REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NO. 31 OF 2006

REPUBLIC.....PROSECUTOR

VERSUS

FRANCIS NDUNGU GITHUI.....ACCUSED

JUDGMENT

The accused was charged with the offence of murder contrary to Section 203 as read with section 204 of the Penal Code, *(Cap. 63, Laws of Kenya).*

The prosecution's case is that, the accused, on the 7th day of January 2006 at Likii village in Laikipia District of the Rift Valley Province, murdered Njogu Shabaan.

Under Section 203 of the Penal Code the primary ingredients of murder, to cause the death of another person with malice aforethought by unlawful act or omission. Malice aforethought is established under Section 206 of the Penal Code through -

(1) an intention to cause the death of or grievous harm to another person, whether that person is the person killed or not,

(2) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person whether or not that person is the person actually killed or not although such knowledge is accompanied by indifference whether the death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(3) an intent to commit a felony;

(4) an intent to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

To prove its case, the prosecution called seven witnesses. The first witness (PW1) was Doctor who described the injuries inflicted upon the deceased by the accused. The deceased had dead wound on the right parietal region about 3cm long with rough edges signifying that the injury was inflicted by a blunt object, and that the deceased had bruises on the knees. He had a fracture of the right parietal bone on the right of the head, causing sub dural hemorrhage blood clot found in between the brain cavity and comprehension of the brain.

The head where opined had cerebral aedema, as a reaction to the injury to the skull. The Doctor

formed the opinion that the cause of death was due to severe head injury leading to cardiopulmonary arrest.

This witness also testified that the accused was assessed as to his mental capacity to stand trial, and was found fit to stand trial.

The evidence as to the cause of the injuries was given by PW2, a neighbor of the accused and described the accused as not a good person. He is the only eye witness as to the events of 7th January 2006. The time was 7.00 p.m. The accused to their house *(i.e. where he PW2 and the deceased were living)* and demanded for his mattresses and blankets. This witness testified that there was no mattress of the accused in the possession of the deceased.

PW2 testified that the accused asked for those items in a quarrelsome and fighting mood manner and when the deceased answered that he did not have any item of the accused, the accused hit him with an iron all over the body, and he was also hit when he went to help the deceased, and he himself bled from the injury inflicted by the accused on his leg.

Having completely disabled the deceased the accused left them and went to his quarter, at the back of their house. They slept. It is only in the morning when they found that the deceased had been hit on the side of the head and could hardly speak.

In the morning PW2 managed to limp to the sister of the deceased to inform her that the deceased was in bad shape and together with her they managed to get a vehicle and first took the deceased to the Police, who advised them to take the deceased to Nanyuki District Hospital where the deceased died a day after admission.

Upon cross-examination, PW2 testified that the accused was not drunk but was a regular user and abuser of a psychotropic substance commonly called *"bhang"* or cannabis sativa.

In re-examination, this witness testified that the accused was the village bully particularly after he had smoked bhang, he would be fighting mood in the village. The deceased\'s only error was to deny the claims by the accused for a mattress and blanket which the deceased did not keep for the accused.

PW3 was sister to the deceased. She was summoned by PW1 from about 15 minutes away from the scene of the crime. She found her brother groaning in pain with blood oozing from the injury on the head. With assistance with PW2 she took her brother to the Police Station at Likia who directed them to take him to Nanyuki District Hospital. PW4 and PW5 identified the body of the deceased for purposes of the post-mortem.

PW6 collected the accused from Karatina where he had been arrested for another offence, and brought him back to Likia Police Station where the OCS decided to charge him with the offence of murder.

The investigating officer PW7, following a report of a serious crime at Likia Village went to the scene. At the scene he found our bed in the house and blood stains on the flower. He search for a possible weapon was not successful. He carried on investigations until the 25.03.2006, when his office received information from Karatina Police Station that the accused had been arrested in that jurisdiction for another offence.

