



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET

CRIMINAL CASE NO. 84 OF 2005

REPUBLIC.....PROSECUTOR

VERSUS

JOHN KIBET BUSIENEI.....ACCUSED

JUDGMENT

The charge against the accused, **JOHN KIBET BUSIENEI**, per the information dated 22nd August 2005 is that of murder contrary to S. 203 as read with S. 204 of the Penal Code. It is alleged that on the 11th August 2005 at Jua Kali Trading Centre in Uasin Gishu District, the accused murdered Jacob Mwiti M'Ikiara.

The case for the prosecution was founded on the evidence of eight (8) witnesses who testified to the effect that on the material date at about 7.00 p.m., the deceased and a workmate **JOEL MWANGI (PW 1)** were on their way to buy tomatoes and charcoal to prepare their dinner. In the process, they met the accused who was also their workmate. The deceased and the accused had quarreled earlier that day. The accused had a stick which he used to attack and assault the deceased. Mwangi (PW 1) attempted to come to the aid of the deceased but was also assaulted once. He fled from the scene in search of help. Upon his return, he found the deceased on the ground with serious injuries to his mouth such that he could not talk. The accused was nowhere to be seen. He had already left the scene. Mwangi and others made arrangements to take the deceased to the hospital.

Earlier on the same day, **MBAE M'MUGAMBI (PW 2)**, was at a local hotel taking tea when the accused appeared there and remarked that he was very annoyed, would stop working at the sawmill and would kill somebody. After making those remarks, the accused left. At about 8.00 p.m., Mugambi (PW 2) learnt that there was a scuffle outside the hotel. He did not bother to enquire as to what was happening. On the following day at about 7.00 a.m. he was informed that the deceased had been injured on the previous night and had succumbed to his injuries.

Mugambi was one of those who witnessed a post mortem on the body of the deceased. He noted that the

deceased's skull was cracked and that his lower and upper lips were deeply cut. He (PW 2) had known the deceased to be a drunkard. He also knew the accused whom they referred to by his nickname of "Blackie". He did not on that material night see the deceased nor the accused.

EVANS KIDOGO MWARAMA (PW 5) was one of those who were informed by Mwangi (PW 1) that the accused was assaulting the deceased. He went to the scene and found the deceased lying down on the ground with injuries on his chin, upper lip and head. He (PW 5) and others thereafter went looking for a vehicle to ferry the deceased to hospital. After the deceased was taken to hospital, Mwarama (PW 5) and others went in search of the accused. They failed to trace him immediately and reported the matter to the administration police officers based at the Jua Kali A.P Camp.

Two administration police officers (**PW 3** and **PW 4**) received the necessary report and while in the course of their duty were attracted by screams. They rushed to the scene and found the accused surrounded by a mob of people. He had an axe. The mob was enraged and wanted to beat him. They (PW 3 and PW 4) noted that he had an injury on his head. They went to his rescue and in doing so were forced to fire gun shots in the air to scare away the mob. They arrested the accused and handed him over to the regular police.

P.C EDWARD TUNGA (PW 8) of Soy Police Station investigated the case. He found the accused already under arrest at the A.P Camp. The victim had already been taken to hospital. A blood stained axe recovered by the A.P's was handed over to P.C Tunga who in the course of the investigations visited the scene of the offence where a blood stained wooden stick was recovered. He took the accused for treatment of injury suffered by him. He also visited the Moi Teaching and Referral hospital where the victim had been taken. He found the victim in a coma. The victim died on the same date.

A pathologist at the Moi Teaching and Referral hospital, **PROFESSOR KOZLOVA (PW 6)** performed an autopsy on the body of the victim deceased and compiled the necessary post mortem report (P.Ex 3) which shows that the cause of death was head injury with fracture of the skull, facial bones, intracranial haemorrhage caused by sharp and blunt objects.

DR. EMBENZI JOSEPH (PW 7) of Moi Teaching and Referral Hospital examined the accused and found him to have suffered grievous harm. He also found him mentally fit to stand trial. He compiled and signed the necessary report (P.Ex 4. In his defence, the accused denied the offence. His case was that he was at work on the material date. Thereafter, he drank "changaa" with his workmates while waiting for their day's pay. It was then that he was told that some workmates were searching for him. He went looking for them but they all met on the way. The workmates who were from Meru told him that the deceased had been killed and that he was required to explain what had happened. They (workmates) set upon and beat him up after which he was arrested. He was shocked to hear that he was charged with murder of the deceased. He contended that he was not involved in the offence.

S. 203 of the Penal Code provides that:

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

From the evidence adduced herein, it is not disputed and indeed there is ample evidence to that effect, that the deceased died as a result of an unlawful act of assault committed against him. The post mortem report (P.Ex 6), confirmed that the cause of death was head injury with fracture of the skull, facial bones and intracranial haemorrhage caused by sharp and blunt objects.

The issue for determination is whether the accused was responsible for that assault against the deceased which later turned out to be fatal.

The defence raised by the accused was a denial and an implication that the deceased was assaulted by persons other than himself. He also implied that he was an innocent victim of an unlawful act for which he was not responsible.

There being no burden upon the accused to prove his innocence, the burden to prove his guilt beyond a shadow of doubt lay on the prosecution.

Other than Joel Mwangi (PW 1), none of the prosecution witnesses saw the deceased prior to the offence or during the offence. Mugambi (PW 2) did not see any incident involving the deceased. He only heard the accused making threatening remarks without indicating who was targeted. He was informed on the following day that the deceased died as a result of the injuries inflicted upon him.

