**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**CRIMINAL CASE 87 OF 2009**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**BONIFACE MUTEMBEI.....ACCUSED**

**JUDGMENT**

The accused BONIFACE MUTEMBEI is charged with murder contrary to Section 203 of the Penal Code. The particulars of the charge are that on the 3rd day of October 2009 at Maili Tano village, of Imenti North District within Eastern Province murdered John Muramba.

The prosecution called four witnesses. The facts of the prosecution case were that the deceased was in the company of his brother, PW2 and a friend PW3. PW3 was escorting PW2 and 3 homes after he had given the two supper at his house.

The deceased was left 20 meters behind as he relieved himself on the side of the road when the accused came out of a near house carrying a panga. The accused cut the deceased severally on the head, even after he had fallen to the ground. He died at the scene of attack.

The accused denied the offence and said that the deceased was his greet friend. He said that he was at a bar with the deceased and another where he had a couple of sprits. He claims that he passed out and did not know where he was until 6 am when he came to and found himself nude sleeping next to his greet friend, the deceased. The deceased was dead.

The accused faces a charge of murder section 203 of the Penal code provides:

**“Any person who of malice aforethought causes death of another person by an unlawful act or mission is guilty of murder”.**

Malice aforethought is a very important ingredient for the offence of murder. The prosecution has to prove facts which establish malice aforethought. S. 206 of the Penal Code sets down the facts which constitute malice aforethought as follows:-

**“Malice aforethought shall be deemed to be established by evidence Proving any one or more of the following circumstances:-**

**a) An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not.**

**b)Knowledge that the act or omission causing death or grievous harm to some person, whether**

**that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;**

**c) ……**

**d)…….**

The prosecution called two eye witnesses to the incident, PW2 and 3. PW2 was a brother of the deceased and PW3 a friend.

The incident took place at 10pm. According to PW 2 & 3 they were walking towards the deceased house when the deceased stopped to relieve himself that the two eye witnesses saw the accused approach them running from the opposite direction. He passed them once according to PW2, and twice according to PW3. H e then proceeded to where the deceased was relieving himself and started cutting himself with a panga shouting that he would kill him completely. Both PW2 and 3 said that they ran towards the scene to stop the accused from attacking the deceased but that he turned against them with the panga and chased them away. The tow said that the accused went back to where deceased lying and continued cutting him with the panga.

Since the incident took place at night, the court has to keenly consider the issue of identification. I must mention here that I did not hear the case for the prosecution. It was heard by my colleague, Hon Kasango, J who was transferred from the station. I only heard the defence. I did not have the opportunity to see.

Regarding identification in the case of **ABDULLAH BIN WENDO VS. REX 20 EACA 166,** the Judges of Appeal emphasized the need for careful scrutiny of the evidence of identification especially by a single witness, before basing any conviction on it. The Court held as follows:

**“Subject to certain well known exceptions it is trite law that a fact may be proved by a testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt from which a Judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness can safely be accepted as free from the possibility of error.”**

The eye witness said it was not dark because there was bright moonlight directly above them on the material night. PW2 was seeing the accused for the first time but PW3 knew him before.

PW3 said that the accused spoke to him when he asked him where he was going. The accused answered, “I am going to another Maina’s place” PW3 stated that he heard and recognized his voice. The words spoken by he accused as he attacked the deceased were:

**“Today I will kill you!”**

PW2’s evidence was that he saw the accused and was able to identify him subsequently. He also heard him speak saying he would kill the deceased. Most importantly according to PW2 the deceased body was not collected until the next morning. That at the same time, the accused was sought for and found lying in as trench naked the same night. He too remained at the scene until next morning when police went to the scene, collected the accused and the body of the deceased.

It is clear from the prosecution case that after the accused cut the deceased several times in the head, he remained within the area until the next morning. That agrees with the accused statement in defence.

The accused does not deny knowing the deceased before the incident. He said he was his great friend. The accused did not deny being with deceased the day of the incident. The issue of identify is therefore

not denied.

PW3 knew the accused person before his evidence is clear he saw him and recognized him. He also recognized his voice. I am satisfied that PW2'S evidence taken together with circumstance of the case that the accused was apprehended same night about 150 meters from where the attack took place.

Regarding malice aforethought Mr. Isaboke for the accused urged this court to find that the accused was so drunk that he could not have been able to form the necessary malice aforethought. The question is whether the defence of intoxication is available to the accused.

Section **13 (1) (2)** of the **Penal Code** provides as follows:

**"Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.**

**Intoxication shall be a defence to any criminal charge if by reason thereof he person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and (a) the state of intoxication was caused without his consent by the malicious or negligent act of another person or**

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

**REPUBLIC VS KIMAIYO ELD. HCCRC NO.40 OF 2005** where the court stated thus:

"**The main ingredients in a charge of murder are that the accused must have formed the criminal intention and have had a motive to cause death or bodily harm prior to killing the deceased and that the death must have been as a result of an unlawful act or omission on the part of the accused, while the first two ingredients would be lacking in the charge of manslaughter.**

**I have taken his statement into account and noted the fact that he has consumed busaa and chang'aa during the material day and night. The fact that he had even engaged in a fracas with his own brother earlier that evening when both were armed with bows and arrows would convince me that he was in a state of intoxication which in my view was a condition graver and more extreme than just being meredrunk, or under the influence of drink. Such is a condition which exists "when as a result of his consumption of intoxicating liquor (a man's) physical or mental facilities, or his judgments, are appreciably and materially impaired in the conduct of the ordinary affairs or acts of daily life" ( per fair, J, in R.v. Ormosby, ( 1945) N.Z.L.R 109.**

**Based on the above, I find that the elements of malice aforethought and intention are lacking. Having found that the circumstances tend to incriminate him, I do however find that the accused would qualify for a defence of intoxication, and in such case then I find him guilty of the lesser charge of manslaughter."**

The accused's defence was he started imbibing strong spirits from 3p.m and that he was with the deceased.

PW3 in his evidence confirms the accused defence on two points. One that the accused and deceased were drinking together earlier on the day of the incident. The other fact PW3 confirmed is that the accused was quite drunk when he saw him earlier in the day.

I have considered the conduct of the accused on the material evening. PW2 & 3 said he ran out of a house, panga in hand and both hands raised up. He then ran passed them. He then attacked the deceased who was busy relieving himself. He cut him repeatedly as he kept saying he will kill him completely. Eventually he went and slept in a trench naked until morning. All this is not the conduct of a sane person. I find the accused conduct at the time was that of a person intoxicated with alcohol as PW3 described in his evidence. The accused defence that he was unaware of what happened between 3 pm when he started

drinking spirits until 6 a.m the following morning does appear to have been contributed by his drunken state.

I find that as a result of his consumption of intoxicating liquor the accused mental faculties, and or his judgement were appreciably and materially impaired that accused was incapable of forming an intention to cause death or grievous harm.

I am convinced he is the one who caused the injuries on the deceased which caused his death. However, I find he did not have the mental capacity to form the intention to cause the death due to the influence of alcohol.

Consequently I substitute the charge against the accused from murder contrary to section 203 of the Penal Code to manslaughter contrary to section 202 of the Penal Code.

I find the accused guilty of the substituted charge of manslaughter and convict him accordingly.

Dated, signed and delivered this 31st day of July, 2012.

**LESIIT, J**
**JUDGE**