

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

Criminal Case 8 of 2008

REPUBLIC PROSECUTOR
VERSUS
BURUNO MUCHERA KOBIA ACCUSED

JUDGMENT

The accused was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that the accused on 20th January 2008 at Mbeu Sub Location, Mbeu Location in Tigania District within Eastern Province murdered Muchugi Kirema. The prosecution's case is that the accused cut the deceased on the right leg where the main vein was severed leading to shock caused by bleeding which resulted in death. PW1 stated that on the 20th January 2008 at 9pm, her front door was knocked. The person introduced himself as the deceased. She knew him since childhood and she used to see him pass near her home. The deceased resided in the neighbouring village. The deceased asked her to open the door because he had been cut by the accused. PW1 knew the accused. When the deceased told her so, she began to scream. Her screams attracted the neighbours. She described the accused and the deceased as friends and that they used to walk together. They also came from the same village. When she agreed to open the door, she saw the deceased lying down outside her house. His right leg had been cut. She however found that he had already died. She said that she talked to the deceased before he died. He, the deceased, again repeated that he had been cut by the accused. PW2 knew the deceased and the accused from their childhood. They were his neighbours. He too confirmed that the deceased and the accused were friends from childhood. He further stated that the accused brother was married to the deceased sister. On hearing PW1's pleas, this witness went to her house and found the deceased lying down. He had an injury to his right leg. The deceased said that he had been cut by Buruno the accused. The deceased was bleeding profusely. PW2 went to call the deceased father and mother. On returning to the scene, he found the accused was still alive and was crying. He left the scene to look for transport. Two hours later when he returned without transport, he found the deceased had died. This witness reiterated that the deceased and the accused were good friends

and that they ate and drunk together. PW3 the assistant chief also stated that the deceased and the accused were known to him from their childhood. They were his neighbours. He also stated that the two were good friends. He said that he was informed by PW2 that the deceased had been hurt. He found the deceased at PW1's house. By then, the deceased was not talking. He noted that the deceased had an injury to his right leg. He, in the company of PW7, went to look for the accused. They found the accused in his house. Thereafter, this witness said that they found the accused at his brother's house. They found him hiding in the tobacco barn. The accused had a panga which had blood stains. This witness identified the panga which was before court. The accused was taken to the AP Post. On being cross examined, this witness said that the panga was in the barn with the accused. He further stated that the deceased had died before he was taken to hospital. On being further cross-examined in respect of the statement he made before the police where he stated that the panga was found under the bed of the accused, this witness said that the accused house was next to his brother's barn. He further stated that there was no bed in the barn. PW4 was the father of the deceased. He said that his daughter was married to the accused brother, Rwanda. He said that the accused and the deceased were friends. That they walked together. That it was only once that they disagreed when the accused took PW4's bicycle but PW4 went for the bicycle from the accused. Thereafter, the deceased and the accused continued being friends. PW5 was the brother-in-law of the deceased. He was in the company of other members of the public whilst they were looking for the accused after it was reported that the accused had hurt the deceased. This witness stated that they found the deceased in his house and they handed him over to the assistant chief, PW3. On being cross examined, this witness stated that the accused was found in his house preparing to sleep. PW6 was the wife of the deceased. She stated that on the fateful night they were eating a meal with the deceased. She heard somebody calling the deceased outside and saying, "Let us go." This person who was calling the deceased was standing a meter away from the door which was open. She knew that the person was Buruno the accused because the deceased asked her to give Buruno some food which Buruno declined. She however did not see the face of Buruno since he was outside the door and it was 7pm and not yet dark. She also had a tin lamp on the table which illuminated outside. Later, she learnt that the deceased had a deep cut on the right leg. When she went to the scene, she found the deceased had died. She too confirmed that the deceased and the accused were good friends. That they used to drink alcohol together

but she could not confirm whether on that night in question they were drinking. PW7 also confirmed that the deceased and the accused were friends. He was amongst those who went looking for the accused. He said that they found the accused in the kiln which burns tobacco. That kiln belonged to the deceased brother called, Mwenda. That the accused was hiding in kiln and the panga was found under the bed of the accused in the accused house. PW8 was the inspector of police who was the investigating officer. He got information of the death of the deceased on 21st January 2008. On that day at about 10am, he rearrested the accused from the A.P post. He found the deceased dead outside PW1's house about a meter away from the door. He noted that next to the body was a lot of blood. He also noted that the deceased had a cut on the right leg. He was given the panga recovered by those who had arrested the accused. It had blood stains. On being analyzed by the government chemist, the panga was found to have blood group A. The deceased blood group was A. On being cross-examined, he said that he got to know that the deceased and the accused were friends. He however did not get to know whether on the fateful night the deceased and the accused had been drinking. PW9 was the doctor who performed the postmortem. He found a deep cut on the back of the right leg which caused compound fracture of the right tibia and fibular. There was damage to the main vein of that leg. In his opinion, death was caused by bleeding. He took the deceased blood sample for the request by the investigating officer. The accused on being put to his defence stated that on 20th January 2008 he went with the deceased at a place they used to frequent and drink *chang'aa* (illicit brew). He said he and the deceased were friends from their childhood. It was the deceased who bought *chang'aa* for Kshs. 100/=. When they finished drinking, the deceased suggested that they go to buy cigarettes. The accused said that he had no money. On saying so, the deceased asked the accused to refund him the amount he had used to buy him *chang'aa*. The accused responded by saying that he would refund the money the following day. That did not please the deceased. As they walked, the deceased who was behind the accused, hit the accused with his walking stick. The accused reacted by removing what he called a knife and by hitting the deceased with it. He stated that he did not realize he had cut the deceased. He further stated that he did not intend to kill the deceased. He also stated that the deceased did not tell him that he had been cut. They parted company and later at 10pm, he heard people banging his door and telling him that they needed to take the deceased to hospital because he had cut him. As they went to take him to hospital, they learnt that the deceased had

