REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Case 7 of 2008

REPUBLIC ..... PROSECUTOR

VERSUS

JOEL NDERITU MIHANG'O ..... ACCUSED

J U D G M E N T

Joel Nderitu Mihang'o hereinafter referred to as *"the accused"* was tried on an information dated 28th January 2008 that charged him with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars contained in the information were that on the 15th December 2007 at Gatumbiro village in Tetu Division, Nyeri District within Central Province, he murdered **Naftali Kimani Murage**; *"the deceased"*. The accused returned a plea of not guilty to the charge and his trial ensued. A total of 7 witnesses were called by the prosecution in a bid to prove its case against the accused.

This is how the prosecution put together its case against the accused. PW1, **Grace Nyambura Nderitu** a wife of the deceased testified that on 15th December 2007, the deceased left home for Gatumbiro shopping centre at about 11 a.m. for a drink. It was not however until 2 a.m. that he came back and went straight to bed without speaking to anybody and never woke up until about 4 p.m. the following day. The deceased then told her that he had been kicked in the stomach outside the bar by the accused. She knew the accused as he was a neighbour at home. Apparently the deceased had been drinking in the bar with his brother, **Hoseah Kimamo** and the accused. The accused later saw off **Hoseah Kimamo** and returned to the bar and kicked the deceased as aforesaid. The accused did not tell her why he had kicked him.

As the deceased was in immense pain, PW1 went and reported the incident to the Assistant Chief. The Assistant Chief advised her to approach PW3, the brother of the deceased to assist in taking the deceased to hospital. However PW3 refused to go along claiming that the deceased had abused him. When she informed the deceased of PW3's refusal the deceased retorted that he should refund him his Kshs.36,000/=. On 17th December 2007, she pleaded with people presumably neighbours to assist her take the deceased to hospital to no avail. On 18th December 2007 she bought the deceased soda and panadol to ease the pain. It was not however until 19th December 2007 that she managed to take the deceased to Nyeri PGH. But before he could be attended to, he collapsed and passed on. On 2nd January 2008 she attended the post mortem of the deceased and identified the body to the Doctor.

She was cross-examined on her evidence by **Mr. Gori** learned counsel for the accused. She conceded that the relationship between the deceased and the accused was good. Her relationship with the deceased

was good as well. The deceased had been on a drinking spree on the material day. When he came back home at about 2 a.m., she did not speak to him. Indeed she only managed to speak to him at about 4 p.m. the following day. It was then that he confided into her that he had been kicked by the accused. She conceded that she did not report the incident to the police immediately because she was not the one in pain and she also feared that the police would ask her many questions. The deceased had been in the company of his brother, PW3 during the drinking spree. PW3 had told her that he could not assist the deceased as he had abused him. The deceased had in return retorted that even if he refused to assist him he was not a Doctor. That notwithstanding, he would have to refund him his Kshs.36,000/=. A lady in the bar who had sold beer to the three did not witness the alleged fight between the accused and the deceased. She denied having assaulted the deceased. She also denied having conspired with PW3 to frame the accused.

The 2nd witness called by the prosecution was **Dr. Samuel Owino Ong'ang'a**, a Consultant Psychiatrist attached to Nyeri PGH. On 15th January 2008, the accused was brought to him with a request for mental state assessment. His findings were that his mental state was normal at the time and was fit to plead. He then filled his P3 form to that effect.

PW3 was **Hoseah Kimamo Murage**. He testified that he was a brother of the deceased. On 15th December 2007 at about 7 p.m. he left with the accused who was his employee for Gatumbiro shopping centre. They met the deceased in Kiandongoro bar and joined him for a drink. They drunk until about 10 p.m. and left. The deceased was left behind in the bar. On the way they parted company with the accused and went separate ways. On 19th December 2007 he received a call from his sister **Rose Wambui Murage** informing him that the deceased had been taken to Nyeri PGH by his wife. Later that evening he received information that the deceased had passed on. On 21st December 2007 he went to Nyeri PGH mortuary and identified the deceased's body. The Doctor who performed the post mortem informed him that the cause of death was a puncture of intestines having been hit by a heavy object. However he was never told who hit him.

Cross-examined by **Mr. Gori**, he responded that the accused was his farm hand whom he had known since birth. He confirmed that the deceased had taken beer by the time they joined him at his table. They left the bar at 10 p.m. There was no bad blood between him and the deceased. They resided in the same compound. It was his sister in Nakuru who infomed him about the deceased's admission at Nyeri PGH as he was not on talking terms with PW1. He denied that PW1 had approached him to take the deceased to hospital and he had refused. PW1 did not even inform him of the deceased's death. He confirmed that the deceased's relationship with his wife (PW1) was strained as they used to fight frequently.

