



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**HCCC NO. 91 OF 2003**

***LESIIT J.***

**REPUBLIC.....PROSECUTOR**

***Versus***

**DAVID KINOTI NGURU.....ACCUSED**

**JUDGEMENT**

The accused persons David Kinoti Nguru is charged with murder contrary to section 203 as read with section 204 of the Penal Code. It alleged that on the 30<sup>th</sup> March 2003 at Limauru Market Nkomo Location Meru North District murdered Jesse Kaume.

The case was substantially heard by Hon. Lenaola J. The prosecution called 11 witnesses all of whom were heard by Hon. Lenaola J. the honourable judge also made a ruling in which he put the accused person to his defence. The defence case was taken over by Hon. Emukule J. who also heard submissions by the defence counsel. However he set aside the entire defence when he realized that he had taken that defence without the aid of assessors. For a reason which I could not understand, Hon. Emukule J. also set aside the evidence of PW.11, Dr. Henry Njiru, which had been taken by Hon. Lenaola J.in the presence of assessors.

I took over the case heard the evidence of PW.10 PC Makoli, who was recalled by the persecution to produce the posy mortem report P. exhibit 3, on behalf of Dr. Njiru who could not be called without undue delay.

The evidence of the prosecution was as follows.

PW1 testified that at 10am on the materials day, she sold liquor to several youths including the accused, the deceased and Mukira (PW6). That after the accused drank the liquor; he left briefly only to return carrying a knife and stick. PW1 stated that she went out and held the accused and asked him what his problem was. That the accused told her that he wanted to fight the deceased whereupon she threw the accused out and told him not to fight in her compound. PW1 testified that at 5pm the same day, she heard screams from the home of the accused. She went out towards the direction of the screams only to find the wife of the accused screaming and saying that the accused had killed the deceased.

PW6 Josphat Mukira was in company of the accused person at about 9 am that morning. He testified that he, the deceased and one Gichuru were collecting seats from a local church and taking them to some compound. Josphat's testimony is that after they made two trips they met with Muthamia PW7, Fridah's mother and the accused. Fridah's mother wanted to beat Muthamia because he had harassed her daughter Fridah but the deceased prevented her from doing it. According to Josphat, Kaume's (the deceased's)

intervention deeply incensed the accused. That as a result the accused and deceased started abusing one another. That is when Josphat and the deceased went to the home of PW1, Janet to take liquor.

While in the home of PW1, the accused found them. The accused was carrying a stick and a panga. Josphat testified that the accused threatened the deceased with death and told him that he would kill him that day and that if he did not succeed to do so, he would kill four other people. PW6 testified that PW1 threw all of them out of her compound to avoid a fight taking place in her compound. Josphat said that they continued picking seats from the church and taking them to some other place until 5pm.

Josphat told the court that at 5 pm after their work, he was carrying the deceased on his bicycle to take him home. PW6 stated that as they rode near the home of the accused, the accused person came out of his compound carrying a stick and a panga PW6 testified that the deceased quickly alighted from the bicycle and jumped over the fence into the home of Hellen Muru's, PW3 where he picked a stool and jumped over the fence back to the road. According to Josphat and Hellen, the deceased lifted the stool to use it as a shield against the attack by the accused. Josphat said that he saw Kinoti lift the stick he was carrying and hit the deceased with it on the head. Josphat said that when he saw that the deceased had fallen down and that the accused person had lifted the panga he was carrying ready for further attack the deceased. PW3 too corroborated the evidence of PW6 and said that she too ran away to call the mother of the deceased when she saw the deceased fall down. The deceased died on the spot.

PW2 Lucy was at 11 am of that morning at her neighbour's (Hellen's) house. PW2 testified that she heard an argument on the road, 50 meter away. The argument was between the accused, Muthamia PW7 and Josphat Mukira PW6. Lucy stated that the argument was about a girl called Fridah. She says that she asked them to stop quarrelling after which they all dispatched. PW2 stated that before the group parted, Kinoti stated that he would stab someone five times.

Muthamia PW7 confirmed that on the material day at about 9am. He was in company of the accused, the deceased and Josphat, at the home of Janet Muru PW1, taking liquor. He said that as they were taking liquor, Kinoti threatened to kill four people. PW7 said that Janet Muru threw all of them out of her compound. Muthami stated that as he went away, he met with Fridah PW8, who had earlier taken his hat. He said that he caned her. That he only ran away when Fridah's parent went to her rescue.

Fridah PW8 confirmed that Muthamia had caned her earlier on the material day. She stated that she was being cane because of not attending church and also over hat which Muthamia claimed she had taken from him. Fridah confirmed that when her parent was called to rescue her from Muthamia, Muthamia ran away. Fridah testified that she was not a girl friend of any of the persons i.e. Muthamia the deceased, the accused, Josphat or any other man. She told the court that at the time of the incident she was only 13 years old.

PW9 Laiboni Chabari the Assistant Chief of the area where this incident occurred told the court that he identified the body of the deceased at Meru Hospital Mortuary for post mortem.

The investigating officer was PC Makoli PW 10. He told the court that he received the report of murder at 6.50 pm on the material day. He testified that he accompanied IP Gichunge, the OCS to the scene where they found the body of the deceased along a foot path with stick and a stool next to him. PC Makori testified that they moved the body to the mortuary. PC Makori stated that he immediately started looking for the accused person, and that he was found 3 days later.

