



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL CASE NO. 4 OF 2011

REPUBLIC.....RESPONDENT

VERSUS

JOSEPH KYALO NGONDO.....ACCUSED

JUDGMENT

The accused **JOSEPH KYALO NGONDO** faces a charge of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE.** The particulars of the charge were that:

“On the 13th/14th day of January 2011 at unknown time at Leseswa village within Taveta Township of Taita Taveta County unlawfully murdered MICHAEL GICHINI GITHUA.”

The accused entered a plea of ‘Not Guilty’ to the charge and his trial commenced before me on 13/6/2012. The prosecution led by the Learned State Counsel **MR. ONSERIO** called a total of nine (6) witnesses in support of their case. **MR. BIRIR** Advocate represented the accused.

The brief facts of the prosecution case are that the deceased a retired teacher was a tenant of the accused having rented one of the accused rooms at a local trading centre. **P.W.2 BONIFACE MUSYOKA** told the court that he ran a local chang’aa den in Lesesia. On 13/1/2011 at about 8.00 p.m. the accused came to partake at the den. Later at 9.00 p.m. the deceased also arrived. The accused purchased chang’aa worth Kshs. 10/= for the deceased who thanked him. After taking the drink the deceased left. The accused continued to drink with one ‘**Peter**’ and ‘**Musyoka**’ until 11.00 p.m. when **P.W.2** asked them to leave as he was closing his bar.

On her part **P.W.1 DORCAS KYALO** the wife to the deceased told the court that on the night of 13/1/2011 at about 8.00 p.m. she and her husband took supper together. The accused then left to go drinking as was his habit. **P.W.1** and her children slept. At about 12.30 a.m. the accused came home. He was drunk. The accused told his wife that he and his friend Musyoka had come across the deceased on the way lying badly injured and groaning in pain. **P.W.1** insisted that they return to check on the condition of the deceased. They went and found that he was already dead. A stone was lying beside the body. **P.W.1** called the chief who alerted police who arrived the next day and removed the body to the mortuary. Upon completion of police investigations the accused was arrested and charged.

At the close of the prosecution case the accused was found to have a case to answer and was placed onto his defence. He opted to make an unsworn defence in which he denied any involvement in the death of

the deceased. This court must now analyse the evidence and determine whether the charge of murder has been proved beyond a reasonable doubt.

The offence of murder is defined as follows by section 203 of the Penal Code.

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

Therefore the prosecution must adduce evidence to prove three of the following crucial ingredients for this offence:

1. **Proof of the fact and cause of death of the deceased.**
2. **Proof that the by some unlawful act or omission caused the death of the deceased**
3. **Proof that said unlawful act or omission was caused by malice aforethought**

In this case there are several witnesses who include **P.W.1**, and **P.W.2** all of who knew the deceased person well who testified that they saw his body lying dead by the roadside. The witnesses all name the deceased as Michael Githua who was commonly known as ‘*Mwalimu*’ on account of the fact that he was a retired teacher. **P.W.5 HESBORN GITHUA** who was a son to the deceased confirmed the identity of the deceased and identified the body to the doctor for purposes of an autopsy examination.

P.W.7 DR. HESBORN DIANGA a Medical officer based at Taveta District hospital performed the autopsy examination on the body of the deceased on 25/1/2011. He told the court that he noted multiple lacerations and skull fractures on the head and ribs. **P.W.7** formed the opinion that the cause of death was ‘**severe head and brain injury with gross brain laceration and fractured chest.**’ He filled and signed the post mortem report which was produced in court as an exhibit **Pexb.2**. This was expert medical evidence and was neither challenged nor controverted by the defence. As such I am satisfied that the cause of death was an unlawful attack on the person of the deceased.

The prosecution must prove that it was the accused who committed the unlawful act caused the death of the deceased. In this case no person actually saw the accused attack the deceased with a stone or indeed with any other item. By all accounts the accused and deceased were good friends and there is no evidence of any quarrel and/or disagreement between the two. Indeed the testimony of **P.W.2** is that on the material night the accused and the deceased were in his bar and that the accused as a good friend purchased for the deceased a glass of chang’aa worth Kshs. 10/= . The deceased appreciated the gesture and took the drink. According to **P.W.2** the two did not even leave the bar together. The deceased left at about 9.00 pm whilst the accused left almost two (2) hours later lat 11.00 p.m when **P.W.2** was closing down his bar. There is no evidence from any witness that the accused and deceased met and had an altercation thereafter. The accused reportedly left the bar with ‘Peter’ and ‘**Musyoki**’. Neither of the two men was called as a witness to testify as to what could have transpired **after** they left the bar. So far no tangible link was shown to exist between the accused and the death of the deceased.

It was alleged that the clothes which the accused was wearing at the time of his arrest were blood-stained. These clothes together with blood samples taken from both the accused and the deceased were taken to the government chemist for comparison and analysis. **P.W.8 ANNE WANGECHI NDERITU** was the government analyst. She told the court that she carried out the analysis as requested and made her report dated 16/7/2012 which report was produced as an exhibit **Pexb 3**. The report confirms that the accused’s trouser had human blood-stains. However her analysis revealed that those blood stained matched the DNA profile of the accused himself. In other words the accused trouser was stained with his own blood. This gives credence to the accused’s claim that in his drunken state he had fallen down and injured himself (not entirely uncommon occurrence amongst those who drink alcohol). The second trouser submitted to **P.W.8** for analysis was simply labeled “**D**” of this **P.W.8** says

“There was a trouser labeled D”. There was no indication in the memo form of who the trouser belonged to.”

P.W.8 found that the blood stains on this trouser ‘D’ actually belonged to the deceased himself. Given the serious injuries which the deceased sustained there is every likelihood that he bled all over his clothes and this would provide an explanation for the presence of the deceased’s blood on this trouser.

The behavior of the accused during all this time did not suggest that he had a guilty mind **P.W.4 JOHN MWANZUI** a village elder told the court that the accused accompanied him to the police station to report the incident. Surely if the accused had been involved in the death of the deceased he would not have so readily volunteered to go to the police station. His actions show that the accused had nothing to hide.

All in all I find that there is no evidence at all to link the accused to the murder of the deceased. All the accused did was to report having come across the deceased groaning by the road as he staggered home from a local drinking den. There was no eye witness to the incident. The case against the accused is mere speculation. I find that the prosecution have failed dismally to prove the ‘**actus reus**’ of the offence of murder against the accused. As such I do hereby enter a verdict of ‘**Not Guilty**’ and I acquit the accused of this charge of murder. Accused is to be set at liberty forthwith unless he is otherwise lawfully held.

Dated and delivered in Mombasa this 12th day of July, 2013.

M. ODERO

JUDGE

12.7.2013

In the presence of:

Mr. Gichana holding brief for Mr. Tarus

Ms. Ogwenyo for State

Court Clerk Mutisya