PW4 **Samuel Wamiti Waiganjo**, the Assistant Chief for Gatumbiro testified that on 16th December 2007 at about 9 p.m. whilst on duty, PW1 came to see him and informed him that the deceased had informed her that he had been assaulted by the accused on the way. He advised her to approach PW3 for assistance and report the incident to police. She went away and after 5 minutes came back and reported that PW3 had turned down her overtures. On 20th December 2007 PW1 told him that the deceased had been taken to hospital and had passed on as he underwent treatment.

PW5 was **P.C. Alex Wanjohi**. He stated that whilst in the office at Tetu Police post, PW1 and the deceased approached him and reported that the deceased had been assaulted by the accused and Kshs.800/= of his taken. He had been assaulted on the ribs. He took down the report and referred them to Nyeri PGH for treatment. He also advised them to get P3 form from Nyeri police station. Later he was informed that the deceased had passed on whilst undergoing treatment.

Under cross-examination, he stated that he could not recall the exact OB number for the report. On receiving the report, he took no further steps in the matter. He did not even bother to arrest the accused.

P.C. George Odhiambo was PW6. He testified that on 2nd January 2008 at around 3 p.m. he proceeded to Nyeri PGH mortuary to witness the post-mortem. He was accompanied by the deceased's wife and brother. The post-mortem was conducted by **Dr. Ondila**.

The last witness called by the prosecution was Chief Inspector **Meshack Juma Buluma**. He testified that on 21st December 2007 whilst at Nyeri Police Station he received PW1 who reported to him that the deceased had been assaulted by the accused on 15th December 2007 and had passed on whilst at the hospital. On 3rd January 2008 a post-mortem was conducted.

Cross-examined, he responded that he was the investigating officer in this case. As he went about investigating the case, he visited the scene of the alleged crime but could not identify the scene of attack. The accused was arrested at the police station after he was brought there by PW3. He had never been in hiding. He acted on the information provided by PW1 that the deceased had been assaulted by the accused. The assault was however at unknown place and time. PW1 confirmed that during the assault there was no light. However the deceased somehow managed to recognise the accused. The accused left with PW3 from the bar according to his investigations. The deceased never mentioned PW3 and that is why he only charged the accused. With that the prosecution closed their case.

Thereafter respective counsel made oral submissions on no case to answer. In a reserved ruling delivered on 30th June 2009 I held that the prosecution had made out a prima facie case against the accused to warrant him being placed on his defence and I so ordered. The accused elected to make a sworn statutory statement in his defence and called no witnesses.

He testified that he knew both PW1 and deceased very well. On 15th December 2007 he was a farm hand employed by PW3. After work he in the company of PW3 went to Gatumbiro shopping centre at about 5.30 p.m. They entered Ruthaithi bar and they started drinking. At about 10 p.m. they left for home. He denied having assaulted the deceased as he never saw him in the bar. As far as he was concerned PW1's evidence was a pack of lies. She had a grudge against him over land dispute involving the deceased and PW3. He was arrested at the police station where he had been summoned by PW3. He was thus charged for an offence he knew nothing about.

Cross-examined by **Mr. Makura**, he stated that he had worked for PW3 for about 7 years. It was common for him to drink with his aforesaid employer. He heard rumours regarding the deceased's sickness from people at Gatumbiro including one, **Munene**. His relationship with the deceased was cordial. However there was a land dispute involving the deceased and PW3. He denied having advanced the deceased Kshs.36,000/= and or way laying the deceased. With that the defence closed its case.

Counsel thereafter made final submissions. On the part of **Mr. Gori**, he submitted that the prosecution had failed to prove its case against the accused beyond reasonable doubt as required by law. Out of the seven witnesses called by the prosecution, none of them gave credible evidence linking the accused to the offence. The evidence relied on heavily by the prosecution was that of PW1. She claimed that the deceased had told her that he had been assaulted in the bar by the accused. However that did not amount to a dying declaration. The investigating officer never carried out thorough investigations. The circumstances under which the alleged assault took place were not favourable for positive identification of the accused as it was deep in the night. The evidence on record was thus insufficient to sustain a conviction.

On his part, **Mr. Makura** submitted that the prosecution had adduced sufficient evidence to nail the accused for the offence. The seven witnesses called proved that it was the accused who attacked the deceased on the night of 15th December 2007. The evidence of PW1 was corroborated by that of PW3, PW4, PW5 and PW7. The totality of this evidence was that the deceased was attacked by the accused whom he had known and recognised. There was no grudge between the deceased and the accused as would have precipitated the deceased to implicate the accused.

Having carefully evaluated the evidence tendered by the prosecution as well as the defence, respective oral submissions by learned counsel and the law I think that the issues for determination in this case are clear cut;

(i) Whether the deceased was killed

(ii) Whether the killing if at all amounted to murder

(iii) Whether the accused was responsible.