The post mortem on the deceased was done by Dr. Njiru on 3<sup>rd</sup> of April, 2003. His findings were that the deceased had a deformed head with depressed parietal region and comminuted parietal bone. He formed the opinion that the cause of death was cardio pulmonary damage due to severe head injury.

After the close of the prosecution case the accused was placed on his defence. The accused admitted that he was with the deceased, Mukira PW6 and Muganya. He stated that he found the three men at Janet's house taking a traditional brew/ liquor. The accused stated that PW6 picked a quarrel with him when he refused their demand that he buys them liquor. The accused stated that he left Janet's place before the

other three. He stated that he found the three men at Janet's house taking a traditional brew/ liquor. The accused stated that PW6 picked a quarrel with him when he refused their demand that he buys them liquor. The accused stated that he left Janet's place before the other three. He stated that later that day he met the deceased carrying a stool, a knife and a stone and that since he was near his home. He, the accused ran into his home with the deceased hot on his heels. The accused stated that the deceased continued chasing him around the compound of his house. That he decided to ran out of his compound and that it is then that he found a stick along the way, picked it and threw it at the deceased. The stick hit the deceased on the head as a result of which he fell down. The accused also stated that he had spent the whole day between 9am and 5pmdrinkig liquor with the deceased and others.

I have carefully considered the evidence adduced by both sides. This trial. This trial was conducted with the aid of assessors. There opinion was as follows:

KANYAMBU IRAMBU stated that although the accused and the deceased were friends, they collided due to drunkenness. He said that in his view the accused was guilty of murder.

BASILIO MUGWIKI stated that accused is guilty of murder. BASILIO stated that the evidence adduced revealed that the accused and the deceased drunk marua that day; that the accused and the deceased had quarreled and people had intervened. He stated that the accused had threatened to kill many people that day before he started the drinking spree.

I agree with the opinion of the Assessors and in this judgement I will show the reasons for my conclusion.

There is no dispute that the accused caused the death of the deceased. The accused admits that he hit the deceased on the head. The accused has put forward a defence of self defence and drunkenness. The issue is whether the prosecution has proved that the accused had formed the necessary malice aforethought to cause the deceased either grievous harm or death.

The disputed facts are those surrounding the events that took place just before the accused struck the fatal blow. The accused version was that he was on his way home when he came face to face with the deceased armed with a stool, knife and stick. He stated that it was in the process of escaping from the deceased that he found a stick which he picked and used it to hit the deceased.

The prosecution evidence was that the deceased was the pillion passenger of PW6 as both rode home after a long days work, when they met the accused carrying a panga and a stick. The deceased ran into the home of PW3 Muru, picked a stool which he used to defend himself. PW6 stated that the accused used the stick he had to hit the deceased on the head.

That evidence was corroborated by PW3 in all material particulars as PW3 said she was present just before the accused first hit the deceased and therefore witnessed the whole episode. That evidence also received support from the evidence of PW1 who said that she heard the wife of the accused screaming saying that the accused had killed the deceased. She went to the road and confirmed the death. The evidence of PW5 also confirmed the same evidence when he said that he heard screams near his home only to go to the road immediately thereafter to find the deceased lying on the ground with a head injury and the accused standing near.

I find that the evidence of the prosecution was overwhelming that the accused had armed himself just before the attack. The accused defence that he acted in self defence is therefore not available to him.

The prosecution evidence clearly establishes that the accused had threatened the deceased with death early on the morning of the material day. PW1's evidence clearly shows that the accused had not take alcohol when he found the deceased in her house and threatened him with death. That was at 10am. There were several other witnesses who heard the accused threaten the deceased that morning. These were PW2, 6 and 7. Their evidence was consistent that the accused threatened the deceased several times that day before he finally executed his threats.

The evidence before the court clearly shows that the accused had premeditated the murder of the deceased from the morning of the day in question until 5pm that day when he fatally wounded the deceased. The nature of the injuries inflicted was so severe that the deceased head was deformed and depressed. That kind of action by the deceased was proof that the accused had formed the necessary mens rea to cause either death or grievous harm on the deceased. For that proposition I am guided by the court of appeal case of **DANIEL MUTHEE – V- REP CA NO. 218 OF 2005 (UR)**, BOSIRE, O’KUBASU and ONYANGO OTIENO JJA, where the court, while considering what constitutes malice aforethought observed as follows:

**“when the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206 (b) of the Penal Code.**

**In view of the foregoing, we are in no doubt that the appellant was convicted on very sound and watertight evidence as his guilt on the two counts of murder was proved beyond any shadow of doubt.”**

I find that the defence of drunkenness is not in the facts and circumstances of this case available to the accused.

Having carefully considered the evidence on record by both sides, the submissions by counsels and he exhibits in the case I am satisfied that the prosecution has proved the case against the accused beyond any reasonable doubt. I reject the accused defence, find him guilty of murder and convict him accordingly.

**LESIIT, J  
JUDGE**

Dated, Signed and delivered at Meru this 17<sup>th</sup> day of March, 2011.

**7<sup>th</sup> April, 2011  
LESIIT, J**

Marangu / Kiriimi.....Court Clerks

Mr. Kimathi.....For the State

Mr. Mosota.....For the accused

**LESIIT, J  
JUDGE**