

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL CASE NO. 30 OF 2010

REPUBLIC :: PROSECUTOR

V E R S U S

VICTOR SHIOSO KHALI :: ACCUSED

J U D G M E N T

The accused person is charged with the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code**. The particulars of the offence are that the accused person *on the 22.8.2010 at Shibuname village, Shibuname sub-location, Isulu location Kakamega South District within Western Province murdered NEVIN BETI.*

Seven witnesses testified for the prosecution. **ANTHONY MUHAMBI** was **PW1**. On the 22.8.2010 he was in his house when he heard the accused's mother **ALICE (PW5)** saying that the accused had cut the deceased. PW1 went out and saw the deceased bleeding. He administered first aid and took him to the local dispensary. They were referred to Shibwe hospital but there was no doctor and they went back home. The deceased died that night. According to PW1 the deceased had cuts on the hands and legs. The deceased used to drink alcohol. **PW2 SUSAN MASIZA** testified that on the 22.8.2010 at about 9.00 p.m. she was in her house when she heard Alice screaming painfully. At about 10.30 p.m. the accused person went to her and informed her that he had fought with the deceased who was his brother and had injured him in the buttocks. PW2 told the accused to go and sleep. At about 3.30 a.m. PW2 heard screams and people were shouting that the accused had killed his brother. PW2 went to report the matter at the local AP camp and the accused was arrested. PW2's further evidence is that the accused was drunk and the following day she recovered a slasher that was used to assault the deceased. **PW3 JULIA INGATO** is a nephew to the deceased. On the 25.8.2010 she went to Kakamega Provincial General Hospital and identified the body for postmortem purposes.

PW4, DR. JEREMIAH KINUTHIA produced the postmortem report on behalf of doctor **DUNCAN NYIKULI** who performed the postmortem on the 25.8.2010. According to the postmortem the deceased had a cut wound on the right arm anterior aspect with no fracture. There was also another cut wound on the forehead also with no fracture. The doctor opined that the cause of death was cardiac arrest due to excessive bleeding from the two injuries. **PW5, ALICE KHATAMBA** is the mother to the accused and the deceased. Her evidence is that on the 22.8.2010 the accused went home while drunk. He was shouting in luhya that he would kill someone. Shortly she heard him cutting trees within the compound. The deceased who was in his nearby house went to speak to the accused and the accused assaulted the deceased using a slasher. The deceased was taken to hospital and died at 3.00 a.m. that night. According to her the deceased did not fight with the accused. The incident occurred at about 8.00 p.m. and there was moonlight.

PW6 CPL WECHULI is a scene of crime officer. On the 23.8.2010 he went to the scene and took five photographs of the deceased. **PW7 SGT. ANTHONY KITAVI** was the in charge of Isulu police patrol base. He investigated the case. On the 23.8.2010 at about 8.20 a.m. a report was made at the patrol base about the incident. PW7 went to the scene with other officers and found the body. He was informed by PW5 that the accused person reached home while drunk. He picked a quarrel and assaulted his brother with a slasher. The accused was arrested and charged with the offence.

The accused was put on his defence. In his sworn testimony the accused testified that the deceased was his younger brother. On the 22.8.2010 he went for his manual jobs and went back home at

about 7.00 p.m. while drunk having taken chang'aa. He went to his mother's house and was given food. Shortly the deceased went in and asked their mother why the accused was informing neighbours that they had chased away the accused's wife. His mother and brother started abusing him and the deceased pushed him. The deceased hit him three times with a slasher and he fell on the seat. The accused ran away to his house and closed his door but the deceased followed him and broke the door. It was dark and the two struggled. The deceased was armed with a slasher and the accused was still drunk. In the process the accused cut the deceased and he later succumbed to the injuries. According to the accused their mother was encouraging the deceased to teach the accused a lesson. He further testified that it was not his intention to kill his brother.

The prosecution evidence does establish that the deceased sustained injuries inflicted by the accused on the 22.8.2010. The deceased passed on that night after having visited hospital. The only eye witness is the accused's mother PW5. It is her evidence that the accused arrived home that night while drunk. He started slashing some trees on the compound using a slasher and the deceased went out and asked the accused to stop it. According to PW5 the accused assaulted the deceased using the slasher. On his part the accused contends that the deceased who was his brother inquired from their mother why the accused was spreading rumours to the neighbours that they had chased away the accused's wife. The deceased started assaulting him and he ran away to his house. PW5 was encouraging the deceased to teach the accused a lesson. The deceased followed the accused to his house and they struggled. According to the accused he took the slasher from the deceased and he injured him. According to PW2 Susan Masitsa the accused went to her at night and informed her that he had fought and injured his brother.

From the evidence on record I do find that the accused had no malice aforethought to kill his brother. He was drunk and did not out rightly attack the deceased. I am satisfied that there was a scuffle between the deceased and the accused and that led to the deceased sustaining injuries. It is clear that the accused was drunk and the defence of intoxication under **Section 13** of the **Penal Code** applies. It is also clear that the accused was provoked by the deceased. This was not an act of blatant attack on the deceased. I do find that the prosecution has not proved a case for murder against the accused but has proved a case of manslaughter.

In the end, the accused is hereby acquitted of the charge of murder but is found guilty of the offence of manslaughter contrary to **Section 202** as read with *Section 205* of the **Penal Code** and shall be convicted accordingly.

Delivered, dated and signed at Kakamega this 14th day of November 2013

SAID J. CHITEMBWE

J U D G E