

REPUBLICPROSECUTOR

VERSUS

FRANCIS KIPNGETICH LANGATACCUSED

JUDGMENT

The accused, **Francis Kipngetich Langat** 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 were that on 1st February, 2004 at Kaplong market in Bureti District, the accused murdered Alfred Kipkorir Mutai (*hereinafter referred to as the deceased*) when the accused was arraigned before this court he pleaded not guilty to the charge. The prosecution called eight witnesses in its bid to establish the guilt of the accused. After the close of the prosecution's case, this court put the accused to his defence. He gave an unsworn statement in his defence. He denied the offence. He told the court that he was innocent of the charge.

Before giving reasons for this court's judgement, the facts of this case will briefly be set out. The accused was employed as a security guard of Joy point pub situated at Kaplong market in Bureti District. PW1 Richard Kipsang Rono was at the material time employed as the manager of the pub. Pw6 Hillary Kipkemoi Keter was supervision at the bar. He was employed to man the pool tables at the said Joy point bar. On 1st February, 2004 at about 11.00p.m, according to PW6 the deceased entered the bar. He was drunk. He caused disturbance to other patrons who were enjoying themselves at the bar at he material time. PW6 testified that he saw the accused forcefully remove the deceased from the bar. According to PW6, the accused slapped and kicked the deceased as he was removing him from the bar. PW6 testified that he did not intervene when the accused was beating the deceased. He recalled that PW1, the bar manager, told the accused no to beat the deceased. In his testimony, PW1 testified that although he did not see the accused assault the deceased, he saw them quarrel or argue outside the Joy Point bar. PW1 testified that he saw them quarrel or argue outside the Joy Point bar. PW1 testified that he saw the accused arguing with deceased at the entrance of the bar which was about ten meters from the bar. PW6 testified that the accused slapped the deceased on his face and kicked him on his abdomen. He recalled that at the time, he did not see the accused was beating the deceased, the deceased did not react or respond by defending himself.

PW6's testimony in regard to what transpired on the material night was corroborated to some extent by the testimony of PW8 Philip Kipkurui Maritim who testified that on the material night he was at Joy Point bar. He was then employed as a barman. He recalled that he was with PW1 when he saw the deceased enter the bar. The deceased was drunk. He testified that the accused prevented the deceased from entering the bar as he was of the view that the deceased would disturb other patrons at the bar. Although he testified that he did not actually see the accused assault the deceased, he recalled that he left the accused and deceased quarrelling outside the bar. He also recalled pw1 telling the accused not to quarrel with the deceased. Apart from PW6, who testified actually seeing the accused assault the deceased, the other witnesses who testified in regard to events that took place at the scene, i.e. PW1 and PW7 offered testimony confirming the fact that the accused and the deceased quarreled or were engaged in an argument outside Joy point bar at the time it was alleged the accused assaulted the deceased.

PW4 Robert Kipngetich Mutai, an employee of James Finlay Tea company (*and a brother to the deceased*), was informed on 4th February, 2004 by his father that the deceased was seriously sick and required medical attention. The father of the deceased sought financial assistance from PW4 to enable the deceased be taken to hospital. PW4 to enable the deceased be taken to hospital. PW4 sought permission from his place of employment and traveled home to attend to the deceased. When he arrived home, the deceased told him that he was assaulted on 1st February, 2004 by the accused. W4 knew the accused. The accused was their neighbour at home. He deceased complained of pain on his chest, stomach and on his private parts. He took the deceased to Sotik dispensary. At the dispensary, he was advised to take the deceased to Kapkatet District Hospital. He was told that in view of the injuries sustained by the deceased,

he would require surgical intervention. PW4 took the deceased to Kaplong Mission Hospital. The deceased was operated on 5th February, 2004. The deceased succumbed and died of his injuries on 6th February, 2004.

