



**REPUBLIC OF KENYA**

**High Court at Meru**

**Criminal Case 31 of 2010**

**REPUBLIC .....PROSECUTION**

**VERSUS**

**ELIAS MURIUNGI NKONGE.....ACCUSED**

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

The accused **ELIAS MURIUNGI NKONGE** is charged with murder Contrary to section 203 as read with section 204 of the Penal Code. It is alleged that on the 22<sup>nd</sup> day of May 2010 at Kithangari Village, Ntherene Sub-Location, Karini Location, Imenti South District within Eastern Province jointly with others not before court murdered M'BURUGU NKANATA KANANGA.

The facts of the prosecution case are that the deceased visited the home of the accused in company of Saverio Miriti. They found PW3 John M'Inoti already there. The accused sold them illicit brew and as they continued drinking the deceased stood from where he was and walked to the goats shed. The accused person told him not to enter the shed. According to PW 3 despite being told twice not to enter the shed he still entered inside the shed. That provoked the accused person and he turned violent and started fighting with the deceased. PW3 separated the two and immediately thereafter he left the deceased and Saverio. The deceased was seen later by PW4 Gilbert. PW4's evidence was that the deceased was walking with one Kiunga. PW4 testified that the deceased shouted and told him to wait for him across the river so that they could go home together. It was around 5 pm. He said the deceased looked very drunk. He said that Kiunga was able to cross the river ahead of the deceased. He walked away and left the two. As PW4 waited for the deceased to cross he saw the deceased looking very drunk, trying to walk on the poles across the river (a make shift bridge). He said that when the deceased reached the middle of the poles he fell inside the river. PW4 testified that he ran back quickly and entered the river and tried to save the deceased but he realized that he had been swept away by the current. PW4 said that he had to hold on to the branches in order to come out of the river as it was too deep. He said that he did not go home that night but spent the night with one Kirimi. He said that he was not able to tell the family of the deceased what had happened to the deceased because they were already aware of the incident.

PW6 produced the post mortem examination report on behalf of the doctors who performed the examination. The results of the examination were that the body was decomposed and could only be identified using fingers and toes. The injuries on the external body could not be determined due to the level of decomposition. Internally the body had fractures of the seventh rib on the right side and of the first, seventh and eighth ribs on the left. There was water in both lungs and lung collapse. The result of the examination was that the cause of death was blunt chest injury.

The investigating officer produced a sketch plan of the home of the accused where the fighting incident had taken place. He also caused photographs of the scene to be taken and according to his evidence of special interest was a big stone or boulder within the compound of the accused. The relevance of the

stone was not disclosed in evidence.

The accused person gave a sworn statement. He told the court that he did not know the deceased until the day he went to his place, on the 22<sup>nd</sup> May 2012. He said that he was at the Irindi Market where he sells changaa when the deceased with one Saverio and one Ngaine went together to his place. The accused stated that the three were already drunk when they entered his premises. He said that the deceased became a nuisance and started an uproar because he started taking people's drinks. He said that the accused person was carrying a panga with him and that when he told him to stop he was hit with that panga. He said that he took a branch of dried pigeon peas shrub and hit the deceased with it on the back. The accused said that it was at that point that the deceased Saverio and Ngaine left his premises. He said that the next day at around 5 pm, he received information from PW3 that the deceased had fallen into Kithima river. Three days after the incident he was arrested by police.

The accused person was represented by Mr. Omari advocate while the case was prosecuted on behalf of the state by Mr. Moses Mungai learned State Counsel. Mr. Omari's submissions were that the prosecution had the burden to prove its case beyond any reasonable doubt. Mr. Omari urged the court to find that it was very clear from the prosecution evidence that the deceased met his death as a result of being very drunk and falling into river Kithima. He said that there was an eye witness of that incident, PW3. He said that PW7 the investigating officer also confirmed that there was an independent eye witness who saw the deceased falling into the river. In regard to the injuries found on the body of the deceased at post mortem, Mr. Omari urged that they could have been caused by a fall on rocks inside the river. Counsel urged that even though the accused admitted that he had a fight with the deceased, that fight did not cause death.

Mr. Mungai for the state relied on the evidence on record and urged the court to find that there was sufficient circumstantial evidence upon which a conviction could be sustained.

The accused person is charged with murder contrary to section 203 of the Penal Code. That provision stipulates:

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

The prosecution must adduce evidence to show that the accused committed an unlawful act, motivated by malice aforethought and which act led to injuries which caused the death of the deceased.

The evidence on record shows that the deceased person went to the premises where the accused was selling illicit brew and caused an uproar because he started taking peoples drinks. The only witness called who was present at the scene when the deceased entered the accused premises was PW3. PW3 said that he was already drinking brew at the accused place when the deceased walked in, in the company of one Saverio and one Ngaire. According to PW3 the deceased provoked the deceased person when he entered the goats shed despite being warned by the accused not do so. PW3 said that the accused person picked two branches of dried pigeon peas plant and hit the deceased with them on the back. The shrub broke into two. He said immediately after that the deceased left with Saverio. The evidence of PW3 is in tandem with the accused defence to the effect that he hit the deceased with dry pigeon peas shrub.

The medical evidence adduced by the prosecution shows that the body of the deceased was severely decomposed to the extent that external injuries if any were not visible. The only injuries which could be seen were to the internal organs. The doctor found that the deceased had several broken ribs.

It is the duty of the prosecution to establish beyond any reasonable doubt that the accused action led to the broken ribs. As already stated the only eye witness of that incident was PW3 and it is clear from his evidence that the accused hit the deceased with dried branch of a very weak shrub. It is also clear that he hit him on the back. No significant findings were made on the back side of the deceased body.

There was the evidence of PW4 which clearly shows that the deceased fell into a river as he tried to cross

across some poles with his drunken unstable walk. PW4 who entered the river in a bid to save the deceased said that the river was very deep. The possibility of the deceased having hit rocks on his chest inside the river cannot be ruled out. On the other hand the prosecution has not adduced any evidence to show how long after the deceased left the accused premises he fell into the river.

There was crucial evidence missing which the prosecution made no attempt to adduce. That is the evidence of one Saverio and one Ngaine who were seen in the company of the deceased by the PW3 long before he fell into the river. Their evidence was important in order to rule out the possibility of the accused person having been injured between the time he left the accused premises and the time he fell into the river. I think that failure to call this vital witnesses must mean that if the witnesses were called their evidence would have been adverse to the prosecution case.

In **BUKENYA & OTHERS 1972 EA 549 LUTTA Ag. VICE PRESIDENT** held:

**“The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.**

**Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.”**

After considering the evidence adduced in this case. I find that the prosecution did not prove at all that the accused caused chest injuries to the deceased as were discovered at postmortem and which led to the death of the deceased. From the account of the events as given by PW3 the only injuries the accused could have caused the deceased were to the back. From the evidence of PW3 which the accused also confirmed he used dried shrub to hit the deceased on the back to stop him from being nuisance at his premises. That could not have caused broken ribs to the deceased. From the prosecution’s own evidence the only way the deceased got injured was when he fell into the river as he attempted to cross it. The prosecution has not proved its case against the accused person to the required standard.

I therefore find that the case against the accused was not proved and I give him the benefit of doubt and acquit him for this offence under section 306 of the Criminal Procedure Code.

**DATED, SIGNED AND DELIVERED AT MERU THIS 20<sup>TH</sup> DAY OF DECEMBER , 2012.**

**J. LESIIT**

**JUDGE**