



No.2978
THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL CASE NO.41 OF 2008

REPUBLIC PROSECUTOR
VERSUS
SILVESTER MUTUNGA MAKAU.....1ST ACCUSED
STELLA WANZA MUTUNGA..... 2ND ACCUSED

JUDGEMENT

The accused are husband and wife. On 15th July, 2008, they were arraigned before **Lenaola J.** on an information charging them with the murder of **Patrick Kiilu Makau**, deceased. The deceased was the elder brother of the 1st accused and a brother-in-law of the 2nd accused. In the particulars of the information, it was alleged that on 28th October, 2009 at Misakwani Sub-location, Mumbuni Location, Machakos District of Eastern Province, they murdered **Patrick Kiilu Makau**. The accused denied the information and their trial began in earnest initially before **Lenaola J.**

Beatrice Nduku Kiilu, (PW.1), the wife of the deceased testified that on 28th October, 2007 at about 3.30 p.m., the deceased left home to visit his brother, the 1st accused who lived at Mbitini. He never came back. She waited until 10 p.m. and then retired to bed. The following day at about 9 a.m., she received a report from her elder son, **Makau Kiilu** (PW.5), that the deceased had passed on in the 1st accused's home. She went there and on observing the body, it appeared to her as though, it had been dragged behind a bar. She recalled seeing blood on the verandah of the bar where the accused had their kitchen. The 1st accused later came with the police. The 2nd accused was at home but the witness never spoke to her.

Cross-examined by **Mr. Sila**, learned counsel for the accused, she responded that there was no bad blood between the deceased and his siblings, the 1st accused included and or their families. The deceased used to drink a lot in the 1st accused's bar and would sometimes sleep in his house. Though the body had injuries on the face, she could not tell how the deceased had sustained them. She was not sure whether or not he was injured after a fall whilst drunk.

Bernard Mumo Kiilu (PW.2), the son of the deceased stated in his evidence that on 29th October, 2007 at about 9 a.m. he was informed by Mutua Musyoka that a body belonging to his father was lying near a bar. He went to the scene. The body was next to urinal behind the bar. He observed the ground where the body was lying and noticed no blood. His clothes though were blood stained. The bar and urinal were in the home of the 1st accused. The 2nd accused used to run the bar though. The 1st accused and deceased had no grudge between them. However, the witnesses had tried to stop the running of the bar, and the accused were not happy. On 9th January, 2007 he identified the body of the deceased to the doctor for purposes of post mortem.

Cross-examined, he confirmed that the deceased and 1st accused had no bad blood but they would occasionally disagree whilst drunk. He did not know who had killed his father. He had no bad blood with the accused and was not jealous of their business success.

Boneventure Makau Kiilu (PW.3), another son of the deceased told the court that on 28th October, 2007, whilst on his way to work, he saw the 1st accused coming from his toilet. At about 9 a.m. the 2nd accused called him back saying that there was a problem as his father had passed on. At the mortuary he saw the body and noted that it had injuries on the face and above the eye brows. The chest had drag marks. He recalled seeing blood and drag marks at the scene from where the body was, to a place behind the urinal.

Cross-examined, he stated that the deceased used to drink and would sometimes sleep in the 1st accused's house. He had no bad blood with the accused. He did not know who killed the deceased.

James Ngugi Kombo (PW.4), the Assistant Chief for Misakwani Sub-location testified that on 29th October, 2007 at about 8 a.m., **Sylvester**, a brother of the deceased came to him and reported the death of the deceased. The witness in turn passed over the report to the OCS, Machakos Police Station. The police came and took away the body.

Anthony Kaloki Musau (PW.5) was a bar patron on the material day. In the company of his distant cousin, **Makau**, they entered the accuseds' bar at about 11.30 p.m. They found the deceased at the door visibly drunk. The 2nd accused told the duo that she wanted to retire to bed. She went to the counter and closed. Inside the bar, they saw both accused one, **Mutiso** and the deceased.