Meanwhile, on 5th February, 2004 PW4 and his brother PW3 Gilbert Kiplangat Mutai report the assault of the deceased to Sotik Police station. PW3 testified that when he saw the deceased at Kaplong Mission Hospital, where he had been admitted before the operation, the deceased told him that he was having pain on his abdominal area. He further told him that he was having pain on his abdominal area. He further told him that he was assaulted by one Franco outside a bar known as Joy Point bar. PW3 knew Franco as their neighbour. He identified the accused in court as the person known as Franco in their home area. He recalled that the deceased was in pain at the time he informed him of the assault by the accused. After the death of the deceased, PW3 and PW4 notified the police of his death. The initial investigation relating to an assault case was transformed to be an investigation relating to the unlawful death of the deceased. PW2 P.C. Reuben Langat was assigned to investigate the case. He commenced investigations. He was present on 10th February, 2004 when post mortem was performed on the body of the deceased by PW7 Dr. Tonny Njoka. PW5 Alexander Kiprono Kering, the paternal uncle of the deceased, identified the body of the deceased before the post mortem was performed. According to Dr. Njoka, before he performed the post mortem, he observed that there was a midline extended surgical incision on the abdomen of the deceased measuring about 20cm. the surgical incision had been sutured. The abdomen was slightly distended. On internal examination of the abdomen, he observed that there was inflammation of the intestines and liver which had matted together with evidence of thick fluid. There was evidence that the small intestines had been surgically repaired. The region of the gut had darkened being evidence of necrosis. He formed the opinion that the cause of death was evidence of necrosis. He formed the opinion that the cause of death of the deceased was septicemia secondary peritonitis. He testified that the cause of the death of the deceased was spillage of the contents of the small intestines into the abdominal cavity which caused an infection. The post mortem report was produced as prosecution evidence No. 1. Upon his arrest, the accused was taken to Kapkatet district hospital. He was examined by Dr. Serem who formed the opinion that the accused was mentally fit to stand trial. The medical report by Dr. Serem was produced on his behalf by PW7 Dr. Njoka as prosecution exhibit No. 2. Upon concluding his investigations, the PW2 caused the accused to be charged with the present offence.

As stated earlier, when the accused was put to his defence, he denied assaulting the deceased or causing him to sustain the injuries that ultimately caused his death. After the close of both the prosecution's and the defence case, Mr. Koech for the state and Mr. Maengwe for the accused made closing submissions. Whereas Mr. Koech made submissions urging the court to reach a finding that the prosecution had established its case on the charge of murder to the required standard of proof beyond reasonable doubt, Mr. Maengwe on his part made arguments urging the court to find that insufficient evidence had been adduced to place the accused at the scene where it was alleged that the deceased had been assaulted and thereby sustained injuries which later proved to be fatal. He submitted that as the deceased was drunk, there was no direct evidence of any witness who saw the accused actually assault the deceased. He urged the court to acquit the accused.

That burden must be discharged to the required standard of proof beyond any reasonable doubt. In the present case, the prosecution offered direct evidence and evidence of a dying declaration in support of its case implicating the accused with the death of the deceased. This court's evaluation of the evidence adduced is that on the material night while the accused was on duty guarding the Joy point bar at Kaplong market, the deceased went to the bar. The deceased was drunk. It was apparent that other patrons at the bar complained of the deceased's conduct. Although PW1, the bar's manager denied that he was present when the deceased entered the bar, my evaluation of the evidence leads me to reach a finding that it was PW1 who ordered the accused to secure the removal of the deceased from the bar.

According to PW8, the deceased was disturbing other patrons at the bar. Although PW8 denied having seen the accused assault the deceased, it was clear to this court that he was being less than candid in relating the circumstances under which the deceased was removed from the bar. Whereas PW8 confirmed that the deceased apparently resisted his forceful removal from the bar by the accused, PW8 denied seeing the accused assault the deceased. I believe the testimony of PW6, the supervisor who was manning the

pool tables of Joy Point bar at the time, when he stated in his testimony that when the deceased became a nuisance at the bar, the accused forcefully removed him from the bar. In the process, the accused assaulted the deceased by slapping him and kicking him in the abdomen. The injury that ultimately caused the death of the deceased was in his abdomen. The injuries were consistent with a kick in the abdomen. I analyzed the testimony of PW6. I am of the view that the same was truthful and indeed gave a blow by blow account of what transpired on the material night. PW1 and PW8, although they were at the scene on the material night, chose to be less than candid in their testimony. Obviously, the two witnesses were protecting or shielding the accused who was their co worker, from criminal liability.

