



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Criminal Case 110 of 2009

REPUBLIC..... PROSECUTOR

VERSUS

JOHN MAINA NYAMBURA1ST ACCUSED

JULIUS CHERUIYOT NG'ETICH 2^N ACCUSED

JUDGMENT

The accused persons, **JOHN MAINA NYAMBURA** and **JULIUS CHERUIYOT NG'ETICH** were charged with the offence of Murder **contrary to section 203 as read with section 204 of the penal Code**. The particulars of the offence were that on 28th October 2009, at Masai Village, Nairobi, the accused persons jointly murdered the deceased, **LEONARD KIBET NG'ETICH**.

The prosecution called TEN (10) witnesses. Thereafter, when the accused were put to their defence, each of them gave an unsworn testimony. Neither of the accused called any other witnesses.

In determining the case, I will now summarise the evidence tendered by each of the witnesses. I will then evaluate the totality of the evidence, to ascertain whether or not the prosecution had proved the case against the accused persons.

PW 1, FRANCISCA SYOKUA KAWINZI, was employed by the 2nd accused at his bar. At the said bar, patrons used to partake of chang'aa. **PW 1** worked as a waitress at the bar. On the material night she was on duty.

At about 9.00p.m, there were many people at the bar, most of whom had gone to watch news on the television.

PW 1 testified that the deceased was a regular customer at the bar. But on that night, the deceased became violent when **PW 1** told him that she did not have his Identity Card. It was the evidence of **PW 1** that the deceased hit her twice on the head, using a stick.

PW 1 screamed; and some patrons went to her help. Those patrons included **BROWNY, MAINA** and **OTI**. When the deceased saw the patrons rise up, he got scared and went outside the bar. Some customers followed him outside.

PW 1 testified that the 1st accused was one of the customers who followed the deceased. **PW 1** identified the said accused as the customer whose name she knew as **MAINA**.

PW 1 also testified that when the deceased ran out of the bar, he left behind the stick which he had used to hit her. But the 1st accused picked up the stick, and went out with it.

PW 1 did not leave the bar. Meanwhile, the 2nd accused was asleep, at his house, which was adjacent to the bar. He only came out after the commotion.

Those who pursued the deceased returned to the bar after about 30 minutes. **BROWNY** said that they had left the deceased in a gutter.

The 1st accused cautioned **PW 1** not to tell anybody that the deceased had been left in a gutter. Indeed, the 1st accused advised **MAINA**, **BROWNY**, **OTI**, **PW 1** and his wife, (**PAULINE WAITHERA**), not to reveal how the deceased had been chased out of the bar and was thrown into a ditch.

On the following day **PW 1** saw the deceased being assisted by two men, namely **FREDERICK** and **DERRICK**. The said 2 men used to be customers at the bar where **PW 1** worked.

According to **PW 1**, the 2 men were assisting the deceased because he could not walk on his own.

It was the evidence of **PW 1** that the 2nd accused told her that he wanted to move his residence away from the place which was next to the bar. His reason for wishing to move was that the 2nd accused had heard that he was being considered as one of the people who had information about the incident. He therefore wanted to move away before he and **PW 1** could be arrested.

PW 1 said that the 2nd accused moved away about 4 days after the incident. But **PW 1** did not know where her employer moved to.

During cross-examination **PW 1** said that there was electricity lighting inside the bar. **PW 1** did not know what happened to the deceased, outside the bar.

PW 1 was arrested after the 2nd accused moved. She was held in custody for 4 days. A total of five (5) people were arrested. **BROWNY** was one of those five. The 2 accused persons were also a part of the five people who were arrested.

PW 2, JOYCE KOIRA KIPAS, was a girlfriend of the deceased. The two of them used to live together, within Masai Estate, Nairobi. However, the deceased also had his own house within the same area.

On the material night, the deceased arrived at the house which he used to share with **PW 2**. When **PW 2** informed him that supper for that evening was Ugali and Sukuma-wiki, the deceased left to go and buy “maziwa mala”, or fermented milk.

PW 2 waited for the deceased, for an hour, but he did not return. **PW 2** went to look for the deceased, first at the house of his uncle, David.

PW 2 did not find the deceased there. She then accompanied David (**PW 4**) together with Kemboi and Koech, to the bar operated by the 2nd accused. They went there because it was the place where the deceased used to have his drink, regularly.

When they inquired from the 2nd accused if he had seen the deceased at the bar, the said accused told them that he did not wish to know anything about the deceased.

According to **PW 2**, the 2nd accused responded very aggressively to the inquiry.

PW 2 returned to her house. But whilst at the gate, the caretaker (**PW 8**) told **PW 2** that he (**PW 8**) had heard the voice of the deceased when he was asking that the gate be opened. But by the time **PW 8** reached the gate, with a view to opening it, he saw 3 people chasing after one man.

Thereafter, **PW 2** joined **PW 8**, Kemboi and Koech in searching for the deceased. They did not have a torch. The only source of light which they had was from a mobile phone. But even that light went off after awhile.

The search in the village was not fruitful.

Early the next morning, **PW 2** was informed by a neighbour called Freddie, that the deceased had been found in a ditch.

