



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL CASE NO. 52 OF 2008___

REPUBLICPROSECUTOR

VERSUS

JOSEPH IKUMBI WAITHAKA ACCUSED

JUDGMENT

The accused, **JOSEPH IKUMBI WAITHAKA**, was charged with the offence of Murder **contrary to section 203 as read with section 204 of the Penal Code**. It is the prosecution case that the accused murdered **DAVID MBUGUA HINGA** on 22nd May 2008, at Gathaito Village in Kiambu District.

The prosecution called nine (9) witnesses. Thereafter, when the accused was put to his defence, he gave an unsworn defence. He did not call any other witness.

In this judgment, I will evaluate all the evidence on record to ascertain whether or not the prosecution discharged its obligation of proving the guilt of the accused, beyond any reasonable doubt.

PW 1, JOSEPH KARANJA HINGA, is a brother of the deceased. Late on the night of 22nd/23rd May 2008, he was informed that his brother, David Mbugua Hinga, had been killed by the accused herein. The person who provided **PW 1** with that information was Kamau Mbugua (**PW 4**).

At day-break **PW 1** went to the scene of crime, where he found the deceased lying dead, in a trough.

PW 1 noted that the deceased had 3 different swellings on the head. He then reported the incident at the Kagwi Police Post.

Later, **PW 1** went with the police to the place where the accused used to work, and the accused was arrested.

On 27th May 2008, **PW 1** identified the body of the deceased at the City Mortuary; the said identification was for purposes of post mortem.

PW 2, PETER CHEGE KONYE, was with **PW 1** at the City Mortuary, when the body of the deceased was identified.

PW 3, PC BABU MBIJIWE was attached to the Githunguri Police station, at the material time. At about 8.30a.m., on 23rd May 2008, **PW 3** received a phone-call from the Chief of Gatamaiyu Location, telling him that some 3 men had reported to him about a murder. At the request of **PW 3**, the 3 men were sent by the Chief to the Kagwi Police Post, where the witness (**PW 3**) was working.

The 3 men were **PW 1, PW 4** and Peter Muchiri Hinga. Whilst Peter Muchiri Hinga and Joseph Karanja Hinga (**PW 4**) were brothers to the deceased, John Kamau Mburu (**PW 4**) was a neighbour.

The 3 men told **PW 3** that the person who had killed the deceased was the accused herein, who was a brother-in-law to the deceased.

PW 3 was one of the police officers who arrested the accused, after **PW 1** pointed him out.

Upon searching the accused's house, the police recovered wet military boots, a wet jacket and a wet pair of trousers.

PW 4, JOHN KAMAU MBURU, was a friend of the deceased. On 22nd May 2008, **PW 4** was together with the deceased, at the Gatamaiyu Trading Centre. They left for home at 11.30p.m.

When the deceased and **PW 4** reached near the gate to **PW 4's** home, they met the accused. According to **PW 4**, the accused was a person who was well-known to him.

As soon as **PW 4** and the deceased reached near the accused, the latter abused the accused. He called him a devil and a dog. That prompted the accused and the deceased to fight each other. The accused was armed with a "Maasai rungu", which he used to hit the deceased on the head.

PW 4 made every effort to separate the two, but the accused succeeded in hitting the deceased with the rungu, until the deceased fell down.

PW 4 was one of the 3 people who reported the incident to the police at Kagwi Police Post. He told the police that the accused killed the deceased.

When **PW 4** was asked about the circumstances prevailing on the night when the deceased was killed, he said that it was not a dark night. He explained that there was moonlight.

During cross-examination, **PW 4** said that on the material night he drunk two (2) bottles of "Tusker", whilst the deceased had one (1) bottle of "Tusker".

He therefore, emphasized that he was not drunk.

However, when **PW 4** was shown the statement he had recorded with the police, he admitted having told the police that he and the deceased were "a little drunk".

PW 4 also admitted that in his statement he had told the police that on the night when the deceased was killed, it was very dark. Indeed, **PW 4** had gone to his house to fetch a torch because of the darkness.

Nonetheless, **PW 4** reiterated, when testifying in court, that there was moonlight on the night when the deceased was killed.

