



IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NO. 70 OF 2007

REPUBLIC.....PROSECUTOR

VERSUS

ERNEST IRUNGU NGANGA.....ACCUSED

JUDGMENT

The accused is charged with the murder of Benson Kuria (the deceased) on 5th July, 2007 at Olopito area, Narok.

The prosecution witnesses led evidence that at about 7p.m. on the fateful evening, **P.W.1, Joseph Ndegwa (Ndegwa)** heard noises from the accused person's house which neighboured his and upon going there, found the deceased and the accused fighting. The accused had a piece of timber in his hand and threatened to beat the deceased with it.

After failing to pacify the two, Ndegwa returned to his house. At about 1a.m., he heard the deceased calling out another neighbour, **P.W.2, Benson Njuguna Kamau (Kamau)**. Both Kamau and Ndegwa responded and found the deceased lying outside the accused person's door with multiple body injuries. The deceased repeatedly told them that the accused person, also known as "*Nguare*" had inflicted the injuries on him.

The accused person's landlord, **P.W. 3, Dickson Ole Nkoyo** was alerted of the incident and shortly arrived at the scene. He persuaded the accused person who had locked himself up to come out. When he did come out and upon realizing that the deceased was dead, the accused attempted to flee but was arrested. The police collected the body and re-arrested the accused.

Meanwhile, Dr. Sitati performed post-mortem examination on the body of the deceased. He noted multiple injuries on the body, which included fracture of tibia and fibula, multiple fractures on chest and legs. According to the doctor, death was caused by cardiopulmonary arrest due to haemorrhagic shock secondary to multiple injuries caused by a blunt trauma. The report was produced by Dr. Soita under **Section 77 of the Evidence Act.**

In his defence, the accused explained how he spent his day with four other people working on a farm. Later in the evening, he spent his time in Ndegwa's house. After 9p.m. news Ndegwa escorted him to his house about 50-60m from the former's house. While sleeping, his door was knocked by **P.W. 3 Dickson Ole Nkoyo**. Upon opening the door and before he could even talk to Ole Nkoyo, someone hit him, he fell down and lost consciousness.

In the morning, when he came to his senses, he found himself at the police station – bleeding. It was at this juncture that he learnt he was being held as a murder suspect. He further told the court that he knew

the deceased and had never had any differences with him.

From the foregoing, the questions that emerge are whether the fatal injuries on the deceased were inflicted by the accused person and if he did whether he had malice aforethought. It is clear from the evidence that there was no eye witness.

The prosecution evidence is purely circumstantial and based on three pieces of evidence. In the first instance, it was the prosecution case that Ndegwa found the deceased and accused person quarrelling; that the accused person was armed with a piece of wood. The second piece of evidence is the testimony of both Ndegwa and Kamau that the deceased explained to them that it was the accused person who had inflicted the injuries on him. That is evidence of a dying declaration. The third evidence is that the accused person attempted to escape when he realized that the deceased was dead.

There will be a conviction based on circumstantial evidence if that evidence points irresistibly to the guilt of the suspect to the exclusion of any other person and if that inference of guilt is not destroyed or weakened by some other co-existing factors.

See **Republic V. Kipkering Arap Koske & Another** (1949) 1 EACA 135 and **Simeon Musoke V. Republic** (1958) EA 715

Ndegwa was a neighbour to the accused person. There is no evidence of bad blood between them. All he told the court was that he found the deceased and the accused persons fighting and/or arguing. He also said the accused was armed with a piece of wood with which he threatened to beat the deceased.

That evidence is credible and I am persuaded that the accused was the only person in the company of the deceased. They appeared to have disagreed but were also drunk. The deceased later that evening called both Ndegwa and Kamau who found him with multiple injuries which he attributed to the accused.

It is corroborated by the earlier evidence of Ndegwa that the two had disagreed; that the accused had a piece of wood and had threatened to beat up the deceased. See **John Matu Gichuru V. Republic**, Criminal Appeal No.53 of 1997 and **Republic V. Francis Gatonye**, Criminal Appeal No.22 of 2005 cited by learned counsel for the accused person. It has further been argued that death of the deceased was caused by the delay in him being given appropriate medical attention.

In terms of **Section 213** of the **Penal Code**, the death of the deceased cannot be attributed to failure to receive proper treatment in time. It was directly as a result of the injuries inflicted by the accused person.

I come to the conclusion that it is the accused who inflicted the fatal injuries on the deceased. The accused person's defence is therefore displaced by the overwhelming evidence that he was the only person who was with the deceased and that in his dying declaration the deceased was specific that he, the accused known as "*Nguare*" had beaten him.

The next question is whether the accused in inflicting the injuries on the deceased had malice aforethought. Although in his *alibi* defence the accused maintained that he did not see the deceased on the fateful evening, both Ndegwa and Kamau who saw him before and after the incident were categorical both the accused and the deceased were drunk.

It is also conceded that the two had no previous differences and that the deceased lived several kilometers from the accused person's house. As a matter of fact, it was Ndegwa's testimony that when he found the two arguing, he asked the deceased to leave the accused person's house and go to his but he ignored the advice.

Section 13 of the **Penal Code** provides that

"13(1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge"

It is provided however in **sub-section (4)** that:

“(4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.”

The question then is whether the accused was capable of forming the specific intention to kill. **Isaac Wachira Thuo V. Republic**, Criminal Appeal No.411 of 2007.

There is evidence that when Ndegwa and Kamau got to the scene, the accused had locked himself in his house and was asleep. The deceased was still alive calling for help and generally talking.

According to the witnesses, the accused was asleep. When he finally came out, touched, the deceased and upon realizing that he was dead he took to his heels. I am of the considered view that in the totality of the evidence the accused was not capable of forming an intention to kill or cause grievous harm due to inebriation of alcohol.

For that reason I find him guilty of manslaughter under **Section 202** of the **Penal Code**.

Dated, Signed and Delivered at Nakuru this 26th day of March, 2012.

W. OUKO
JUDGE