PW7 testified that the D.C.I.O. and his team proceeded and collected the accused from Karatina. The accused had disappeared from the area immediately after the incident from the shanty where he used to in polythene paper houses. He gathered evidence that the accused came late at night, broke the deceased\'s house and battered the deceased with a metal bar, which was unfortunately, not recovered.

With that evidence, I put the accused on his defence, and reminded him of his statutory rights, to

give evidence on oath and be cross-examined, and to call witnesses to give evidence on his behalf or to give an unsworn statement and be not subject to cross-examination or to remain silent. The accused elected to give an unsworn statement.

In accordance with his unsworn statement, the accused was a truck driver, and that on the particular day he had gone to work at Dol Dol and he left his place of work at about 10.00 p.m. and parked the vehicle at the local petrol station and returned to the Likia Shanty town his home.

The accused stated that upon reaching home, he found the door to his house was open found all things missing and that he was hit on the head and that he screamed and heard many voices, and that some good Samaritan took him to hospital where he was treated, and then went to the police station, where he was asked for some money, and that since he had no money, he was charged with the offence of murder. He denied killing the deceased.

That was the prosecution and the evidence of the defence. The question in these murder cases is whether there was malice aforethought when the accused inflicted fatal blows upon the deceased.

According to the clear evidence of PW2, the accused came to their house *(which he apparently shared with the deceased)* and informed them that after pushing his door, it was not locking properly, and called *(Njogu) (the deceased)* to give some mattresses and blankets which the deceased did not have or keep for the accused. PW2 and the deceased both knew his voice well. Upon the deceased replied that he neither had the accused\'s mattress or blanket, the accused got wild, he beat the deceased with an iron, and kept on battering him for more than half an hour, with an iron bar. PW2 himself got hit on the leg when he attempted to rescue the deceased. After battering the deceased, the deceased, the accused is said to have retired to his quarter from where he disappeared, according to the evidence of PW7, and was not found until the 25.03.2006, where he had been arrested for another offence.

The critical evidence against the accused is the evidence of one witness. Section 143 of the Evidence Act, *(Cap. 80, Laws of Kenya)*, provides that no particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact. Precedent also says that the court must warn itself of the danger of convicting an accused on the basis of the evidence of a single witness.

In this case, Hussein Mohammed Wariu, a water vendor in Likia Shanty of Nanyuki Township was the only witness to the crime. His testimony is two-fold. Firstly, the accused came at about 11.00 p.m. and asked the deceased for his mattresses and blankets. The deceased denied having any mattress or blanket of the accused. Secondly both this witness knew the accused used to sleep nearby at the back of their plot. Thirdly the witness testified that he knew the voice of the accused very well. Fifthly, this witness testified that he had known the accused for a long time, he said over two years. Sixthly the accused was his neighbor and had no other relationship with the accused. Seventh, they live in the same plot. This witness had however lived with the deceased for over 5 years.

This witness was candid upon cross-examination by Mr. Simiyu learned counsel for the accused that though the accused was a friend to him, the accused was however not a good person particularly when he had taken *"that other substance bhang"*. They had no lantern, but that there was moonlight. They too had had some drinks and had come home early to sleep.

Upon re-examination, this witness reiterated that the accused was a violent person and used to cause fights in the village, and he and the deceased only resisted his demands for mattresses and blankets which they did not have.

Perhaps the question to ask in view of the evidence that they had no lantern, and apart from the moonlight this witness was able to positively identify the accused from his voice only. According Archbold, Criminal Procedure and Evidence 2003 Edn. paras 14-4-14-6 (citing the **Turnbull Rules** (**R. vs. Turnbull** and ors. **[1977] Q.B. 224 at 228 - 231** -

"Recognition may be more reliable than identification of a stranger, that even when the witness is purporting to recognize someone he knows, the jury must reminded that mistakes in recognition of close relatives and friends are sometimes made.

All these matters go to the quality of identification evidence. If the quality is good and remains good at the close of the accused\'s case, the danger of mistaken identification is lessened, but the poorer the quality, the greater the danger.

