



**REPUBLIC OF KENYA**

**High Court at Nyeri**

**Criminal Case 48 of 2008**

**REPUBLIC.....PROSECUTOR**

**-versus-**

**ROBERT MUNGAI MAINA.....ACCUSED**

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

**ROBERT MUNGAI MAINA**, the accused person is before this court on the information of the Honourable Attorney General dated 9<sup>th</sup> September , 2008 to face a charge of **Murder** Contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the charge are that on 24<sup>th</sup> August 2008, at Kiharo village in Murang'a South District within Central Province, the accused, murdered Julius Mwangi.

At the close of the prosecution's case, a total of eight (8) witnesses had testified in support of their case.

The star witnesses who testified in support of the prosecution's case are **Samuel Maina** (P.W.2), the father of both the accused and the deceased. He was an eye witness in this case, P.W.3, **Esther Wamwai**, the deceased's mother and P.W.4, Selina Njeri, the accused's sister, were within the scene of the crime. P.W.2 states in his evidence that the offence occurred under his watch when the deceased came and found him with the accused talking. The deceased immediately picked up a quarrel with the accused. He stated that he saw the Accused retreat a step back then cut the deceased on the ear, after which the deceased fell down and the accused fled from the scene. The deceased was rushed to hospital but he bled to death before reaching the hospital. Upon being put on cross examination P.W.1 stated that the deceased and the accused were habitual drunkards. **Esther Wamwai** (P.W.3), the mother of the deceased, who did not witness the action states that she heard two loud bangs outside the kitchen. She rushed out to see what had happened, and found the deceased lying down. Lying next to him, was a panga stained with blood. She took the panga and kept it inside the house. She said that she called other people to witness what had happened as the deceased was unconscious at that point and could not talk to her. She identified the panga which she had seen at the *locus in quo*. Upon cross examination she confirmed that the deceased and the accused being her sons had quarreled amongst themselves confirming that both were drunk on the day of the crime. she stated that prior to the offence, the accused had approached her while tethering goats and told her that he intended to make his last wishes. She never took him seriously since he was drunk. She added that at that time, the accused was not in possession of a weapon. She also stated that the deceased fell inside his house but the panga she had collected was actually outside the house.

P.W.4, **Selina Njeri** a sister of the accused and the deceased stated that she was inside the house with her other sister while her parents were outside. She stated that she heard their father and accused talking. Shortly, P.W.4, said, she heard the deceased's voice asking the accused what he was demanding from their father. She heard screams from their mother stating that the deceased had been cut. She added that their brothers did not have a grudge against each other, but were drunk on the fateful day. She stated that she never went to the scene of crime or witness the fight between the two brothers.

All the other prosecution witnesses were adding to what they heard from the P.W.2 and 3 save for Stephen Matunda Joel Waibe (P.W.7) the government analyst who examined the blood stains and confirmed that the stains in the clothes of the deceased and that on the panga were from the deceased. Erastus Etari (P.W.8) the investigating officer, also tendered his evidence in which he stated that upon inquiring from the deceased's mother, he confirmed from her that the panga found at the scene of crime belonged to the accused. He also learnt that she was aware that at the time of the offence the accused was drunk. Pursuant to the Provisions of **Section 77** of the **Evidence Act**, P.W.8 was allowed to produce the Postmortem Report on behalf of Dr. Kimama. The Doctor formed the opinion that the deceased died as a result of severe hemorrhage and severe head injury due to sharp cut wounds.

The accused's unsworn evidence was that on the material date he went to take some alcohol with a friend before proceeding to the nearby trading centre. He stated that as he was walking with his friend he saw his deceased brother following them. The accused claimed the deceased assaulted his friend and was forced to restrain his brother from further attacking his friend. He stated that after this, he returned home and reported to his father of what had happened. He added that he also went to tell his mother but was told to heed his father's advice and wait until they were sober. Before finishing with his mother the accused said, the deceased arrived and started fighting him. He alleged he used a stick to shield himself, after which the deceased threw a panga at him and he ran away to spent the night at the neighbor's residence till the next day when he came to know of the death of his brother.

I have considered evidence tendered. The court in this matter is called to decide whether the actual commission of the offence is established as well as the requisite intention to commit the offence. Pw2 testified that he actually saw the accused cut the deceased with a panga which necessitated the calling of neighbours and the area chief to take the deceased to the hospital.

P.W.3 too stated that she heard a bang from the direction at which she found the deceased lying while bleeding and next to him lay a panga laced with blood stains. She took the panga and hid it in her house. The a Government Analyst (P.W.7) did testify and stated that the blood stains on the panga that of the deceased. The accused was seen by his own father cut the deceased. The evidence of P.W.3 is clear that the panga at the scene of crime belonged to the accused. There is sufficient evidence to believe that the accused did cut the deceased, a cut from which the deceased succumbed to death.

However for a charge of murder to be well grounded, the requisite intention must be established. From the foregoing it is evident that the accused and the deceased were both drunk and under the influence of alcohol. what was not well explained in court was the time when the accused came in possession of the panga pw2 stated that he saw the accused use a panga to cut the deceased.

From the inference drawn from the evidence of both sides, it is clear the accused came with his own panga the scene of the crime. He was talking to his father when the deceased came and picked a quarrel with the accused. It is the evidence of the accused that the panga at the scene of crime was that of the deceased which the deceased threw at him. However the evidence of the accused appears to be incongruous vis-a-vis what occurred before or after the quarrel. His defence is found to be unreliable.

Evidence was led by the Prosecution which indicated that the accused used quarrel with the deceased whenever they drunk but were good friends when sober. However the evidence of pw3 is very crucial in this case in that on this particular day the accused had made his last wishes to his mother. His mother ignored him due to the fact that he was drunk.

It is evident that the intention to commit a crime although present was formed under influence of alcohol on the part of the accused. It is therefore sufficient for the court to infer that the f accused was intoxicated to the extent that his sense of judgment was impaired. For this reason I do not find the element of Malice Aforethought proved. Pursuant to the Provisions of **Section 179(2)** of the **Penal Code**. I find the evidence tendered supports the lesser offence of manslaughter contrary to **section 202 (1)** as read with **section 205** of the Penal Code which I hereby convict the accused of.

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

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**J. K. SERGON**  
**JUDGE**

In Open Court in the presence of Miss Mwai holding brief for Karweru for the Accused and Miss Kitoto for the State.