PW 4 also said that the deceased had confronted the accused, asking who the thug standing outside **PW 4's** gate was. But **PW 4** did not know why the deceased asked that question.

After **PW 4** had given his evidence, the advocate for the accused asked the court to make note of the intention to use the statement of **PW 4** as a defence exhibit. The said statement was then Marked for Identification.

During cross-examination, **PW 4** insisted that he and the deceased had not been drunk on the

material night; and also that that night was not dark.

He explained that the police officer who recorded his statement may have written that it was dark because **PW 4** told him that the incident took place at about 11.30p.m.

PW 5, DR. PETER NDEGWA, is a pathologist. On 27th May 2008, he performed a post mortem examination on the body of the deceased.

He found that the deceased had a depressed fracture of the skull, with some bleeding inside the brain.

In his considered opinion, the cause of death was a severe head injury due to a blunt force trauma. The body had no external injuries.

PW 5 said that the fatal injury could have been caused by a blunt object, like a stone or a piece of wood. He also explained that the said injury could have been caused by either one or more than one blow.

According to **PW 5**, the injury could not have been caused by a fall, unless the deceased had fallen on his head.

But the doctor emphasized that it was not normal for any person to fall down, with the top of his head hitting the ground. Ordinarily, a person could fall and injure the prominent parts of their bodies, which do not include the head.

Therefore, if the deceased had fallen on his head, that would have been abnormal, said the doctor.

PW 6, INSPECTOR HEDLUM BARISA MWAKIO was the Deputy OCS at Githunguri Police Station as at 23rd May 2008, when he accompanied the OCS to the scene of the alleged murder, in Gathaito Village, Gatamaiyu Location. It was **PW 3** who led the senior police officers to the scene, after they met him at Kagwi Police Post.

When **PW 6** looked at the body, he noted an injury on the left side of the face, as well as a deep cut on the back of the head.

Whilst **PW 6** was still at the scene, one police officer was dispatched to Gachuraini, where he arrested the accused. The accused was then taken back to the scene.

A search was conducted in the accused's house, which was about 3 to 4 kilometres from the scene. However, the police did not recover any exhibits.

During cross-examination, **PW 6** said that he would be surprised if the doctor who did the post-mortem said that the body had no visible injuries.

PW 6 also told the court that he was informed that the night when the deceased was killed, was dark. The person who gave him that information was the eye-witness. By that piece of evidence, I understand that it was **PW 4** who talked to **PW 6**, telling him that it had been a dark night.

PW 6 was also told by **PW 4**, that he (**PW 4**) had looked at the assailant very closely, identifying him as the accused herein.

PW 6 told the court that his investigations revealed that both the deceased and **PW 4** had been drunk. He added that those 2 gentlemen were both from the bar.

The accused also told **PW 6** that he had been with **PW 4** and the deceased at the bar. However, the accused left the bar ahead of the other 2. Later, when they found the accused near the home of **PW 4**, the deceased asked the accused;

“who is this criminal standing here?”

As the deceased had called the accused a criminal, the 2 of them started fighting.

Even though it had been a dark night, **PW 6** said that he was convinced that **PW 4** saw exactly what happened. His belief stems from the fact that the accused had been with both **PW 4** and the deceased earlier that night, at a bar.

When asked how he knew that **PW 4** and the deceased had been drunk, **PW 6** said that it is because the 2 of them had had some alcohol in a bar.

PW 7, CHIEF INSPECTOR ERNEST MARINGA worked in the Scenes-of-Crime Support Services section of the CID Headquarters.

On 23rd May 2008 he took photos of the body of the deceased as it lay on the edge of a road. He saw injuries on the left side of the head and the back of the head.

The photographs taken by **PW 7** clearly show the injuries.

As there was blood at the scene, **PW 7** concluded that the deceased must have been killed there.

PW 8 APC LABAN ALAKE arrested the accused after a brother of the deceased pointed him out. At that time, the accused was cutting some wood, using a power-saw in a shamba.

He handed over the accused to the regular police at the Kagwi Police Post.

During cross-examination **PW 8** said that the accused told him that he had disagreed with the deceased when the two of them were having drinks.

