



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL CASE NO. 19 OF 2012

REPUBLICRESPONDENT

VERSUS

1. MANGALE KITZINE1 ST ACCUSED
2. RAI WATSUMA 2ND ACCUSED
3. MRUCHE LEWA BATI 3RD ACCUSED

JUDGMENT

The three (3) Accused persons hereinafter referred to as the 1st, 2nd and 3rd Accused persons are charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars are that: _

“On the 23rd day of April, 2012 at Mwangulu – Mwereni – Kwale County they murdered MWADZINE BEJA “.

The prosecution in this case called seven (7) Witnesses in support of the charge of murder.

Brief facts of this case are that the three Accused persons and the Deceased were at local pub specializing in the sale of a local brew called “*mnazi*” Palmwine. The three and the Deceased were at various stages of inebriation when a misunderstanding arose and there was a scuffle which resulted in the pushing of the Deceased who fell down unconscious and succumbed to injuries allegedly associated with the fall.

The three Accused persons were later arrested and charged with the offence of murder.

Section 203 of the penal Code defines murder thus,

“Any person who malice aforethought causes death of another person by an unlawful act or omission is guilty of murder”.

Malice aforethought is defined under Section 206 of the Penal Code thus,

“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 killed or not, although such knowledge is accompanied by indifferences whether death or grievous bodily harm is caused or not 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”.

According to the evidence of **PW 1 (MWEMBE NYAMAWI)** its the first Accused who pushed the Deceased who fell down backwards and sustained fatal injuries.

AGNES MKAMBE (PW 2) was the one selling palmwine at the local club. She testified that the Deceased went to the club already drunk and bought himself a drink thereafter he stood up and pushed the first Accused who also pushed the 2nd Accused. The 3rd Accused went to separate them. In the process the Deceased fell down and passed on. **PW 1** had tried to pour water on him in a bid to resuscitate him but in vain.

CHIZI CHENJEW A (PW 3) was selling palmwine to the revellers. She testified that the first, second Accused and the Deceased were pushing each other while drunk when the 3rd Accused went to separate them, in the process the Deceased fell down unconscious.

The Doctor who carried post mortem examination on the body of the Deceased was of the opinion that death was as a result of head injury. There was fluid from the brain flowing from the nose and ear. No other injuries were detected. The doctor did not rule out the injuries to have been caused by a fall.

What transpires from the evidence before the Court is that at the time of this incident the three Accused persons and the Deceased had all been imbibing “**mnazi**” drink and were at various degrees of drankness.

At some stage the deceased rose up and kicked and poured the palmwine belonging to the first Accused and a scuffle ensued culminating into the fatal push.

It is quite evident from the above scenario that the act of pushing the deceased was not with the intention to cause grievous harm. It was not premeditated. There was no intention to kill or maim the Deceased, in short there was no malice aforethought on the part of the Accused persons. However, the post mortem report produced in Court did indicate the cause of death as Cardid – respiratory arrest due to head injury due to basal skull injury. There is evidence to the effect that a scuffle had ensued after the Deceased poured palmwine belonging to the first Accused and there was pushing and shoving which caused the Deceased to fall down and sustained fatal injuries from the fall. This fall was caused by the willful and unlawful acts of the Accused persons.

Section 179 of the criminal Procedure Code provides,

“When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

2. When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it”.

I am satisfied that the facts adduced before the Court are sufficient to prove the offence of

manslaughter which is defined under Section 202 (1) of the Penal Code thus,

“ Any person who by an unlawful act or omission causes the death of another is guilty of the felony termed manslaughter”.

I am satisfied that the prosecution has proved the offence of manslaughter and under Section 179 of the Criminal Procedure Code the Accused persons are found guilty of the lesser offence of manslaughter contrary to Section 202 of the Penal Code and are Convicted accordingly under Section 322 of the Criminal Procedure Code.

Judgment delivered dated and signed this **25th** day of **June, 2014**.

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M. MUYA

JUDGE

25TH JUNE, 2014

In open Court and in the presence of:-

Odundo for 3rd Accused holding brief Achilo for first Accused and for Mr. Mushelle for 3rd Accused.

Miss Ogweno for the State

M. MUYA

JUDGE

Mr. Odundo:

I have instructions to mitigate. The 1st Accused is sixty six (66) years old. He is married. He has been in custody since arrest two (2) years ago. As for the 2nd Accused. He is sixty six (66) years old. He is married with seven (7) children. He has been in custody for one (1) year before he was released on bond.

3rd Accused is forty two (42) years old married with five (5) children. He has been in custody for close to twelve (12) months. The Accused persons are remorseful and pray for leniency. The incident was by accident. We pray that the Court temper Justice with mercy and do grant a non custodial sentence.

That the term they have been in custody be deemed as sufficient punishment. They are the sole breadwinners.

Thats all.

M. MUYA

JUDGE

Court: A probation report to be availed on all the Accused persons. Mention on **10th July, 2014**. Remand in custody. Bond extended.

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M. MUYA

JUDGE

25TH JUNE, 2014