From the totality of the evidence tendered there is no doubt at all that the deceased was killed. He did not die from self-inflicted injuries. Neither did he commit suicide. There is the post-mortem report. The cause of death was stated therein by the **Dr. Ondila** to be as a result of blunt abdominal injuries leading to the rapture of the intestines. There is no way that these injuries could have been inflicted by the deceased on himself. They must have been inflicted by another party.

Every killing however does not necessarily amount to murder. Murder is all about intentional and deliberate killing of another person. However there are cases where the killing is accidental in which event such killing cannot amount to murder but perhaps manslaughter. For the charge of murder to be proved the prosecution must show that the deceased was killed and was so killed with malice aforethought. What is malice aforethought? On my part I can do no more than refer to the definition of malice aforethought under section 206 of the penal code which provides:-

"**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 had committed or attempted to commit a felony....."

In the circumstances of this case there is no doubt at all that malice aforethought was not proved. There is no evidence at all that the accused had set out to kill the deceased and went into meticulous planning to do so. Indeed there is evidence that the relationship between the deceased and accused was harmonious and cordial. In fact on 15th December 2007 they had drinks together. There would therefore have been no reason for the accused to kill the deceased. If we were to accept the evidence of PW1 about the alleged fight then it must have been spontaneous and occurred on the spur of the moment. It was not something planned and or anticipated. These facts take the accused's case if at all away from the realm of malice aforethought and therefore murder.

Malice aforethought may of course be proved by the nature and seriousness of the injuries sustained by the deceased in the process. From the evidence on record it is alleged that the accused kicked the deceased on the stomach. By that, if indeed true, did he intend to cause grievous harm to the deceased or intend to commit a felony? I do not think so. Going by the evidence on record, it would appear that if indeed there was a fight, it would be the normal and frequent bar brawls among patrons. It should not be forgotten that the deceased had been on a drinking spree from about 11 a.m. It should also not be

forgotten that after the alleged assault, the deceased never sought medical treatment until after about four days. All this time, the best treatment that PW1 could offer was a single dose of panadol. Could this failure on the part of the deceased to seek treatment point to the fact that perhaps he deemed the injury as not serious enough to warrant medical attention. On the converse could the failure of the deceased to seek medical attention have compounded the injuries sustained if at all? Should that negligence and or oversight then be visited upon the accused? I do not think so.

That being my view of the matter, I am satisfied that malice aforethought has not been established in the circumstances of this case. I tend to see this case as one of accidental death as a result of injuries caused by a third party and therefore manslaughter if at all.

Was the accused responsible for the death of the deceased? On this score, the prosecution have relied heavily on circumstantial evidence as well as the deceased's alleged dying declaration.

Dealing first with the issue of dying declaration it is the evidence of PW1 that the deceased had the following day, on 16th December 2007 at about 4 p.m. told her that he had been assaulted by the accused in a bar. In turn she passed the same information to PW4, PW5 and PW7. Four days later the deceased passed on. To the prosecution therefore what the deceased said regarding the circumstances that led to what was bedevilling him at the time amounted to a dying declaration.

A dying declaration is generally admissible in evidence. However the general principal on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at the point of death and the mind is induced by the most powerful considerations to tell the truth. In Kenya however, the admissibility of a dying declaration does not depend upon the declarant being, at the time of making it, in a hopeless expectation of imminent death. Again there need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in reception into evidence of such a declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person. See generally **Choge v/s Republic (1985) KLR 1**.

However in the circumstances of this case, the evidential weight to the said declaration even assuming it was a dying declaration was lessened by the fact that the deceased passed on four days later in circumstances which point to negligence on his part and or on the part of his minders in seeking medical attention. The deceased's expectation of death was not therefore severely imminent at the time he made the declaration. Thirdly, the declaration was only made to the wife and nobody else.

In any event the conduct of PW1 towards the deceased was suspicious. She is a wife of the deceased. The deceased comes back from his drinking spree at about 2 a.m. on 15th December 2007 and she does not talk to him at all. Indeed she does not talk to him almost the whole of the following day. She goes about her business as normal whereas the deceased is allegedly in pain. It is not until 4 p.m. that she allegedly comes round to talk to him. It is then that she is told that he had been assaulted by the accused. According to PW1, the deceased was at the time writhing in pain. What does PW1 do, she merely reports the incident to the assistant chief. She does not spare any efforts at all to have the deceased attended to medically. I do not accept as credible the excuse proffered by PW1 that between 16th and 19th December 2007 she was seeking means of transport to ferry the deceased to hospital. The conduct of PW1 in the whole imbroglio raises more questions than answers. In the end the conclusion I have come to with regard to the alleged dying declaration is that it is not worthy of consideration.

How about circumstantial evidence?

