



**REPUBLIC OF KENYA**

**High Court at Nyeri**

**Criminal Case 9 of 2009**

**REPUBLIC.....PROSECUTOR**

**-versus-**

**PETER MWANGI MURIGI.....ACCUSED**

**J U D G M E N T**

**Peter Mwangi Murigi**, the accused is before this court on the information of the Honourable Attorney General dated 6th February 2009 to face a charge of **Murder** contrary to the **Provisions of Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence are that: ***On the 9th and 10th day of January 2008, at Mbugua Village in Murang'a South District, the Accused is alleged to have murdered Abraham William Kimani.***

The Prosecution presented the evidence of eight witnesses in support of their case. The key witness who linked the Accused with the deceased's death is one John Chege Mwangi (P.W.7). He told this court that he worked as a Bar Attendant at *Nginda Bar* when at 8.00 p.m. On 9th January 2008, Peter Mwangi Murigi (accused) and Abraham William Kimani (deceased) arrived. P.W.7 said knew the duo very well. He stated that he served them with drinks and that at 9.00 p.m. the duo left *Nginda Bar*. P.W.7 continued with his work until 11.00 p.m. When he closed the bar. On 10th January 2008, P.W.7 learnt about the deceased's death. He told this Court that the deceased's body was found lying outside *Gatitu Bar*. P.W.7 visited the scene where the deceased's body lay and met Samuel Kinuthia Ng'ang'a the Bar Attendant of *Gatitu Bar*. Peter Mwirigi Kimani (P.W.3), a cousin of the deceased told this court that he received the news of the deceased's death on 10th January 2008. He, together with other members of public reported to the police who swung into action. P.W.3 and Moses Ng'ang'a (P.W.4) confirmed that they knew the Accused and the deceased were friends and worked together in a quarry. They (P.W.3 and P.W.4) stated that they found the accused to be amongst those people who were at the scene where the deceased's body was found. Corporal Symon Mwangi (P.W.5) a police ^ visited the scene. He told this court that he later recorded evidence in which the accused was named as the last person to have been seen with the deceased alive and that is why he was arrested as a suspect. Dr. Cosmas Karanja Kimama (P.W.6) did a Postmortem on the deceased's body and formed the opinion that the cause of death was *asphyxia* due to strangulation.

When placed on his defence, the accused denied committing the offence and gave sworn testimony without the benefit of independent witnesses. He told this Court that he was with the deceased at *Nginda Bar* on 9th January 2008 where they shared a drink. The Accused stated they left the bar and on the way he branched for his home as the deceased proceeded ahead to his house which was past *Gatitu Trading Centre*. The duo agreed to link up the next day to meet the deceased's son who had not come home for a long time. The Accused said he was surprised to learn of the deceased's death the next day. He stated that he was amongst the people who made frantic efforts to contact members of the deceased's family and the relevant authorities over the incident. He alluded that there was need to summon the watchman who was on guard of *Gatitu Bar* during the fateful night. He produced in his evidence a statement recorded at the police by the *Gatitu Bar* Attendant which indicated that the night watchman of the aforesaid bar disappeared also immediately after the body of the deceased was discovered lying next to *Gatitu Nginda Bar*. He denied the allegation that he escaped from the area after the deceased passed away. The accused stated that he left the area to search for employment and that he did not attend the deceased's burial because he was not aware of the burial date.

At the close of evidence, Learned Counsels from both sides were invited to make final submissions. It is the submission of Miss Mwai, Learned Advocate for the Accused that the Prosecution had failed to discharge the burden of proof. Miss Ngalyuka, Learned Senior State Counsel was of the view that the Prosecution had tendered evidence establishing the case against the accused beyond reasonable doubt.

I have considered the evidence tendered plus the rival submissions. In order to prove the offence of Murder, two ingredients must be established. First, the element of malice aforethought must be shown to have existed. Secondly, the element of *actus reus* must also be established. At this juncture, let me try to discover whether or not the evidence presented by the Prosecution established the above ingredients.

I will start with the element of *actus reus*. It is clear from the evidence of Dr. Cosmas Karanja Kimama (P.W.6) that the deceased died as a result of *asphyxia* due to strangulation. In other words, the deceased did not die due to natural causes. He was basically strangled. The question which arises at this juncture is: Who did it? The Prosecution is saying that since the Accused was the last person to be seen with the deceased while he was alive, then he is the culprit. The Prosecution further alleges that since he disappeared from the area immediately after the deceased's death then he has guilt conscience. The Accused on the other hand has explained himself out in his defence. He stated that he was with the deceased at *Nginda Bar* having a drink on the fateful night until 9.00 p.m. When the duo left. On the way, the Accused said he left for his home while the deceased proceeded for his home which was far away from the Accused's home. The Accused said he was shocked to learn of the deceased's death the next day. His body was found not far from another bar in *Gatitu Trading Centre*. The Bar Attendant and the night watchman of the aforesaid bar were never summoned to testify to shed light on what happened. There is also documentary evidence from the accused that the watchman disappeared from the area almost immediately after the deceased's death. This case heavily depends on circumstantial evidence. There is strong suspicion that the Accused could have committed the offence but suspicion however strong cannot substitute proof. In the circumstances of this case, there are more one possible assailant's of the deceased. The deceased could have been assaulted by the Bar Attendant of the Pub where his body was found lying. Secondly, it is also possible he was assaulted by the night guard of the aforesaid Pub. It is therefore not a clear cut case. Some doubt has been created in my mind. It has also been alleged that the Accused disappeared from the area after the death of the deceased was reported. I think the aforesaid submission was displaced by the Accused's evidence in his defence. That assertion was also discounted by the evidence of P.W.7 and P.W.4 who stated that the Accused was part of the people who were present at the scene where the body was discovered. In fact, it is the evidence of the Accused that he informed some of the deceased's family members about the death of the deceased. The accused's conduct during the period is not that of a guilt mind. In my view, the element of *actus reus* has not been proved against the accused. In short, there is no evidence beyond reasonable doubt that the accused committed the offence.

Let me now turn my attention to the ingredient of malice aforethought. It is the evidence of P.W.4 and P.W.7 that the accused and the deceased were blossom friends. This fact was confirmed by the accused when he testified in his defence. There is no direct nor circumstantial evidence showing the accused had malice aforethought. In the end, the two ingredients of Murder have not been established. I will give the accused the benefit of doubt. The prosecution has failed to establish its case to the required standards of beyond reasonable doubt. I find the accused not guilty. He is acquitted of the offence of Murder. Consequently, he should be set free forthwith unless lawfully held.

**Dated, signed and delivered this 18th day of October 2012.**

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**J. K. SERGON**

**JUDGE**