



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Case 52 of 2006

REPUBLIC

-VS-

JOEL WAITHAKA MAINA

JUDGEMENT

The accused has been charged for the offence of murder, contrary to Sec. 203 as read with Sec. 204 of the Penal Code, Cap 63, Laws of Kenya. The particulars of the offence as stated in the information are as follows:

“On the 8th December, 2005 at KENDA BAR along Solai Lane in Nairobi within Nairobi Area Province murdered JOHN MAINA KIRONJI.”

In her evidence, PW1 Eunice Wanjiru testified that on 10th December, 2005, she was informed by her husband that their son had been admitted at Kenyatta National Hospital following an assault by one Waitthaka. On the following day, PW1 went to the said hospital to locate her son called John Maina Kironji. However, the visit was in vain. On 12th December, 2005, PW1 went to Kamukunji Police station while accompanied by her daughter viz, Rachel Wanjira. While there, one police officer confirmed that he had actually escorted the son of PW1 to the above hospital. From there, they went to Kenatco, where one Maina informed them that her son had died. Seeing the above, PW1 and her daughter went back to I.C.U Kenyatta National Hospital where a nurse confirmed that information. In response, PW1 went back to her home. On 23rd December, 2005, PW1 went to the mortuary where she identified the body of her son before a post-mortem was carried out. On the other hand PW2 Alice Wangui Wanjiru identified herself as a sister to the deceased. She also testified that on 23rd of December, 2005 she accompanied her mother to KNH where she was able to identify the body of her brother before a post-mortem was carried out. Eventually, the body was released to them for burial purposes. On his part, PW3 Anthony Muturi Mhuri testified that he was 22 years old and that he stays in Majengo Estate which is just next to Pumwani Estate. He recalled that on 8th of December, 2005 at around 8.30 am while he was in a club at Munyaka area, he saw the accused fighting the deceased. According to PW3 he did not know how the fight started. Later, at around 2.00 – 3.00 pm, PW3 saw the accused leaving the club and on reaching outside, he hit the deceased with a stick on the head. PW3 reckoned that he saw the deceased falling down while bleeding from the ears. On seeing the above, PW3 called the workmates of the deceased from the bus station – station and on going back, they never found the accused at the scene. Further to the above, PW3 also stated that the accused later disappeared for six months and on being arrested, he was taken to Kamukunji Police Station. PW3 also recalled that earlier on, he managed to block the accused from hitting the deceased with an iron-bar. In his evidence, PW4 Inspector Johnstone Matoke introduced himself as an officer attached to Kamukunji Police Station. He recalled that on 8th of December, 2005 at around 3.46 pm while he was on duty he was phoned and informed that there were some people who were fighting. On rushing to Kianda Kanini Bar, PW4 found a person lying down while bleeding. In response, PW4 organized for the victim to be taken to Kenyatta National Hospital. Besides the above, PW4 also testified that he later collected a stick which he suspected to have been used to hit the victim. After a lapse of two days, PW4 was told that the victim had died. PW4 was later informed that on 16th of April, 2006, the accused was arrested and charged for the offence of murder. On the other hand, PW5 police constable Steven Moindi recalled that on 19th of December 2005, while he was in the crime office, he received a murder report from Eunice Wanjiru. She explained that her son who had been admitted at KNH had died. After booking the report, PW5 opened the case file. PW5 also testified that on 19th of April, 2006, he

