



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL CASE NO.114 OF 2008

REPUBLIC.....PROSECUTOR
VERSUS
KENNEDY NDUANI.....1ST ACCUSED
ESTHER WANGARE.....2ND ACCUSED
GLADYS NYAMBURA MWANGI.....3RD ACCUSED

RULING

The three accused persons are jointly charged that on the night of 1st and 2nd November, 2008 at Rocky Bar, in Nairegi Enkare, they murdered David Maina Murigu (the deceased).

The prosecution at the close of its case called seven witnesses. The combined effect of their evidence is that the 2nd accused person owned Rocky Bar. On 2nd November, 2008, Shadrack Kotikoti, the brother in-law to the deceased received information that the deceased was lying dead near Rocky Bar. He proceeded to the scene where he confirmed the information that the deceased was dead. The body was lying under an electricity post some 100m from Rocky Bar. He did not notice any injuries on the body. He entered the foyer where Rocky Bar is located.

In the corridor, he found on the ground some personal effects of the deceased namely identity card, a driving licence waiting card and a certificate of good conduct. There was no blood where the body lay, a sign that the deceased must have been murdered elsewhere and the body dumped at the scene.

It was the evidence of Shadrack Kotikoti that when the chief of the area arrived, the 2nd accused told him that the deceased had fought with the 1st accused the previous night in Rocky Bar. But when the chief (P.W.6 Samuel Leposo) testified, he maintained that upon arrival at the scene he was informed that it was Shadrack Kotikoti who had witnessed the fight; that Shadrack was in the crowd that had formed where the body was lying but did not confirm this version.

Kotikoti and the chief suspected the 2nd and 3rd accused persons because the bar (Rocky) was already open and cleaned up early in the morning. He, however, stated that the 2nd accused person told him that the deceased and 1st accused person had fought the previous night.

Chief Inspector Justus Odumbe, the then OCS Nairegi Enkare Police Station also told the court that when the 2nd and 3rd accused persons were arrested, they told him the same thing – that the deceased and the 1st

accused had fought. There is also evidence that on the night of the incident, the 2nd accused had made a report (OB 16 of 1st November, 2008) at the police station to the effect that the 1st accused had assaulted her. She was referred to the hospital as she had obvious injuries.

There is also evidence that when the police went to the home of the 1st accused, he ran away on seeing the police. The police shot in the air but he escaped and was arrested later. That constitutes the evidence presented by the prosecution to prove the offence of murder against the three accused persons.

At this stage, the court is called upon to determine if that evidence discloses *prima facie* case to warrant it to call upon the accused persons to make their defence. A *prima facie* case as was defined in **Ramanlal Trambaklal Bhatt V. Republic** (1957) EA 332 as a case -

“.....on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.”

Is the evidence recorded in this trial for the prosecution such that a conviction may result if the accused persons were to elect not to call evidence in rebuttal?

There is no doubt that the body of the deceased was found lying under an electricity post with severe injuries. The doctor who performed post mortem examination on the body noted large bruises on the chest, penetrating cut wound on the left lateral chest measuring 2cm wide, penetrating wound through the diaphragm to the abdomen and a penetrating wound through the stomach. As a result of these injuries, the doctor concluded that the cause of death was cardiopulmonary arrest secondary to penetrating wound inflicted by a sharp object. It is clear from the evidence, summarized above that there was no eye witness to the stabbing.

As a matter of fact, no witness pointed at any of the accused persons as having inflicted the fatal stab wounds. The prosecution case is based solely on circumstantial evidence.

To begin with, out of all the eight (8) witnesses, only **P.W.7, Chief Inspector Isaac Odumbe** mentioned the 3rd accused person and only to the effect that in her statement to the police she confirmed that there was a fight in the bar and for that statement alone she has spent three years in custody. There is absolutely no evidence against the 3rd accused person, Gladys Nyambura Mwangi.

