



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CRIMINAL CASE NO. 102 OF 2008

REPUBLIC.....REPUBLIC

VERSUS

CHARLES WARUGENDO SAFARI.....1ST ACCUSED
EUNICE WANJIRU MUTAHI.....2ND ACCUSED
JANE WANGUI KAMAU.....3RD ACCUSED
DANIEL MUCHUNU MUREITHI.....4TH ACCUSED

RULING

Charles Warugendo Safari, (2) Eunice Wanjiru Mutahi, (3) Jane Wangui Kamau and (4) Daniel Muchunu Mureithi (*accused*) were charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code (*Cap. 63, Laws of Kenya*).

The prosecution's case was that the accused between the 20th and 21st day of September 2008 at Kasuku Trading Centre within Ol Joro Orok Division, Nyandarua District of Central Province, jointly murdered Paul Ngatia Wanjiru.

Section 203 of the Penal Code reads as follows -

"203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder."

And Section 204 says -

"Any person convicted of murder shall be sentenced to death."

Section 206 of the Penal Code provides that malice aforethought is established by evidence proving any one 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 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."*

In an attempt to prove malice any of the ingredients of "*malice aforethought*", the prosecution called six (6) witnesses including PW5, who was Dr. Fredrick Kariuki. I will commence with his testimony. The deceased had multiple stab wounds to the right and left temporal region of the scalp measuring approximately 5cm and 4cm each, the deceased also had multiple wounds on the left occipital region measuring 5cm in length. The Doctor put the cause of death as cardiopulmonary arrest due to multiple stab wounds to the head.

The following was the testimony of the other witnesses. PW1 was a Bar attendant at Afraha Bar located in Kasuku Trading Centre. At the time of her testimony she worked at Riwa Bar within the same centre.

Her testimony was that she went to work at her Bar at 10 a. m. on 20th September 2008, and opened the Bar at about that time and served many customers throughout the day. The deceased whom she knew by his first name Paul came in at about 10.00 p.m. The deceased ordered a drink and she served him. The deceased was alone, and that she and the deceased were the only people in the bar at the time.

She further testified that a little later she and the deceased were joined by the 1st, 2nd and 3rd accused and a 4th person who bought "*Mama Wairimu (the 3rd accused)*, a drink and left after making the order.

The 2nd accused sat with the deceased drinking. The group drank until 10.45 p. m. the closing time of the Bar, when asked them to leave. They all left together with the "*deceased who was very drunk*", but the 3rd accused was not intoxicated. She locked the Bar and went to sleep at her quarters at the back of the Bar. That was the first part of her testimony.

The second part of her testimony comprised the events of the next day 21st September 2008. On that date PW1 testified at about 8.00 a.m. she found several people milling around the place, about 10 metres from the place where the body of the deceased lay. She also went to the place, saw the deceased's body, and found that it had injuries to the head, "*the head and face had been battered.*"

In cross-examination, PW1 testified that the deceased was the first customer in the evening, but that her bar had had many customers during the day and the deceased came after other customers had left, and he was followed by the 1st accused who came at about 10.10 p.m. The 2nd accused also came on his own but the 3rd accused came in the company of another man, who bought her a drink and left. The 2nd accused sat together with the deceased, while the 1st and 3rd accused sat together. The 1st accused however was not taking any alcohol. PW2 remembered the 1st accused wore a maroon cap on the head and the deceased also wore a cap - the colour of which PW1 would not remember.

PW1 reiterated her evidence in chief that she asked the accused and the deceased who was very drunk to leave at about 10.45 p. m. and that the next day the deceased was found dead near the Bar - not very far away. PW1 testified on 20th September 2008 was a Saturday, and that there were many people at the Centre. She could not tell whether the accused went to their respective houses, all she remembered is that the deceased did not appear to have been rained on when he entered her bar.

