REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 77 OF 2007

LESIIT, J.

REPUBLIC……..……PROSECUTOR

VERSUS

ERICK MURITHI MICHENI ……..……ACCUSED

JUDGMENT

The accused **ERICK MURIITHI MICHENI** is charged with murder contrary to Section 203 as read with Section 204 of Penal code. It is alleged that the accused murdered **JOYCE KARIMI** on the 17TH June, 2007 at Mwonge sub-location in Meru South District.

The prosecution called eight witnesses. The facts of the prosecution case are that deceased had been employed by PW1 Jasper as a bar maid. Jasper testified that about 1 a.m. on the material day, he, Jasper, heard a serious quarrelling between the accused and deceased outside his bar. Jasper had been sleeping and so he woke up and went to check on the cause of the quarrel. He found accused and the deceased quarrelling. Jasper said that the accused told him that the deceased had his Kshs.200/=. Jasper testified that she gave Kshs.200/= to the accused and the quarrel ended and all 3 of them went their ways. The next day Jasper said he noted deceased had a black eye and that she informed him that the accused had slapped her during the quarrel. The deceased also complained of headaches and that for 3 days she worked partly. Eventually she stopped working and was admitted in hospital. She died 11 days later, on 28th June 2007. The cause of death was found to be intracranial bleeding due to blow by a blunt object. Prior to her death, the deceased told her brother PW2 and father PW3 that accused had hit her. She gave the same report to PW7, on 18th June 2007 who issued her with a P3 form filled on 20.6.07 confirmed by others. The deceased also record a statement with police produced as PExh3. In the statement deceased stated accused hit her on the left side of head with blows.

The accused gave a sworn testimony and one witness in his defence. His defence was that he spent the whole evening of the day in question doing taxi business until 12.45 a.m. when he went to Mwebeni bar. He was a taxi driver. He stated that the bar was closed but that he could hear people at the makuti area, at the rear of the bar and he proceeded there. He ordered beer and gave the bar maid, the deceased this case, Kshs.200/=. That he waited for his beer but the order never came. He called the deceased and demanded for his drink. That the deceased told him he had not given her any money. That the seven other patron who were in the club joined in and told the deceased that she had received the money. That it is at that point that Jasper, PW1 appeared. That Jasper paid the Kshs.200/- he was demanding from the

deceased. The accused said he left the club immediately thereafter and that he did not hit the deceased. The accused called John Muketha as a witness. John said he had arrived at the bar in question half an hour before the accused. That he saw accused enter and sit on the table next to where he, John, was sitting and gave the deceased Kshs.200/- for beer and he ordered. That eventually accused asked the deceased where his beer was and a quarrel erupted as the deceased denied receiving any money from the accused. John said that the bar owner eventually arrived and promptly paid the accused his Kshs.200/=. The accused then left. John said that he visited the bar the next day and found the deceased working as usual.

The accused was represented by Mr. Kaimenyi. Counsel submitted that the prosecution has not proved the case against the accused on the required standard. Counsel urged that none of the prosecution witnesses saw the accused hit or injure the deceased at any one time. Mr. Kaimenyi urged that the deceased worked for 3 days after the incident and that in the circumstances it was unsafe to convict the accused: Counsel urged court to consider the evidence of John who was present at the scene earlier than Jasper, and who testified that the accused never hit the deceased that night.

Mr. Kimathi, learned counsel for the state urged the court to find that what deceased told her brother PW2 and her father PW3, that the accused had attacked her viciously and her statement to the Police before she died, were dying declarations. Counsel for the state urged that since deceased sought medical help the day following the attack; it was immaterial that she died 3 days later.

I have carefully considered the evidence adduced by both the prosecution and the defence. The accused faces a charge of murder. For the charge to be proved, the prosecution must adduce evidence to show that the accused, by some act an omission with malice, aforethought caused the death of the deceased. The circumstances which can amount to malice, aforethought are set out under S.206 of the Penal Code which stipulates as follows:

“206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances - (*a*) 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;

(*b*) 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 actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(*c*) an intent to commit a felony;

(*d*) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony. “

There is no dispute in my view, that the accused and the deceased had a confrontation over Kshs.200/=. The deceased’s statement to the Police is in tandem with the accused’s statement in defence and that of John DW2. From these three statements, I find that they all agree on all material particulars that the accused had given the deceased Kshs/=200 as one of the bar attendants at Mwemberi bar for beer; that the deceased delayed in delivering the order made by the accused; that a quarrel ensued between the accused and deceased; and that Jasper, the deceased’s employer paid the accused the Kshs.200/= he had given the deceased.

There was one material difference between the statement of the deceased and the evidence of the accused and his witness. The deceased’s statement was that when the accused called her back to the bar to demand his or her Kshs.200/= the accused held her (the deceased) by the collar and rained blows on her on the head. That as a result of the blows she sustained a swollen scar on left side of face. The injury she suffered was the reason she reported to the Police and also sought Medical attention.

The accused denied hitting the deceased at all. John, the defence witness corroborated the accused

defence to that extent.

The question is whether the Prosecution has established that the accused did any act which caused the injury that led to the death.

The prosecution is relying on statements made by the deceased to PW1, Jasper, PW2, her brother James, pW3 her father Ashford and PW7 the Police Officer who received the report from the deceased few hours after the alleged attack.