In our judgment when the quality is good, as for example when the identification is made after a long period of observation, or in satisfactory conditions by a relative, a neighbor, a close friend, a workmate and the like, the jury can safely be left to assess the value of the identifying evidence even if there is no other evidence to support it, provided always, however, that an adequate warning was given about the special need of caution…"

In this case, PW2 had known the accused for over 2 years. They were neighbours. He knew the behavior and character of the accused and in particular his use and abuse of psychotropic substances - bhang - cannabis sativa. This witness did not say how many other occasions when the accused had attacked him or the deceased, but knew that the accused had a reputation of being violent, "of not being a good person. And, he knew the accused well as well also by his voice, and required no acoustic to establish whether that was indeed the voice of the accused calling the deceased for non existent mattresses and blankets. The identity of the accused was therefore well established by this single witness.

The next question to ask is whether the accused was by virtue of being under the influence of psychotropic substance.

Although generally under Section 13(1) of the Penal Code, intoxication *(which under S.13(5))* includes a state produced by narcotics or drugs, is not a defence to any criminal charge, the question to ask in this case is whether the accused was by virtue of being under the influence of psychotropic substance or bhang *(as PW2 suggested),* was to intoxicated that he did not know the act or omission was wrong, or that he did not know what he was doing. To afford such a defence the accused must show or the court as in this case must make a finding that -

(a) the state of intoxication was caused without the consent of the accused; or

(b) the accused was by reason of intoxication insane temporarily or otherwise, at the time of such act or omission.

It is clear from the evidence of PW2 that the accused was not so intoxicated so as not know what he was doing. He came to the room of the deceased and PW2, and demanded for **"his mattresses and blankets",** and when the deceased denied having any of those items, he attacked him viciously causing serious and fatal injuries to the head, and from which injuries the deceased died. He also hit PW2 viciously with an iron bar. He ensured that the iron bar was never recovered. He disappeared from the scene for over 2 months *(7.01.2006 to 25.03.2006 when he was arrested for another offence in Karatina).* Those are not the action an insane person.

In any event a mental assessment done on the accused on 15.05.2006, found his mental status normal, and fit to stand trial for murder.

The answer to the latter whether the defence of intoxication is available to the accused must be that such a defence is not available to the accused. The abuse of bhang was merely an excuse for what PW2 described as his violent character - not being a good person.

The next question is whether the accused found the intention to kill the accused. From the evidence of PW2, I have no doubt that he had such an intention. Coming late at night 10.30 - 11.00 p.m., and demanding mattresses and blankets from a person who was not your roommate was merely to

set the stage or an excuse, to batter the deceased, and the battering was severe that the deceased succumbed to his injuries 2 days later on 9.01.2006. That certainly was malice aforethought.

And what was the Accused\'s defence - **"I did not kill the deceased",** that he was hit on the head, that he screamed, he heard noises *(presumably after being hit),* that some good Samaritan came took him to hospital, that he went to the hospital, and he went to the Police, and that the police asked him for moneys his father a watchman had no money, so he was later charged.

For that line of defence to be successful, the accused might have told the court, which police station he went to, which hospital he attended, or else to say the Police asked for money, becomes a favourite pass time to smear the name of the police with dark paint.

The accused lacked the honesty to say, he had run away and was a fugitive from the scene of the crime for over 2 months until he was arrested in Karatina for probably a less offence, and was handed over to Likia Police according to the evidence of both PW6 and PW7. There is therefore no merit at all in the accused\'s defence and I find it not credible at all.

I therefore find the accused guilty of murder contrary to Section 203 of the Penal Code, and I convict him accordingly in terms of Section 322(2) of the Criminal Procedure Code, *(Cap. 75, Laws of Kenya).*

I therefore call upon counsel for the accused, and the State to address me on why the accused should not be sentenced to the prescribed sentence of death under Section 204 of the Penal Code.

There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 30th day of March, 2012

M. J. ANYARA EMUKULE
JUDGE