PW2 a Teacher by profession testified that he had come from a wedding in Muranga and arrived at Kasuku Trading Centre at 11.00 p. m., and coming late he went to look for a motor-cycle taxi operator Wandani Bar at Starehe premises. Before entering the Bars he met the 1st accused, Charles Warugendo

Safari whom he knew as "*Kimathi*", and that the accused stopped him and claimed that "*he had been attacked by some unknown assailants who had beaten him and robbed him*", and he was holding some money in his hands and had signs of someone who had been involved in a fight and looked very disturbed", and also informed him that he had lost his cap, and was slightly drunk. As it was late, PW2 did not want to engage the 1st accused long, wished him well and left.

PW2 testified it was on the next day, 21st September 2008 as he prepared to go to church that he met the deceased's brother George Muchai (PW3) who told him his brother had been murdered at Kasuku Trading Centre the previous night. He remembered that the 1st accused told him about being beaten, and he thought he would have been involved in the murder of the deceased, and suspected him from what 1st accused had told him. Together with the deceased's uncle, Paul Ngatia Muchai, the two went and reported what he had been told, to Ol joro Orok Police Station and recorded his statement.

In cross-examination PW2 reiterated his evidence in-chief that the 1st accused was slightly drunk, and had either fought or been beaten, that he had known the 1st accused for the past 4 years, and had known him as a *badly behaved person, a mugger of people*, he had no shoes, he wore a dirty white shirt, the light (*electric lights*) were very bright. He saw the deceased's body, it was so muddied that one could not decipher the colour of the clothes the deceased was wearing.

PW3 testified that he had been with the deceased on Saturday 20th September 2008. He learnt the next day from his mother that the deceased had been murdered at Kasuku, and that he went there at 7.00 p.m., found the body near a club and a church, (*harvester church*), he had been pierced in the head. He did not see anything at the scene but there was water at the scene, there was no rain, but the spot where the body was muddy.

PW4 was Paul Ngatia Mwangi (*Paul*). Paul's evidence was that he was an employee of Kibara (*Kibara*), as a driver. He recollected that on 20th September 2008 Kibara asked him to take the vehicle to him at Kasuku Trading Centre where Kibara had been dropped off by a G.K. vehicle, and found at Riwa Bar having a drink at the counter, and a little later the 1st accused came together with the second accused, and the deceased. They had drinks and left.

PW4 was later dropped home by Kibara, his boss, where left him. On his way to work the next day, he heard people say that a person had been killed, and so he went to the site, and found a cap a number 8, which was muddied, and it was the cap won by the 1st accused. He took possession of the cap and took it to the Police. The cap was produced as PExh I - Blue Cap. 8.

Upon cross-examination by Miss Muturi for the accused, PW4 denied his statement that all the four accused wore caps that night.

The last person to testify was PW6, PC Simon Ndobu. His testimony was that he accompanied his OCS, C.I.P. Zakayo Kibet and P.C. Hassan to Kasuku Trading Centre where a report of a murder had been received. The date was 21.09.2008 and the time was 8.00 a.m. They found a large crowd of people looking down over a body lying in mud - which they later found was that of the deceased.

The body had deep cuts on the forehead. They also found PW3 and one James Ndirangu who said they were brothers of the deceased. The body was removed to Nyahururu District Hospital Mortuary and that they did not recover anything from the area, it had been tampered with.

PW6, testified that on 24th September 2008, they met the deceased's brother (PW3) who pointed out to them some of the suspects, and they arrested them - Charles Warugendo, (*1st accused*), Eunice Wanjiru Mutahi (*2nd accused*), Jane Wangari Kamau (*3rd accused*), and Daniel Muchai Mureithi (*the 4th accused*).

PW6 testified that upon interrogation they established that the 1st and 2nd accused had been

drinking together at another bar, and on the same night those two went to Furaha Bar where they were joined together with the 3rd and a 4th person, and that these four left the Bar together on their way home.

PW6 also testified that on 26.09.2008 he was brought a hat (*cap*), and was informed that the hat/cap belonged to the 1st accused.

In cross-examination by Miss Muturi, PW6 testified that he was the 2nd investigating officer, and reiterated that he had found a large crowd of people at the scene and that the cap was brought to him by one of the witnesses on 28/09.2008 (*a week after the death of the deceased*), and that there was little chance that the cap belonged to any other person other than the 1st accused. PW6 stated he did not find out where either the deceased or accused went to after leaving the bar, and he had not found any witness who saw the accused assault and kill the deceased.