The testimony relating to the events that took place inside and outside Joy Point bar on the night of 1st February, 2004 was corroborated to a large extent by the evidence of the dying declaration made by the deceased. PW3 and PW4, the brothers of the deceased, testified that the deceased told them that he had been assaulted by the accused, a person who was known to both PW3 and PW4. PW3 was specific in his testimony: he stated that the deceased told him it was Franco (*the accused*) who had assaulted him. The deceased made these statements to PW3 and PW4 on different occasions a day or two before he succumbed to his injuries and died. Under **section 32(1)** of the **Evidence Act**:

“A dying declaration is relevant whether the person who made it was not, at the time when it was made under expectation of the death, that is, it is immaterial whether there existed any expectation of death at the time of the declaration”

In **Pius Jasanga s/o Akumu v R (1954) EACA 331** at 333, the court of Appeal of East Africa held as follows:

*“The question of the caution to be exercised in the reception of dying declarations and the necessity for their corroboration has been considered by this court in numerous cases, and a passage from the 7th edition of Field on Evidence has repeatedly been cited with approval. The caution with which this kind of testimony should be received has often been commented upon. The test of cross examination may be wholly wanting; and ... the particular of the violence may have occurred under circumstances of confusion and surprise calculated to prevent their being accurately observed ... the deceased may have stated inferences from facts concerning which he may have omitted important particulars, from not having his attention called to them, (**Ramazani bin Mirandu (1934) 1 EACA 107; Rv Okulu ss/o Eloku (1938) 5 EACA 39; R v Muvovya bin Msuma (supra)**)”*

In the present case, the direct evidence by PW1, PW6 and PW8 which placed the accused at the scene where the deceased was assaulted. It corroborates the evidence of the dying declaration made by the deceased to PW3 and PW4 which was to the effect that he had been assaulted outside the Joy Point bar by the accused. The injuries that the deceased sustained i.e. the injuries on his abdomen were the same injuries he complained of to PW3 and PW4 as having been inflicted on him by the accused outside the said Joy Point bar. PW6 was categorical in his evidence that the accused kicked the deceased on the abdominal area in the process of forcefully removing him from the said Joy Point bar. The post mortem report is clear that the deceased died due to an infection of the small intestine and the liver that was caused by the contents of the small intestine leaking into the abdominal cavity. The defence of the accused was a mere denial and did not address the factual evidence that was adduced by the prosecution witnesses placing him at the scene where the deceased was assaulted. I therefore hold that the prosecution has established, to the required standard of proof beyond reasonable doubt, that It was the accused who assault the deceased by kicking him on his and abdomen that caused him to sustain injuries which later proved fatal. My evaluation of the evidence does not rule out the fact that the deceased could have survived his injuries If he had sought appropriate medical attention and he had been attended to promptly.

I further hold that the prosecution did not adduce evidence which established malice aforethought on the part of the accused. It was clear that the accused assaulted the deceased in the course of securing his forceful removal from Joy Point bar on account of deceased’s being a nuisance to other patrons who were enjoying themselves at the said bar. In the course of removing the deceased from the bar, the accused kicked the deceased in the abdomen causing him to sustain injuries which later proved fatal. I therefore find that accused guilty of the lesser but cognate offence of manslaughter. The accused unintentionally

caused the death of the deceased. He did not have the requisite *Mens rea* that would lead this court to reach a finding that the accused killed the deceased with malice aforethought.

I therefore convict the accused for the offence of manslaughter contrary to **Section 202** as read with **Section 205** of the penal code.

DATED at KERICHO this 14th day of May, 2009

L. KIMARU

JUDGE