



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**MURDER NO. 10 OF 2008**

**REPUBLIC.....PROSECUTION**

**VERSUS**

**EDWARD KIVUTI NJAGI.....ACCUSED**

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

Edward Kivuti Njagi hereinafter referred to as the Accused is charged with the offence 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> day of August 2008 at Gatituri Village in Embu District of the Eastern Province, he murdered John Kiriamburi – hereinafter referred to as the Deceased. He denied the charge and the matter proceeded to full hearing with the state calling a total of 15 witnesses in support of its case.

On his part, the Accused testified on oath but called no witness. The gist of the prosecution evidence is that the deceased, PW1, PW2, PW3, PW4, PW13 and others were on their way from the nearby trading center. On the other hand, the Deceased and his now deceased wife were walking home from the opposite direction. It was said to have been about 7.00 – 7.30 p.m.

The path was said to have been a narrow one. They met somewhere near the Accused's home. As they were by-passing each other, one Gitonga (PW13) is said to have brushed his hand against the Accused's wife. PW13 does not dispute that act himself although he said it was accidental. This seemed to provoke the Accused's anger and so he kicked PW13 and floored him. A fracas started and the Accused is said to have ran to his homestead as his wife started screaming. He came back with his parents and they are said to have started running after Gitonga's group. The group started running away but the deceased is said to have fallen down. The Accused who is said to have been armed with a rungu is said to have set on him and started hitting him indiscriminatorily on his body. Gitonga and the others in his group are said to have ran away.

PW12 Joseph Munene Mwaniki who was walking home heard the noise from a familiar voice saying "Tutakuonyesha" meaning "we shall show you". He told the court that he went to check on what was happening and he found the Accused who he knew very well hitting the deceased with a rungu. He confirmed that the Accused's parents were standing at the scene but they did not hit him. This witness said that he was actually the one who pulled the deceased from the path to the side. He was assisted by some of the Accused's companions who had come back to the scene to carry him to the trading centre.

They called for a taxi and ferried the deceased to hospital. He was treated and discharged and they took him home.

Unfortunately, he did not survive the night and he succumbed to the beatings he had been given that night. The matter was reported to the area Chief and councilor who later reported the matter to the police station. The Accused was arrested the following morning after the incident and taken to the police station. A post mortem was conducted on the body of the deceased. According to the post mortem report which was produced as exhibit by PW8 Dr. Silvester Maingi, the deceased had several injuries on his body. The cause of death was found to be hypolemic shock due to severe blood loss in the stomach which was secondary to the possible blunt trauma and intercranial bleeding also caused by possible blunt trauma.

After investigations, the Accused was charged with the offence now before court.

In his defence which as stated earlier on was tendered on oath, he told the court that he and his late wife were walking home on the material night. He said that he met a group of people among whom he was able to identify Githinji (PW1), Mukundi (PW4), and PW13 (Gitonga). He said that the group, who he thought were thugs grabbed him by his neck and became violent. He said that his late wife started screaming and the others in the group came back. He did not say what happened thereafter but concluded that he did not know the deceased, he did not see him in that group and that he did not therefore kill him.

By his own sworn testimony, the Accused placed himself at the locus in quo on the date and time of the incident. His own testimony thus buttresses or strengthens that of the prosecution witnesses that the Accused was at the scene and further that there was a confrontation between himself and the deceased's group. The few discrepancies in the evidence of the eye witnesses as to whether there was sufficient light at the scene or not do not negate the witness' evidence that the Accused was indeed at the scene on the night in question.

The fact and cause of death is not in dispute. The only issues for decision are therefore as hereunder:-

1. ***Was the Accused clearly identified at the scene?***
2. ***Was the Accused the person who inflicted the fatal injuries that resulted into his death?***
3. ***If so has malice aforethought been established? and***
4. ***Ultimately, is the Accused guilty of murder or the lesser charge of manslaughter?***

On the first issue, as I have stated above, the Accused's evidence placed him at the locus in quo. It is also noted that the witnesses knew the Accused before and so did he. This was therefore identification by recognition rather than visual identification. It is also noted that PW12 was a totally independent witness who was drawn to the scene by the noise. He told the court that when he went there, he actually saw the Accused in the act of hitting the deceased who was lying on the ground. His testimony also corroborated the other eye witnesses' evidence to the effect that it was the Accused who hit the deceased severally with the rungu. There is in my considered view overwhelming evidence in support of the first 2 issues. The Accused was indeed at the scene and he is the one who clobbered the deceased leaving him with very serious injuries. There is no sufficient evidence to prove that the Accused's father or anybody else hit and caused the injuries that led to the death of the deceased.

*Actus reus* has therefore been proved.

This leads to the next issue which is whether *mens rea* has been established.

*Mens rea* is clearly defined in Section 206 of the penal code as hereunder:-

1. ***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;***

2. ***Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person whether that person is the person killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not by a wish that it may not be caused; etc.***

In this case, the question is whether the Accused contemplated the death of the deceased. It is noted that their meeting was random and the Accused could not therefore have pre-meditated the killing of the deceased. The other question would be whether the nature of the injuries were such that the Accused meant to kill or otherwise cause grievous bodily harm to the deceased. I acknowledge the fact that the injuries were indeed of a grave nature. The weapon used was nonetheless not recovered and it would be presumptuous on my part to conclude that it was one that the Accused should have been aware that it was a lethal one. It is also noted that the incident happened in conditions that did not avail too much light to enable the Accused person to make accurate aims on the sensitive parts of the body. There is a possibility that he just rained blows without knowing where they were landing.

Lastly, it is further noted that it was the deceased's group which started the fracas by the indecent act of touching or brushing the Accused's wife's breast as her husband watched. That in my view amounted to provocation. Although the Accused's anger may appear to have been aimed at Gitonga (PW13) who was the one who touched his wife's breast, the principle of transferred malice applies here and the Accused cannot therefore escape blame. For the foregoing reasons, I find that circumstances as outlined above do negate *mens rea*. The Accused killed the Deceased but without malice aforethought. The killing was nonetheless unlawful from the nature of the injuries on the deceased's body, the force used was definitely excessive. The evidence on record nonetheless supports and proves the charge of manslaughter and not one of murder.

In the circumstances, I invoke the provisions of Section 179 of the Criminal Procedure Code and find the charge of murder contrary to Section 203 and read with Section 204 of the penal code not proved. I am nonetheless satisfied that the lesser charge of manslaughter has been proved beyond any reasonable doubt. I therefore find the Accused not guilty of murder as charged but guilty of manslaughter contrary to **Section 202 as read with Section 205 of the penal code** and convict him accordingly.

**W. KARA NJA**

**JUDGE**

Signed by the above but delivered and dated at Embu by the undersigned this 7<sup>th</sup> day of February 2011

**H. OKWENGU**

**JUDGE**

**In presence of:- Ithiga for Accused**

**Accused present**

**Ms. Matiru for state**

**Njue**