and PC Mweu escorted the accused to the police doctor for mental check-up. In his evidence, PW6 PC Stanley Mwenda testified that he is currently attached to Kamukunji Police Station. He further testified that on 8th of December, 2005, while he was on patrol with his colleague namely PC Mwandado at around 8 am they met the accused who complained that he had been assaulted by the deceased. After advising the accused to report the matter to Kamukunji Police Station, the two officers continued with their patrol duties. However at around 4.00pm they were informed by members of the public that somebody had been seriously assaulted outside Kenda Bar, along Racecourse Rd. On rushing to the scene, they found the victim lying on the ground, unable to talk and was writhing in pain. Seeing the above, PW6 rang the duty officer – Kamukunji Police Station who later organized for a vehicle to take the victim to the hospital. PW6 further testified that it was PW3 who informed them that the deceased was assaulted by one Waithaka. PW6 later learned that the victim died while in hospital. Acting on a tip-off, PW6 and other police officers arrested the accused on 16th of April, 2006, before charging him with the offence of murder. In his medical evidence, PW7 Dr. Zephania Kamau testified that on 19th of April, 2007, he examined the accused namely Joel Waithaka Maina whom he found to be 28 years old and without any physical injuries. He also found him to be mentally fit. On the other hand PW8 Chief Inspector Peterson Mwangi testified that on 8th of December, 2005 while he was in Kamukunji Police Station, members of the public reported that the deceased and the accused were fighting at Kenda Kanini Bar. PW8 was aware that Inspector Matoke visited the scene and found the deceased lying at the veranda of the bar. After noticing the bleeding from the head, Inspector Matoke collected a stick from the scene. PW8 was later informed that on 10th of December 2005, the deceased passed away while undergoing treatment. He was also aware that on 23rd of December, 2005, an autopsy was carried on the body of the deceased.

In his defence, Joel Waithaka Maina (hereinafter referred to as the accused) testified that he usually carries goods using a handcart. He recalled that on 8th of December 2005, he went to Solai Lane where he got work that took him to the bus station. On going back to his work station, he was called by a passenger who was in a Nissan vehicle. Thereafter, the accused started taking out goods from the vehicle and then suddenly Maina assaulted him without any reason. Later, Maina (who is now the deceased) complained that the accused had hit him while using his handcart. Due to the assault, the accused escaped to where there were three police officers. After reporting the incident to the police officers, the deceased ran away on seeing them approach. From there, the accused took some goods to Nairobi West and on going back at around 1.00 pm, he went into Kenda Bar where he drank two bottles of exotic dry gin. At around 2pm, the deceased went back and grabbed the accused before demanding Kshs.200/= as being compensation for being hit by the handcart. On the following day, the accused found that the bar had been closed. Further to the above, the accused also explained that he had been arrested on 16th of April 2006 and he explained how he had been rescued and left behind the deceased.

After the summing up was delivered on 26th of March, 2009, both assessors returned a verdict of “not guilty” against the accused for the offence of murder. According to the first assessor, PW3 was not consistent in his testimony and that since the accused and deceased had fought outside the bar, the bar patrons could have seen what had happened. On the other hand, the 2nd assessor agreed with the arguments of his colleague. He also added that the stick which was used was denied by PW3. This court has carefully considered the evidence on record. Apparently, the prosecution only availed one eye witness who was PW3. As stated above, he testified that he had earlier seen the accused and the deceased fighting. Consequently, at around 2.00 – 3.00pm he reckoned that he had seen the accused hit the deceased with a stick on his head. In his testimony, PW3 conceded that he did not know the reason why the two were fighting. Though the accused did not admit assaulting the deceased, he testified that it was the deceased who had assaulted him. No doubt, the offence was committed during broad daylight at around 2.00 – 3.00 pm. Though only PW3 was availed as a witness, the court believes that there was actually a fight between the accused and the deceased. Thereafter, the accused assaulted the deceased while using a stick. However, the prosecution did not avail any evidence to prove that the accused had any malice aforethought to kill the deceased. That means that the killing was not premeditated. The two were engaged in a quarrel that culminated in a fight. In view of the total circumstances of the case, I hereby reduce the charge to a lesser but cognate offence of manslaughter. I hereby find that the prosecution has proved its case beyond any reasonable doubt. The upshot is that the court hereby finds the accused “guilty” of the offence of manslaughter, contrary to Sec. 202 as read with Sec. 205 of the Penal Code, Cap. 63, Laws of Kenya. The accused is hereby convicted accordingly. It is due to the above reasons that I hereby wish to differ with the verdict of the assessors.

MUGA APONDI

JUDGE

Judgement read signed and delivered in open court in the presence of the accused:

Ms. Kiptoo Defence Counsel

Ong'ondo State Counsel

Order:

Assessors to be paid allowances.

MUGA APONDI

JUDGE

22ND MAY, 2009

Ong'ondo: I pray for time to check the past record of the accused.

Mrs. Kiptoo: No objections.

Court: In view of the above, record and sentence will be on 26th May, 2006. Accused remanded in custody.

MUGA APONDI

JUDGE

22ND MAY, 2009