PW 2 was present when the deceased was removed from the ditch, and also when he was rushed to a dispensary within Masai Village.

PW 2 testified that the deceased had a wound on the back of his head. After the wound was sutured, the deceased was taken to his uncle's house, which was nearer than **PW 2**'s house. Thereafter, they sought a vehicle, which they used to ferry him to Kenyatta National Hospital.

During cross-examination, **PW 2** said that the deceased was not drunk when he arrived at her house on the material evening.

PW 2 also said that it was a dark night.

PW 2 also said that the deceased was not talking by the time he was removed from the ditch.

PW 3, EDWIN KIPKOSGEI NG'ETICH, is a brother to the deceased. His role was to identify the body of the deceased to the doctor who conducted the post mortem examination.

PW 3 testified that the body had injuries on the back part of the head, and a swollen eye.

PW 4, DAVID KIBET BYEGON, testified that the deceased was his cousin. The two used to live together, although **PW 4** was well aware that the deceased used to visit **PW 2**, regularly.

On the material day, **PW 4** and the deceased left their place of work, Sharper Images, at 4.30p.m. The deceased went to add air pressure to the tyres of his bicycle, at about 5.00p.m. He got back home at 7.00p.m., and left again, shortly thereafter. That was not unusual for the deceased.

At 9.30p.m, **PW 2** arrived at the residence of **PW 4**, saying that she had heard that the deceased had argued with some people. As **PW 2** did not know where the deceased was, **PW 4** accompanied her to the bar run by the 2nd accused, where they went to look for the deceased.

It was the testimony of **PW 4** that the 2nd accused told them that the deceased had been at the club earlier. However, the 2nd accused said that he did not know where the deceased went after that.

In fact, **PW 4** recalled the 2nd accused saying that he only heard the voice of the deceased, because he (the 2nd accused) was in another room when the deceased was at the bar.

PW 4 testified that the caretaker at the plot where **PW 2** was living told them that he had heard the deceased asking some people why they wanted to kill him.

A search for the deceased did not yield any positive results, said **PW 4**.

On the next day, after **PW 4** had made a report to the police, he returned to his house, where he found the deceased. He learnt that the deceased had been retrieved from a hole, and then been taken for medical first aid.

PW 4 testified that the deceased was unable to talk, from the time he was rescued from the ditch until he passed on, 8 days later.

PW 5, DR. JOSEPH NDUNGU, is a consultant pathologist at the Kenyatta National Hospital. He found 2 lacerations on the left side of the deceased's skull.

And on the right frontal part of the skull, the doctor found 3 abrasions.

There was a blood clot on the left side of the sculp, and a linear fracture of the skull. Another fracture was on the left side of the base of the skull.

As a consequence, the doctor concluded that the cause of death was severe head injury due to blunt force trauma. He explained that blunt force trauma is caused by one being hit with a blunt object, such as a metal bar or a stone.

But the doctor also conceded that such injuries could be caused by a fall on the ground. Secondly, a fall from the height could also cause the kind of blunt force injuries as those which the deceased suffered.

However, when the court sought clarification from him, the doctor said that if the deceased fell into a pit-latrine, it would be rare that he would suffer injuries to his head. He said that the injuries were more consistent with being thrown into the latrine.

PW 6, JAIRUS TUITOYEK, testified that he visited the 2nd accused's bar on the material night. He went to watch news on television. He did not drink alcohol.

After a short while, **PW 6** saw the 1st accused arriving at the bar, in the company of **BROWNY** and **ELIAS**.

PW 6 heard the 1st accused saying the man was very lucky to have fallen into a pit, because otherwise, they would have finished him off.

PW 7, DOUGLAS OENDO OMBATI, was living at Cha-ngombe, near KPA village, Nairobi. On the morning of 29th November 2009, at about 7.00a.m, he was walking to his work place, when he saw people standing around a pit. There was somebody inside the pit.

The people present were afraid to enter the pit. **PW 7** got a sack and a rope, and entered the pit. He placed the person on the sack, whose ends he secured with the rope.

PW 1 was then helped by those outside the pit, to pull up the person.

Whilst **PW 7** was in the pit, he saw some stones, a spade, a mattock and some water.

PW 8, MARKO OGOJI OERI, was the caretaker of a residential plot located at Masai Village, Nairobi.

PW 8 said that **PW 2** used to live with the deceased, within the plot where he (**PW 8**) was the caretaker.

At about 9.00p.m, **PW 8** heard the deceased calling out to him, to open the gate. But as **PW 8** was approaching the gate, stones hit the gate.

PW 8 heard people running outside the gate. When he opened the gate, he saw the deceased running ahead of 3 other men.

According to **PW 8**, he saw the 2nd accused, as the said accused was the one who was running behind the others. Shortly thereafter, **PW 8** told **PW 2** that he had seen the deceased being chased by 3 men.

During cross-examination, **PW 8** explained that he saw the 2nd accused when he (**PW 8**) flashed

his torch at him, resulting in the 2nd accused turning backwards to look at **PW 8**.

When asked about the length of time the 2nd accused took when he turned around, **PW 8** said that it was for 2 to 3 seconds. However, in the statement he recorded with the police, **PW 8** did not state that the 2nd accused turned around.