died. The accused stated:-

“I liked deceased. I did not wish to kill him. We were drunk.”

From the evidence narrated above it is clear that the deceased and the accused were childhood friends and had retained their friendship to adulthood. PW6 stated that the deceased and the accused left together at 7pm. PW1 stated that it was at 9pm that the deceased knocked her door. PW8, the investigating officer on drawing the sketch map prosecution exhibit number 1 showed that the deceased was cut about 30 metres away from PW1's house. It can be assumed that it took the deceased about 5 – 7 minutes to reach PW1 house from the point where he was cut. It therefore seems that the deceased and the accused were in the company of each other for atleast one hour and 50 minutes. PW6 stated that the deceased and the accused drunk alcohol together. PW2 also confirmed that the deceased and the accused ate and drunk together. None of the prosecution witnesses could confirm if the deceased and the accused drunk alcohol on the night in question. It is the accused in his defence who stated that on that night he and the deceased went to drink alcohol. He said that they became drunk. The police who investigated this matter failed to investigate where the deceased and the accused were before the fatal cutting. Indeed, the police investigation of this case was very shallow. That investigation only involved the collection of the deceased body and the panga allegedly used by the accused. Despite the evidence showing that the deceased and the accused were in each other's company from 7 – 9 pm, the police failed to find out where they were all that time. The prosecution had an obligation to prove what took place from 7pm up to the period prior to the fatal cutting between the deceased and the accused. Because the prosecution failed to adduce evidence of where or what the deceased and the accused did between 7pm and 9pm, the court is bound to accept the evidence of the accused in his defence. In that regard, and bearing in mind that PW1 to PW8 stated that the deceased and the accused were good friends, the prosecution failed to prove malice aforethought of the accused which needed to accompany *actus reus*. In view of what the accused stated that he was drunk and that he reacted to the hitting by the deceased by hitting the deceased with the knife the prosecution needed to prove the accused had intention to cause death or serious injury to the deceased. The prosecution's evidence on what the accused did after he cut the deceased is inconsistent and cannot be relied on to proof the accused had intent to kill the deceased. PW3 the assistant chief and PW7 said that the accused was found hiding in the barn or the kiln. PW5 however said that he was in the group that found the accused preparing himself to sleep in his house and they apprehended him and took

him to PW3. So the question is, was the accused hiding or not? That inconsistency can only be interpreted in favour of the accused. There is no proof of hiding by the accused and it therefore cannot be said that the accused intended to cut or to cause grievous harm or death to the deceased. The court accepts that both the deceased and the accused had been drinking *chang'aa*. Section 13(4) of the Penal Code will therefore be invoked in favour of the accused. That section provides

“Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.”

In the case **Kongoro s/o Mrisho Vs. Republic** [1956] 23 E.A.C.A. 532 the Court for East Africa referred To E.A.C.A. Criminal Appeal No. 450 of 1955 **Cheminingwa Vs. Republic (unreported)** where it was stated that when an accused, as in this case raises a plea that by means of intoxication he was incapable of forming intention to commit the offence, he does not bear the burden to establish the same. In the above case it was stated:-

“It is of course correct that if the accused seeks to set up a defence of insanity by reason of intoxication, the burden to establish at least demonstrate the probability of what he seeks to prove. But, if the plea is merely that the accused was by reason of intoxication incapable of form the specific intention required to constitute the offence charged, it is a misdirection if the trial court lays the onus of establishing this upon the accused.”

Since I have found that the accused and the deceased had been drinking *chang'aa* from 7pm up to close to 9pm, the accused is not guilty of murder is found guilty of man slaughter contrary to section 202 (1) as read with Section 205 of the Penal Code. I therefore convict the accused of manslaughter. I therefore now invite the accused to address me in mitigation.

Dated and delivered at Meru this 26th day of July 2010.

MARY KASANGO
JUDGE