I have relied on the following authority on an exposition of what constitutes a dying declaration. The Court of Appeal in the case of **MICHAEL KURIA KAHIRI – V- REP CRIMINAL APPEAL NO.45 OF 1991 (NRB)** observed:

"There is no doubt that the appellant's conviction by the superior court was dependent on the deceased's statements as to her cause of death. The law relating to the weight to be attached to such statements was correctly stated in PIUS JASUNGA s/o AKUMU – V- REGINA [1954] 21 EACA 331. **In that case the Court of Appeal for Eastern Africa said that although it is not a rule of law that, in order to support a conviction; and here may be circumstances which go to show that the deceased could not have been mistaken in his identification of the accused, it is, generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person, made in the absence of the accused and not subject to cross examination, unless there is satisfactory corroboration.**

And in MIGEZO MIBINGA – V- UGANDA [1965] E.A 71 **the same Court pointed out that:**

'It is not always appreciated that the probative force of a statement as to the cause of his death by a person since deceased is not enhanced by its being made in the presence of the accused unless by his conduct, demeanor, et, the accused has acknowledged its truth. Consequently, it is advisable that a trial judge should expressly state whether he is satisfied or not that there was such acknowledgement.'

In this regard therefore, it is instructive to take note of Lord Atkinson's observation in REX V CHRISTIE [1914] A.C 545 **at page 554.**

'The rule of law undoubtedly is that a statement made in the presence of an accused person, even upon an occasion which should be expected reasonably to call for some explanation or denial from him is not evidence against him of the facts stated, save so far as he accepts the statement, so as to make it in effect his own. If he accepts the statements in part only, then to that extent alone does it become his statement by word or conduct, action or demeanor, and it is the function of the jury which tries the case to determine whether his words, action, conduct or demeanor at the time when a statement is made amounts to an acceptance of it in whole or in part.'

As was observed in PIUS JASUNGA s/o AKUMU – V- REGINA, **supra,**

"The fact that the deceased told different persons that the appellant was that assailant is evidence of the consistency of his belief that such was the case; it is no guarantee of accuracy."

The deceased statement to the Police on 20th June 2007, eight days she died qualify to be regarded as a dying declaration. Even though made at a time when death did not seem to be inventible, it was made to a person in a position of authority driven by the desire to tell the truth. At the time it was made the deceased was reporting a case of assault against the accused.

She had not died by then and it is also evident that she did not consider the injury serious as she did not go for an x- ray as advised by the doctors. It is my view that the statement the deceased gave to the police at the time she reported the assault is cogent evidence to show that the deceased was not making up a story and that indeed at the first opportunity, she reported the person who assaulted her. Her statement which was taken before she died and at a time her mind was clear is in my view admissible evidence to

establish the identity of the person who injured the deceased.

The statements made by the deceased to PW1, Jasper, PW2 James and PW3 Ashford, two days after the alleged attack, are important to establish that the deceased was consistent as to the identity of the one who attacked her, the nature of the attack and the day of the attack. The defence has challenged the failure by the deceased to complain to her employer of the assault the same day he paid 200/= to the accused on her behalf.

I do not find the failure to complain to her employer about the attack on the same night was material. This is because her job was on the line when the accused complained to PW1 against her and at the time the most pressing issue was the allegation that she was a thief.

I find that the accused hit the deceased by blows. The deceased statement to the Police that she had been hit on the head is consistent with the doctors findings of the injury she suffered and the cause of death.

The issue is whether there is proof that the accused had formed the necessary malice aforethought to cause death or grievous harm to the deceased. What constitutes malice aforethought is set out under section 206 of the Penal Code in the following terms:

"206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances-
(a) 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;
(b) 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 actually killed or not, althoughsuch knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
(c) …..
(d) ……"

I am also guided by the following case. In **DANIEL MUTHEE – V- REP.CA NO. 218 OF 2005 (UR),** BOSIRE, O'KUBASU and ONYANGO OTIENO JJA., 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 a 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."

There was no eye witness of this incident. The only evidence we can fall by is the statement made to the police by the deceased. In her statement she said that the accused hit her with blows on her head. The accused used bare hands. There is no evidence to show how many times the accused hit the deceased. However I find it materials that the quarrel was about money. From the deceased statement it appears there was a misunderstanding between the accused and the deceased over the deceased delay to serve the accused with the drink he had ordered from her. The accused and the deceased knew each other before and the evidence is that there had not been any quarrel or confrontation between the two prior to this incident.

I find that the evidence adduced in this case is clear that the accused had no intention or plans to cause death or grievous harm to the deceased. Having used bare hands I do not think that the accused really meant to grievously harm or cause the decease death. The facts of this case are among very rare ones

which can be described as misadventure. I find that the accused caused the death of the deceased but that it was not intended. I find that the prosecution has proved the charge of manslaughter against the accused.

Having come to this conclusion I find that the charge of murder was not proved to the required standard. I find that the prosecution has proved the lesser charge of manslaughter. I substitute the charge of murder contrary to section 203 of the Penal Code with that of manslaughter contrary to section 202 as read with section 205 of the Penal Code.

Those are my findings.
Dated, Signed and delivered at Meru this 7th day of APRIL, 2011.

LESIIT, J
JUDGE

LESIIT,J.
MARANGU / KIRIMI……Court Clerks
MR. KIMATHI……For the State
MR. KAIMENYI……...…….For the accused

LESIIT, J
JUDGE