Also, when **PW 8** talked to **PW 2**, he did not tell her that he had seen the 2nd accused chasing the deceased.

PW 9, CPL. SAMUEL MAINA, was a police officer attached to the City Mortuary, at the material time. He was present when **PW 5** conducted the post mortem examination on the body of the deceased.

PW 10, PC NANCY KOSGEI was the Investigating Officer. She was instructed by the DCIO to investigate the case.

PW 10 visited the pub which the 2nd accused used to operate, but she did not find him. He had relocated to Kipkelion. She traced him and arrested him.

During cross-examination, **PW 10** said that the accused chased after the deceased, and finally placed him in a pit.

It was suggested to **PW 10** that she was a cousin of the deceased, and that a brother of the deceased, who is a District Officer in Pumwani, influenced her to charge the 2nd accused. **PW 10** denied both contentions. She emphasized that she never met the deceased during his lifetime.

PW 10 also denied that the deceased was a victim of mob justice.

PW 10 explained that there were 2 other suspects, namely OTIENO and ROGERS KALUMA. Those suspects escaped after the incident, and were never arrested.

After **PW 10** testified, the prosecution closed its case. And when the accused persons were put to their defence, they both put forward unsworn testimonies.

The 1st accused admitted having been at the club operated by the 2nd accused, on the material day.

He confirmed that the deceased assaulted **PW 1**, and that patrons responded to the screams of **PW 1**, by getting up and approaching the deceased. At that point, the deceased dropped his rungu and ran out.

The 1st accused said that he only reached the outside of the club, but did not pursue the deceased at all.

On his part, the 2nd accused said that he was awoken from his sleep, after his wife had heard a commotion in the club, which was next to his house. The said club, pub or bar was operated by the 2nd accused.

After confirming that nothing was either damaged or lost in the club, the 2nd accused returned to his house.

Later, he shared out a litre of changaa with his customers. He said that the reason for doing so, was that he was bidding them farewell as he was due to close the club within 3 days.

According to the 2nd accused, he and his family had planned to travel to his rural home, well before the incident in question. Therefore when he did relocate, he was not running away, but was only doing something that had been planned.

The reason for relocating home was to receive treatment. He was first treated at home, and was later treated at the Kericho District Hospital.

Having evaluated the evidence on record, I note that there was no eye-witness to the offence. None of the witnesses saw the accused persons hit the deceased.

The accused persons deny having pursued the deceased outside the bar. But if the evidence of the prosecution witnesses were to be believed, it would mean that when the accused persons returned to the bar, they knew that the deceased had been dumped into a pit. But whereas **PW 1** testified that she heard the 2nd accused saying that they had thrown the deceased into a pit (or ditch), **PW 6** testified that the 1st accused said that the deceased had fallen into the pit. Indeed, **PW 1** heard **PW 6** say that if the deceased had not fallen into the pit, they would have finished him off.

Of course, the doctor who conducted the post-mortem examination on the body of the deceased said that the injuries sustained by the deceased were akin to having been thrown into the pit. The person who rescued the deceased, (**PW 7**), found some stones, a spade, a mattock and some water. Whereas the injuries may have been more consistent with the deceased being thrown into the pit.,I cannot help but ask if a fall from the height of 20 feet, by a man who was running away from people who were pursuing him, could not also have caused the kind of injuries which the deceased suffered, if he hit his head on the various items found inside the pit.

On the other hand, if the deceased was thrown into the pit, the next issue is that of the identity of the person or persons who did so.

The 1st accused may have left the bar, but nobody testified that he was seen pursuing the deceased outside the said bar. **PW 8** only said that he identified the 2nd accused.

The said 2nd accused was seen as he was running away past the plot where **PW 8** was a caretaker. In effect, the 2nd accused had his back to **PW 8**, save for a period of between 2 and 3 seconds when he turned back to look at the direction of **PW 8**. The only light was from the torch which **PW 8** flashed toward the persons. And **PW 8** said that the 2nd accused was about 45 metres from where **PW 8** was.

I hold the considered view that the circumstances prevailing were not conducive for positive identification. **PW 8** may have been honest but mistaken.

I also find it curious that **PW 8** did not tell **PW 2** that he had identified the 2nd accused as one of the people who pursued the deceased on that night. That was very odd, considering that **PW 8** knew that **PW 2** used to live with the deceased within the plot in which **PW 8** worked as the caretaker.

Of course, the fact that the 2nd accused moved away from Masai Village within a few days of the incident, and went to Kipkelion, draws negative attention to him. That is more so when it is considered that the 2nd accused was also heard telling patrons not to disclose what happened to the deceased.

In the final analysis, there is strong suspicion that the 2nd accused was involved. But however strong the said suspicion may be, it is not sufficient to establish the guilt of the accused. I therefore find both accused, "Not Guilty" of the offence of murder. They are acquitted. I order that they be set at liberty forthwith, unless they are or either of them is otherwise lawfully held.

Dated, Signed and Delivered at Nairobi, this 29th day of November, 2012.

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FRED A. OCHIENG
JUDGE