It is apparent from the evidence on record that there was no eye witness to the killing of the deceased. Consequently and as properly appreciated by counsel for the accused, this case has to be decided on the basis of circumstantial evidence. It is settled law that where the prosecution's case depends solely on circumstantial evidence, then, the circumstances from which the inference of guilt is sought to be drawn must be established by cogent and credible evidence. Secondly, those circumstances should point to the guilt of the accused and thirdly, when the said circumstances are pieced together or taken cumulatively they should form a chain so complete that there is no escape from the conclusion that within the realm of

human probability the crime was committed by the accused and no one else. In a nutshell the inference of guilt should only be drawn where the facts said to incriminate the accused are incapable of any other rational explanation except the guilt of the accused and are wholly inconsistent with his innocence. See generally **Republic v/s Taylor, weaver** and **Donovan (1928) 21 Cr. App. R 20**, **Republic v/s Kipkering Arap Koske & Another 16 EACA 135**, **Mwangi v/s Republic (1983) KLR 522** and **Omar Chimera v/s Republic, Criminal appeal number 56 of 1998** (UR).

In my view, the evidence on record does not rule out other co-existing circumstances weakening the chain of circumstances relied upon by the prosecution. The evidence on record is that the deceased had been on a drinking spree from 11 a.m. At about 5.30 p.m. or 7 p.m. he was joined by PW3 and the accused. At about 10 p.m. PW3 and accused left for their homes leaving behind the deceased. There is no evidence that the accused came back for the deceased or that he was the last person seen with the deceased alive. None of the bar waiters and or the patrons thereof witnessed the accused assault the deceased. None of them also saw the deceased leave. Even the investigating officer was categorical that he was unable to identify the scene of attack when he visited the bar as he investigated the case. The investigating officer also conceded that he merely acted on the information by PW1 to the effect that her husband had told her that he had been assaulted by the accused to arrest and later charge the accused. I must at this point state that the investigations in this case were so cavalier that one is really left wondering whether the police from the onset really wanted a conviction returned in this case. One has a distinct feeling that hey merely charged the accused in order to assuage the feelings of the relatives of the deceased notwithstanding lack of credible evidence. They knew from the word go that there was no cogent and credible evidence to link the accused to the death of the deceased.

The conduct of PW3 too is also suspicious. He is a brother of the deceased. He also had drinks with him on 15th December 2007 just like the accused. They stay in the same compound. He hears rumours of his brother's illness and he is least bothered. He does not check on him. Rather he goes about his business as usual. On 19th December 2007, he is informed by his sister that the deceased is admitted at Nyeri PGH and does not bother to go and check on him yet he works at Kamakwa within Nyeri Municipality. Informed that the deceased had passed on he waits until the following day to confirm the information with the police and not with PW1. This conduct in my view is wanting. It tells much more than meets the eye.

Our criminal justice system requires that any doubts created in a criminal matter must of necessity be resolved in favour of the accused. In this case the circumstances leading to the death of the deceased are shrouded in mystery and a lot of doubt. Accordingly I shall resolve those doubts in favour of the accused. The circumstantial evidence led by the prosecution does not link the accused irresistibly to the death of the deceased.

The offence was alleged to have been committed at night. That brings in the question of identification. According to **Mr. Makura**, identification was not much of a problem. The deceased recognised the accused as he knew him. Yes, there is no doubt at all that the deceased knew the accused. However there was no evidence tendered at all that as at that time, it was still bright enough for the deceased to easily see and recognise the accused. By making such submissions, **Mr. Makura** is simply introducing evidence which was never tendered by any of the witnesses. It is upto the prosecution to lead evidence as to the conditions of light prevailing at the material time. Certainly this was not done in this case. I cannot assume as **Mr. Makura** would want me to that there was light that enabled the deceased to recognise the accused without tangible evidence. Clearly a doubt has arisen as to the conditions of light prevailing at the scene, which doubt must be resolved in favour of the accused again. Much as recognition is more satisfactory more assuring and more reliable than identification of a stranger **(Anjononi v/s Republic (1980) KLR 59)**, it is not unheard of for a witness to make a mistake in purporting to identify a friend or even a close relative. This may well have happened in this case in the absence of evidence under which the deceased came to recognise the accused.

The accused was even arrested at the police station where he had been summoned by PW3. Surely if he was the author of the deceased's misfortune, I doubt very much that he would have voluntarily walked into the police station knowing that he could easily be arrested over the incident. Having considered the

defence advanced by the accused, I am satisfied that it is credible and plausible. Despite cross-examination, **Mr. Makura**, was unable to poke holes in the accused's defence.

In the result I hold that the evidence tendered is insufficient to sustain accused's conviction. Accordingly, I do not find the accused guilty as charged. He is accordingly acquitted of the charge.

Dated and delivered at Nyeri this 19th day of November 2009

M. S. A. MAKHANDIA

JUDGE