PW 9, DR. ZEPHANIA KAMAU, examined the accused on 3rd of June 2008. He found that the accused was 27 years old; had no physical injuries; and was mentally fit.

PW 9 did not try to find out if the accused had been under the influence of alcohol, as he was not asked to do so.

PW 9 also said that the accused did not tell him that he, (the accused), may have been under the influence of alcohol. The doctor did not observe anything peculiar on the accused, which might have suggested that the accused had taken alcohol.

After the prosecution closed its case and the accused was put on his defence, he gave an unsworn testimony.

He said that on the night of 22nd May 2008, he had some alcohol at Guruga Bar, which is located at the Gatamaiyo Shopping Centre. Thereafter, he left for home.

On reaching Githuitu village, he met a crowd of people. One person from the crowd grabbed him and demanded to know why he was walking alone at that late hour. He pushed away the man, telling him that he was not a thug, as the man had suggested.

The accused said that he had knocked the man down, with his shoe; that is when the accused was trying to free himself from the man. In the ensuing struggle, both the accused and the man fell down, as the ground was slippery, due to some rain showers.

Thereafter, the accused walked home.

He was arrested on the next day, when cutting wood. He attributed his arrest to the fact that he did not carry with him, the permit authorizing him to cut wood.

However, when he was taken to the police, they demanded an explanation from him about the death of the deceased, David Mbugua Hinga, his cousin.

The deceased was lying dead, at the scene where the accused had encountered a crowd on the previous night.

That was the sum total of the evidence.

The learned advocate for the accused, Mr. Kanyangi, submitted that **PW 4**, who was the alleged eye-witness, was not a witness of truth. He pointed at the discrepancies between the evidence of **PW 4** and the statement he had recorded earlier with the police.

As far as the accused was concerned, **PW 4** could not have known how the deceased met his death, because **PW 4** had left the accused fighting with the deceased. Therefore, it is possible, said the accused, that anybody who might have been hiding in the dark, had killed the deceased.

At worst, the accused says that what happened was so spontaneous that there was no motive.

Having given careful consideration to the evidence on record, I note that **PW 4** was an eye-witness. He had been with both the deceased and the accused at a bar, in Gatamaiyu Shopping Centre. The accused confirmed being at the said shopping centre, at a bar.

PW 4 struck me as an honest and straightforward witness. He did not try to paint the deceased as a saint. Instead, he made it clear that it was the deceased who hurled an abuse at the accused, by suggesting that the accused was a thug.

The said abuse gave rise to a fight between the accused and the deceased. During the fight, the accused used a “Maasai rungu” to hit the deceased on the head.

Although **PW 4** tried to separate the two, the accused hit the deceased until the latter fell to the ground.

As **PW 4** tried to separate the deceased and the accused, he was obviously so close to them that he was able to recognize the accused.

Immediately thereafter, in his first reports, both to **PW 1** and to **PW 8**, he said that it was the accused who had killed the deceased.

Although the accused said that he found a crowd of people at the scene of crime, on the material night, it is noteworthy that he did not raise that line of defence when cross-examining **PW 4**. Indeed **PW 4** made it clear that he did not see anybody else at the scene, save for the accused.

That would mean, as I do hereby find, that the existence of a crowd of people at the scene of crime was nothing other than an after-thought on the part of the accused.

PW 4 was not involved in the fight between the accused and the deceased. He therefore had every opportunity to observe those two as they fought. He then tried to separate them. That brought him into even closer proximity to the 2 men. He was therefore able to, and did recognize the accused.

Although the deceased did abuse the accused by suggesting that he was a thug, the force which the accused used was excessive. He used a rungu to hit the deceased on the head. In doing so, he exerted so much force that resulted in the deceased sustaining a fracture of the skull. There was no justification for the force used by the accused. I find that the accused must have intended to either cause the death of or to

do grievous harm to the deceased. In effect, he had malice aforethought, as defined in **section 206 of the Penal Code**.

I therefore find the accused guilty of the offence of murder, and I convict him accordingly.

Dated, Signed and Delivered at Nairobi, this 3rd day of May, 2012

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FRED A. OCHIENG
JUDGE