Cross-examined, he owned up that when he saw the deceased, he was alone and outside the bar. He was totally drunk. He did not see any of the accused doing anything to him.

Dr. Mutunga (PW.6), conducted the post mortem on the body of the deceased on 9th November, 2007. He formed the opinion that the cause of death was head injury

consistent with a blunt weapon. He tendered in evidence the post mortem report.

Cross-examined, he conceded that a fall could inflict such an injury depending on the distance.

CIP Johnson Otieno (PW.7) the Investigating Officer, in the case, testified that on 29th October, 2007 at about 9.30 a.m. he received a report that a person had died at Misakwani. In the company of **PC. Kibaina** they went to the scene which was in the house of the 1st accused and who was the reportee. They found the body of the deceased at the urinal in a pool of blood lying face down. The body had deep cuts behind the head and also on the forehead. He commenced investigations. He gathered evidence to the effect that the deceased was the elder brother of the 1st accused. On that day, the deceased was totally drunk and unable to go home. The bar was closed and deceased was found dead the next day. Evidence pointed to the accused as the ones who injured the deceased. He was not able to recover any murder weapons. However, there was sufficient circumstantial evidence to have the accused charged for the offence. At the same time, he also took the view that the evidence was not sufficient to put away the accused but pressure built up in the village against the accused and there was fear that they could be lynched. That is when he decided to charge them with the information.

Cross-examined, he stated that there was no land dispute between the 1st accused and the deceased. He searched the accused's house and found nothing incriminating.

With that, the prosecution closed its case. Submission on no case to answer were tendered by respective counsel. However, in a reserved ruling delivered on 16th December, 2009, **Lenaola J.** found that a prima facie case had been made out against the accused and put them on their defence.

Soon thereafter, **Lenaola J.** left the station on transfer and could not take their defence. It was not until 29th March, 2011, that defence of the 1st accused was taken by **Kihara Kariuki J.** He did so after explaining to the accused the provisions of section 200 of the Criminal Procedure Code. They all elected to proceed from where **Lenaola J.** had dropped of the case and did not wish to have the witnesses who had testified earlier recalled or resummoned. Both accused elected to give sworn statements of defence and called no witnesses.

The 1st accused testified that the deceased was his brother. On 28th October, 2007 at about 3.30 p.m. the deceased came to his bar which was operated by his wife, the 2nd accused. He joined other bar patrons in partaking alcohol. The accused remained in the bar until about 9.45 p.m. when he retired home. He left the deceased with other patrons in the bar, namely, **Nzau Mbuvi, Michael Mwilu, Mutua Daudi, Munyao Mutiso, Mutiso Munyoki** and the 2nd accused. He did not return to the bar that night. At about 10.30 p.m. the 2nd accused came home having closed the bar. When he left the bar, the deceased was drunk. On 29th October, 2007 he woke up at about 7 a.m. and went to the toilet. On returning, he saw some blood drops. He asked the 2nd accused where the blood drops were from since he had not left any patrons in the bar fighting the night before. He followed the 2nd accused to the back of the bar. Between the urinal and the rear wall of the bar they came across the body of the deceased. He then went to report the occurrence to the Assistant Chief. They came back together. The chief then sent him to Machakos police station to make a report. He did so and came back with the OCS in the company of other police officers. At the bus stage in town, they picked a photographer, and proceeded home. The police interrogated him, searched the whole bar and took photographs of the scene. Later the body of the deceased was removed to Machakos General Hospital. The accused were then called upon to record statements and upon conclusion of the exercise, they were locked up and later charged for the offence they never committed. They were friends with the deceased. They did not quarrel and had no family disputes.

The 1st accused was then stepped down for cross-examination by **Mrs. Gakobo**, learned Senior State Counsel on another day. Come that day and **kihara Kariuki J.** too had left the station on transfer. The case then fell on me to proceed with. Parties again agreed that I take over from where **Kihara Kariuki J.** had left. The accused did not wish again to have the witnesses who had earlier testified recalled or resummoned.