Regarding the 2nd accused person, the prosecution is relying on the following circumstantial evidence:

- i) that she owned Rocky Bar;
- ii) that the body of the deceased was found some 100m from that bar;
- iii) that personal documents belonging to the deceased were found along the corridors leading to Rocky Bar;
- iv) that the bar was opened and cleaned too early in the morning;
- v) that the 2nd and 3rd accused persons were cleaning the bar but upon seeing the area chief they hid what they were using to clean the bar;
- vi) that Chief Inspector Isaac Odumbe saw traces of blood in the corridor leading to where the bar is located and that the cleaning up was selective and;
- vii) that the owners of the other bars in the area confirmed that their customers did not fight.

The court visited the scene of crime twice. Maraga, J (as he then was) visited the scene on 4th December, 2009 and made very comprehensive notes. After his transfer to Nairobi and upon my taking over the

matter, I also visited the scene on 14th April, 2011.

Rocky Bar is approached from a corridor which opens to a public road in the market. Along the corridor on both sides, Mr. Justice Maraga observed there were several business establishments, butchery, eating room, bar and living room. As one enters the foyer from the corridor one would be facing the Rocky Bar from a distance. Within the foyer, there were at the time of first visit several shops for photocopying, groceries. Within the foyer, there was Bama Hotel, a salon, Salim Bar and two residential rooms. When I visited the scene, most of these establishments were closed down but the lay out was the same.

It is a matter of fact that the body of the deceased was found right outside the building housing these establishments, a distance of about 100m from Rocky Bar according to one witness. Rocky Bar was not the only bar or business establishment at the scene. As a matter of fact, it was further from where the body of the deceased was found or where the deceased person's documents were found. It appears to me that the only reason why the 2nd and 3rd accused persons were arrested in connection with the death of the deceased was because it was said that the deceased had been to Rocky Bar where the 3rd accused was a bar attendant and the 2nd accused was the owner.

However, there was no independent evidence that the deceased was at Rocky Bar the night before his body was found. Apart from what the chief, Kotikoti and Chief Inspector Odumbe said they were told by the 2nd and 3rd accused persons that the deceased and the 1st accused fought in the bar there was no evidence that indeed that was the case. The two accused persons cannot be called upon to fill in those gaps. If indeed they had that information, the police ought to have used them as witnesses and not charged them for witnessing a fight. The 2nd accused was infact a victim of attack by the 1st accused person. She made a report and her injuries were apparent yet she ended up being charged.

In view of these facts, no evidence has been produced that irresistibly points to the guilt of the 2nd accused person to the exclusion of any other person. The area where the body of the deceased person was found is a public place with several business activities. There were many factors that weakened any inference of the guilt of the 2nd accused person.

Turning to the 1st accused person, the only circumstantial evidence against him was that:

- i) he was at Rocky Bar the night before the body of the deceased was discovered;
- ii) he fought with the deceased;
- iii) when the police went to their home the 1st accused person ran away.

Again there is no independent evidence that the 1st accused was infact at Rocky Bar; that the deceased was also at Rocky Bar and that the two fought. There is no evidence of the intensity of the fight and what happened thereafter – whether the deceased left the bar and in what condition. There is no evidence that a knife or sharp object was involved in the fight. The evidence of the fight is said to have come from the 2nd and 3rd accused persons. Once more, it is not for them in the defence to fill in the gaps in the prosecution case.

The fact that the 1st accused ran away when the police went to arrest him can be attributed to many factors other than guilty mind for the death of the deceased. It will be recalled that the 2nd accused person had made a report that the 1st accused person had assaulted her. He perhaps thought that he was being sought after because of this. Again, the evidence does not irresistible point to the guilt of the 1st accused person.

In the result, the prosecution has failed to prove a *prima facie* evidence against the accused persons with the result that the charges are dismissed. The accused persons are acquitted and shall be set at liberty

forthwith unless otherwise lawfully held.

Dated, Signed and Delivered at Nakuru this 14th day of March, 2012.

**W. OUKO
JUDGE**