ANALYSIS OF THE EVIDENCE

According to the evidence of PW1, she opened her Afraha Bar at 10.00 a.m. on 20.09.2008. She had many customers during the day and those customers had left. At about 10.00 p.m., the deceased whom she knew as Paul, came and ordered for a drink and she served him. The deceased was alone, and for a time they were the only people at the Bar. The deceased was joined by the 2nd accused, while the 3rd accused was with another person who bought her a drink and left.

When closing time came she asked the deceased, and the 1st to 3rd accused to leave. PW1 has no mention of 4th accused. She did not hear any commotion outside her Bar, and only discovered the death of the deceased when she saw people milling around the deceased's body. She joined the crowd, and found the deceased had injuries to the head - that the face and head had been battered.

PW1 also testified that 1st accused was not taking any alcohol, yet in his testimony, PW2 a teacher suggested that the 1st accused appeared to be slightly drunk. He had known the 1st accused as a neighbor for 4 years, as a badly behaved person who had been involved in beating and mugging people, although he had not been called to testify on such incidents.

PW3 was told by his mother on 21.09.2008 that his cousin had been murdered at Kasaku Market. According to his evidence, he did not see anything at the scene when he went there except his cousin's body, and he would not say how his brother met his death.

On his part, PW4's evidence is quite inconsistent with that of PW1 who testified that the deceased came to the bar alone and was later joined by the 2nd accused who sat with him, while the 3rd and 4th accused sat alone. PW4 testimony is contrary to that of PW1, PW4 testified that the deceased came a little while after he had come and had discussed with his employer the condition of the vehicle of which he was the driver. He testified that the 2nd accused came later with the deceased, **and a 4th person who has since disappeared.** No effort was made to follow this lead and find out whether this 4th person may have been involved with the killing of the deceased.

PW4 was unsure about the type of cap the 1st accused was wearing and whether it had a number 8 inscribed on it. He protested at the Police recording of his statement that all the accused wore caps.

There is no doubt the deceased suffered and died from the injuries he sustained on the night of 20th September 2008. That is what the Doctor PW5, found in his post-mortem examination of the deceased's body. The investigations by PW6 did not reveal where, who and when the deceased was murdered. About the only thing that is certain, and all witnesses are consistent upon, is that the deceased body was found in a pool of muddied water outside an open area not far from the bar where he had been drinking. Only PW3, the teacher was bold to lay suspicion upon the 1st accused, his neighbor of 4 years and a suspected mugger, and generally badly behaved individual.

Suspicion, however strong is not sufficient evidence upon which to either convict or put the 1st accused to his or any of the other accused, to their defence. They may have left the Bar together, but no evidence was led as to what happened after that. It is fair to return a verdict that the deceased was indeed murdered but no one knows his murderers, and if there is any such person, he has chosen to lie low like an envelope, and if it is any of the accused, there is no evidence to directly connect them with the death of the deceased. The circumstances end at the deceased and the accused leaving the bar together. There is no hypothesis pointing to the guilt of the accused.

CONCLUSION

Section 306(1) of the Criminal Procedure Code, (*Cap. 75, Laws of Kenya*) provides that where the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is no evidence that the accused or any one of several accused committed the offence, shall, after hearing, if necessary, any arguments which the Advocate for the prosecution or the defence may desire to submit, record a finding of not guilty.

In this case, both counsel for the prosecution and the defence offered no arguments. I have examined and reiterated the substance of the evidence of the prosecution witnesses and I am unable to say, within the provisions of Section 306 of the Penal Code, that any of the circumstances - (*an intention to cause death or to grievous harm, - knowledge that the act or omission of the act causing death, or an intent to commit a felony*) forming malice aforethought can be ascribed to the accused or any one of them.

It is the duty of the prosecution to prove their case, and in this instance, they have not even established a **prima facie** case.

For those reasons, I must make a finding of not guilty, which I hereby do, in respect of all the accused.

I direct that the accused be set free forthwith unless otherwise lawfully held.

There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 20th day of May 2011

M. J. ANYARA EMUKULE
JUDGE