At the resumed hearing, **Mrs. Gakobo** cross-examined the 1st accused. His answers were that the deceased was his elder brother and a neighbour at home. He operated a bar in the homestead but it was managed by his wife, the 2nd accused. The deceased had come to the bar at about 3 p.m. on 28th October, 2007 and remained there until about 10.30 p.m. when the accused left him. He was very drunk. He denied that PW.5 came to the bar at 11.30 p.m. By then the bar had long been closed. Otherwise, the said witness entered the bar at about 9 p.m. Occasionally, the deceased would sleep in his house when he became too drunk. There was no misunderstanding between them.

In her sworn testimony, the 2nd accused stated that the deceased was her brother-in-law. At about noon on 28th October, 2007 she opened her bar business situate within her compound. The deceased came to the bar at about 3.30 p.m. and started drinking. There were other customers in the bar including **Mutiso Musyoka, Nzau Mbuvi, Mutua Daudi, Kioo Musyoka, Mutuku King'ola, and Boniface Musyoki Makau.** The deceased remained in the bar until she closed it. He then left with the aforesaid bar patrons. On 29th October, 2007 she woke up at about 6.30 a.m. and when she tried to open the door, it was as though it was locked from outside. She called her nephew, **Nzivo Musyoki** to open it from outside. She went to the kitchen but found out that it had been broken into and 6 goats and 10 chicken stolen. As her daughter, **Winfred Ndanu** was collecting wood to make fire, she saw some blood drops and informed her. They traced the blood drops to behind the urinal and came across the body of the deceased. She ran back to the house and alerted her husband, the 1st accused. Otherwise, she had not heard anything unusual during the night. When she closed the bar, PW.5 had left. He had come to the bar at about 9 p.m., talked to the deceased and left. Her relationship with the deceased was cordial. 1st accused then reported the incident to the Assistant Chief who in turn sent him to Machakos Police Station. She denied that she was involved in the death of the deceased. She did not know how he had come by his death.

Cross-examined, she stated that she did not report the break-in of her kitchen to any police station. She had closed the bar at about 10 p.m. PW.5 came to the bar at about 9 p.m. and not 11.30 p.m. as he had claimed. 1st accused left the bar at about 9.45 p.m. She conceded that it appeared that the deceased had been dragged along, going by the injuries she saw on his chest. Occasionally, the deceased would sleep in their house if he was so drunk as to be unable to walk. On this occasion however, he was not so drunk.

This then marked the close of the defence.

With the close of the defence case, **Mr. Sila** and **Mrs. Gakobo**, learned counsel, agreed to file and exchange final written submissions. This was eventually done. I have carefully read and considered them.

The issues for determination in this case are twofold; whether the deceased was murdered, and if so, whether he was so murdered by the accused.

For the offence of murder to be committed, a person with malice aforethought must cause the death of another by unlawful act or omission. From the foregoing definition of murder, the prosecution has the onerous duty to prove that the accused killed the deceased, that they did so with malice aforethought and that the killing was by unlawful act or omission.

From the evidence on record, much as **Patrick Kiilu Makau** passed on, it is difficult to tell whether he was killed by another person. There was no direct or circumstantial evidence as to the circumstances leading to the death of the deceased and what or who caused it. The evidence of the wife (PW.1), sons (PW.2 and 3), Assistant Chief (PW.4) and **Anthony Kaloki Musau** (PW.5) was of no assistance at all as to how the deceased met his death. All that they testified to was that the deceased went drinking in the bar owned and run by the accused. They could not tell categorically how and where the deceased met his death. They could not also tell whether the death was self inflicted or was caused by an act of another person(s). Is it possible that in his drunken stupor, the deceased fell and fatally injured himself? That possibility exists. Nor is the evidence of the Doctor who conducted the post mortem of any assistance either. He concluded that the deceased died of a head injury following a blunt trauma over the head. However, he was not certain as to how such injuries could have come by. He did not expressly rule out the possibility of the deceased falling, much as he could also have been hit. From the foregoing, it is difficult to

tell whether the death of the deceased was as a result of unlawful act or omission of another person. The prosecution would have been able to resolve this doubt had they called as witnesses those bar patrons or some of them who were in the bar with deceased. A doubt having been created as to how the deceased met his death, the same must of necessity, be resolved in favour of the accused.

