.W.5 agree that a torch flashed at the material time. Although P.W.1 and P.W.5 said it was not very dark, I do not think they were candid to this court. If indeed, it was not dark, then there was no need to flash a torch. According to P.W.1, he managed to recognise the accused attack the deceased when he flashed his torch. It however, came out from cross-examination that he only flashed his torch after the deceased had been assaulted. What is also puzzling is that none of the witnesses reported to the police of their attack. This fact was confirmed by the investigating officer. If it is true that a torch was flashed after the event that it is difficult to confidently attach the deceased's assault on the accused. It is also possible that after consuming some alcohol, the witnesses' sense of sight may have been impaired. In the circumstances, I will give the accused the benefit of doubt. In sum, I cannot attribute the *actus reus* on the part of the accused.

The ingredient of malice aforethought appears to manifest itself from the evidence of the postmortem. It is apparent that the deceased suffered multiple serious injuries. Whoever inflicted the injuries must have intended to cause grievous harm or death. Under **Section 206** of the **Penal Code**, this court is entitled to infer that the assailant had malice aforethought in the circumstances. I have already stated that there was no credible evidence indicting the accused as the person who inflicted those injuries. He will therefore be given the benefit of doubt.

In the end, I find the accused not guilty of the offence of murder. He is hereby ordered acquitted hence he should be set free forthwith unless lawfully held.

Dated, Signed and delivered in open court this 20th day of February , 2014.

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J.K.SERGON

JUDGE

In the presence of:

Mr. A. Kariuki for Accused

Mr. Cheboi for Director of Public Prosecution