



REPUBLIC OF KENYA
HIGH COURT OF KENYA

AT EMBU

MURDER 12 OF 2008

REPUBLIC**PROSECUTO**

R

VERSUS

JAMES NJERU

MUTEMBEI**ACCUSED**

JUDGMENT

JAMES NJERU MUTEMBEI, the Accused herein is charged with murder contrary to section 203 as read with section 204 of the penal code. The particulars of the charge are that on the 9th day of December 2008 at Mufu market of Embu District within the Eastern Province he murdered one Gitonga Nyaga hereinafter referred to as the Deceased. He pleaded not guilty and the matter proceeded to full hearing with the prosecution calling a total of 12 witnesses.

On his part, the Accused testified on oath and called no witnesses. In a nutshell, the prosecution case is that the Accused and the Deceased were friends. Indeed one witness claimed that they were cousins.

On the material date they were drinking together at the nearby Mufu market. According to PW4 who operates a bar at the market, they went to his bar at about 10.00am and started drinking alcohol. They left the bar at about 4.00pm. They appear to have gone to PW1's tailoring shop where according to the Accused, the Deceased wanted to collect his clothes. PW1 told the court that they both appeared drunk. She told the court that the Accused pulled the Deceased from the shop and they left. According to PW1, they both went behind her shop and she heard the Accused tell the Deceased "Let me open for you here so that you can enter and sleep"

She said that the Deceased had protested saying that he was not drunk. They were still behind the shop when PW1 heard a bang as if something had fallen down. She went round to see what was happening. She said that she saw the Deceased sitting down holding his forehead. The Accused was standing beside him. She said that the deceased was coughing and spitting blood. He asked her for some water to drink which she gave him. He drunk the water but he started vomiting blood. She asked the deceased what had happened and he is said to have told her that he had been hit from behind between his shoulders with a piece of wood. She closed her shop and called people to the scene. The area chief PW2 was also called to the scene. The police were also called. PW5 Sammy Mwaniki a first aider with St. John

Ambulance also rushed to the scene. He checked the Deceased's pulse and confirmed that he was dead.

The Accused was by now said to have been lying beside the deceased in a state of total drunkenness. Officers from the scene of crime went to the scene and took photographs. The body of the deceased was removed from the scene and taken to the mortuary. The Accused was arrested and taken to the police station where he was locked up. He was later examined by Dr. Thuo the Provincial Psychiatrist who confirmed that he was of sound mental status and thus fit to stand trial.

A post mortem was carried out on the body of the Deceased. The post mortem form produced in court as Exhibit was totally illegible but PW6 who carried out the post-mortem told the court that the body had a haematoma on the right supra orbital side (front face); the neck was very mobile; both nasal bones were fractured and that the spinal cord was fractured at C4 and there was a dislocation at C3.

She formed the opinion that the cause of death was cardiorespiratory arrest as a result of the spinal cord compression at C3 – C4.

Blood samples taken to Government analyst only confirmed that the blood stains found on the shirt belonging to the Accused were from the Deceased's blood.

I may point out here that the presence of the deceased's blood on the Accused's shirt was not abnormal since it is not denied that the 2 were together during the incident and they must have come into contact.

According to the area chief i.e PW 2, when he enquired from the Accused as to what had happened, he told him that him and the Deceased were pulling each other when the deceased fell down.

In his sworn defence, the Accused admitted that he and the Deceased were friends and that they had been drinking alcohol together that day. He told the court that they went to collect the Deceased's clothes from PW 1's shop but he (Accused) left the Deceased there to go and look for a lady who owed him money. He said that when he went back to the scene, he met the group of people who started beating him asking him what had happened to the deceased.

He said that he was not present when the Deceased fell down. My finding however is that the Accused was not totally truthful in his evidence, he was actually at the scene when the deceased fell and sustained the injuries in question.

PW 1 who was the first one at the scene found the Accused standing at the scene next to the deceased as the latter vomited blood. PW 1 did not however see the Accused hit the deceased. She had only seen him pulling the Accused to take him to a room behind the shop so that he could sleep but the deceased resisted.

The evidence on record is that as at the time the Deceased sustained the injuries he succumbed to, he was with the Accused. There was no other person present. Unfortunately, the stick said to have been suspected to be the murder weapon was not linked to the Accused in any way. What is evident is that the deceased did fall down and sustain the injuries that led to his death.

The question that arises for determination is whether it is the Accused person who was responsible for the

said fall. There is a possibility that the 2 who were very drunk were pulling each other when the deceased fell – as PW 2 stated. There is also a possibility that the deceased was hit with a piece of wood from behind – as he is said to have told PW 1. He (deceased) did not nonetheless tell PW1 that it was the Accused who hit him from behind.

The 2 had been drinking together; They were relatives or close friends; They had not disagreed at all even upto the last moment when PW 1 heard the bang behind her shop. Why therefore would the Accused hit him? As stated earlier on, the purported weapon was not connected to the Accused. Nor was it infact taken to the Government analyst to ascertain whether indeed it was stained with the Deceased's blood.

Although there is very strong suspicion that the Accused could have hit the Deceased causing him to fall and injure himself, the possibility that the deceased who was drunk could have tripped and fallen on his own cannot be ruled out. There is therefore a considerable doubt as to how the deceased met his death. The law requires that such a doubt be resolved in favour of the Accused person. Suspicion however strong cannot be used to found a conviction. A conviction under these circumstances would be very unsafe.

For these reasons, the Accused is given the benefit of doubt and acquitted under section 322(2) of the Criminal Procedure Code. He shall be set at liberty unless he is otherwise lawfully held.

W. KARANJA

JUDGE

Signed by the above but dated and delivered at Embu this 5th day of April 2011 by the undersigned.

M. WARSAME

JUDGE