Even assuming that the deceased had been killed by a person, or even then accused, where is the evidence of malice aforethought. Reading through the entire testimony of prosecution witnesses as well as the submissions of the learned Senior State Counsel, there is no mention of malice aforethought. At some point the prosecution towed with the idea that the accused may have decided to kill the deceased following a misunderstanding between them and the deceased's son (PW.2) who was agitating for the closure of their bar and family members signed a letter to that effect. The deceased was one of them. However, according to the Investigating Officer (PW.7) he carried out investigations along that line and found nothing serious to warrant further investigations. Indeed according to this witness, he found no sufficient evidence to link the accused to the death of the deceased. He conceded that he only preferred the information against the accused due to the pressure by the villagers. He feared that they could be lynched. It is really unfortunate that people could be charged to assuage the feeling of the villagers even where there is no credible evidence linking the accused to the afore charge.

From the testimony of all the witnesses who in one way or another knew both the accused and deceased, there was no bad blood at all between them and their families. Indeed if there had been such bad blood, I do not think that the deceased would have gone to drink in the accuseds' bar in the first place. He could not as well have been sleeping there occasionally when overcome by alcohol and could not walk home. On the whole there is no evidence as to why the accused would have wanted the deceased dead and went out of their way to execute the plot to murder him.

Of course Malice aforethought is defined in Section 206 of the Penal Code thus:

“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.

The circumstances of the deceased's death cannot fit in any of the above so as to attract the inference of malice aforethought. There is no evidence that the accused ever intended to cause the deceased grievous harm. Nor is there evidence that their act or omission if at all would have resulted in the death of the deceased nor did they intend to commit a felony. In a nutshell, there is no evidence that the accused caused or were involved in the death of the deceased and that they did so with malice aforethought.

In trying to tie the accused to the death of the deceased, the prosecution tinkered with circumstantial evidence. That the accused, were the last persons to be seen with the deceased, while alive. Accordingly, the inculpatory facts of the case were so incompatible with the innocence of the accused and incapable of any other reasonable hypothesis than that of guilt of the accused. There is absolutely no basis for this submission. There is no evidence that the accused were the last persons to be seen with the deceased alive. The evidence on record is that the deceased was in the bar on the material day partaking alcohol. It is not clear whether he was left behind by the other patrons as they left when the bar closed or he left with them. The prosecution seem to be saying that since, the deceased was drunk and not in a position to walk, he must have remained behind and decided to sleep in the accused house as he had done in the past. These are however, mere theories, suppositions and speculations. They have no place in criminal proceedings. The fact that the deceased was left behind or walked out as aforesaid does not turn the accused into being the last persons to be seen with the deceased alive.

There is evidence, that the deceased was dragged on the ground. It is therefore possible that he could have been killed elsewhere and his body dragged to the scene where it was discovered. Considering the evidence of PW.2 that he observed the ground where the deceased was lying and saw no blood yet his clothes were blood stained, this possibility cannot be wholly ruled out.

The upshot of all the foregoing is that there is no iota or shred of evidence direct or circumstantial tying the accused to the death of the deceased. The accused appears to have been charged with the instant offence merely on suspicion and pressure from the villagers. Suspicion it has been stated many a time, however strong remains just that, suspicion, and cannot form the basis of a conviction.

The accused persons are accordingly acquitted of the information and set free forthwith.

Dated, signed and delivered at Machakos, this 15th day of November, 2011.

**ASIKE-MAKHANDIA
JUDGE**