Mwarama (PW 5) was merely informed that the accused was beating the deceased but when he rushed to the scene, he did not find the accused. He found the deceased lying down on the ground with injuries on his face and head.

The police officers (PW 3 and PW 4) only arrested the accused after rescuing him from an enraged mob of people. They found him with a blood stained axe (P.Ex 2).

Mwangi (PW 1) was therefore the only and key prosecution witness who saw the deceased prior to and during the offence. His evidence clearly implicated the accused. It showed that the accused was the person who attacked and injured the deceased with a black wattle stick (P.Ex.1).

Mwangi was with the deceased at the material time when they met the accused who then indicated to them that he was looking for the deceased before setting upon and assaulting the deceased with the stick.

The stick was seen at the scene of the attack by Mwarama (PW 5) and was recovered from there by P.C Tunga (PW 8). It had stains of human blood and when it was taken to the Government Analyst for necessary examination, the stains of blood matched with the sample of blood obtained from the deceased. The necessary report (P.Ex 5) was tendered by P.C Tunga.

The report by Prof. Kozlova (PW6) showed that the deceased was assaulted and injured with both a sharp and blunt object.

The axe (P.Ex 2) recovered from the accused was not proved to have been used in assaulting the deceased. Mwangi (PW 1) talked of the stick (P.Ex 1) and not the axe. A stick is generally a blunt object.

Although the accused denied having assaulted and fatally injuring the deceased, the evidence by Mwangi (PW 1) placed him as the real culprit. Mwangi was known to both the deceased and the accused. They were his workmates. He attempted to restrain the accused and protect the deceased but the accused turned against him such that he was forced to flee from the scene to look for help. At the time he fled, the

deceased had already been assaulted and was in the process of being assaulted further by the accused. There was nothing to suggest that Mwangi (PW 1) had any reason to incriminate the accused without cause. His evidence was reasonably credible. It established beyond doubt that the accused was the person responsible for assaulting and eventually killing the deceased. His defence was clearly rebutted.

There being no doubt that the deceased was assaulted and fatally injured by the accused, the next question would be whether the accused acted with malice aforethought in doing so. If he did, then he would invariably be guilty of the offence of murder but if he did not, he would be guilty of the offence of manslaughter under S. 202 of the Penal Code.

The evidence by Mwangi (PW 1) suggested that the attack on the deceased was unprovoked. He, however, alluded to a quarrel between the deceased and the accused earlier on the same date. He knew that both the deceased and the accused regularly consumed alcohol but he was not sure whether or not the accused was drunk on the material date. Mugambi (PW 2) could not tell whether the accused was drunk when he uttered threatening remarks. Mugambi however knew that the deceased used to consume alcohol and was a drunkard. He (PW 2) said that the accused appeared very annoyed on that material date.

The police officers who arrested the accused (i.e. PW 3 and PW 4) found him with injuries. They could not tell whether he was intoxicated. They found him with a blood stained axe. They could not however tell whose blood had stained the axe.

The Government Analyst Report (P.Ex 5) indicated that the axe had no blood stains when it was examined. Prof. Kozlova (PW 6) indicated that the body of the deceased had a strong smell of alcohol. She formed the opinion that the deceased had consumed alcohol prior to his admission in hospital for injuries suffered.

Dr. Embenzi (PW 7) indicated that the history given to him by the accused was that he was involved in a fight with his workmates while in a state of intoxication. He (PW 7) confirmed that the accused had suffered grievous harm.

From all the foregoing evidence, it is possible that the accused and the deceased may have been involved in a drunken brawl which led to physical confrontation resulting in the deceased sustaining fatal injuries. Apparently, the accused used excessive force on the deceased and fractured his skull. It is obvious and apparent that the key prosecution witness (PW 1) avoided mention of a drunken brawl and both the accused's and deceased's state of intoxication prior to and during the unfortunate and senseless incident.

Against that background, it is difficult to make a finding that the accused acted with malice aforethought when he assaulted and fatally injured the deceased. The offence proved against him by the prosecution is that of manslaughter rather than murder. Consequently, he is found guilty of manslaughter and is convicted accordingly

[DELIVERED AND SIGNED THIS 3RD DAY OF NOVEMBER, 2011]

J.R. KARANJA
JUDGE

3/11/11

Before – J. R. Karanja – Judge

Court Clerk – Andrew
Accused present
Mr. Miyienda for Nyambegera for accused

J. R. KARANJA
JUDGE
3/11/11

Court:
Judgment delivered to accused. Sentence on 10/11/11. Remanded in custody.

J. R. KARANJA
JUDGE
3/11/11

10/11/11

Before J. R. Karanja – Judge
Court Clerk – Andrew
State Counsel – Mr. Kabaka
Accused present
M/s. Orina holding brief for Nyambegera for accused

J. R. KARANJA
JUDGE
10/11/11

State Counsel:

Accused may be treated as a first offender.

J. R. KARANJA
JUDGE
10/11/11

Mitigation by M/s. Orina:

Accused is aged 33 years. He prays for another chance to rectify himself. He was the eldest in his family. The family members are ready to receive him back. He has been in custody for six (6) years. We pray for leniency.

J. R. KARANJA
JUDGE
10/11/11

Court:
Accused is a first offender. Mitigation has been noted.

Sentence:
Accused to serve ten (10) years imprisonment. Right of appeal.

J. R. KARANJA
JUDGE
10/11/11

