



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU**

Criminal Case 100 of 2005

SAMUEL MURIU KIMANI.....ACCUSED

VERSUS

REPUBLIC.....PROSECUTOR

JUDGMENT

The accused, Samuel Muriu Kimani was charged with murder contrary to **Section 203** as read with **Section 204** of the **Penal code**. The particulars of the offence were that on the 28th October 2005 at Gatero village, Muthengera location in Laikipia district, the accused murdered Wilson Kamau Wangaca. 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 charge against the accused. After the close of the prosecution's case, the accused was placed on his defence. He gave sworn evidence. He denied that he was in any way involved with the death of the deceased. He urged this court to acquit him.

The facts of this case as can be reconstructed from the evidence adduced in court, and particularly by the prosecution are as follows: The accused deals in cedar posts. According to the evidence adduced, the accused used to steal the cedar posts from a nearby government forest and ferry them using his donkey which pulled a cart. On the 26th October 2005, the accused was approached by PW1 Aaron Kibe Githuku who contracted him to supply him with fifty cedar posts. PW1 negotiated with the accused whereby they agreed that each post would cost Kshs 50/=. PW1 paid a deposit of Kshs 1,000/= to the accused. The balance of Kshs 1,500/= was to be paid upon the accused delivering the said fifty cedar posts. On the same day, the accused went to the homestead of the deceased. According to PW4 Paul Mwangi Wangacha, the accused requested the deceased to accompany him to the forest so that they could fulfil the contract which the accused had secured from PW1. Of course, the accused would pay the deceased for his troubles.

On the 27th October 2005, the accused and the deceased went to the forest with their tools of trade which included pangas, axes and what they referred to as big hammers. The accused and the deceased took with them a donkey which was pulling a cart. The accused and the deceased were away in the forest until 8.00 p.m. when they delivered 54 cedar posts to PW1. PW1 inspected the delivered cedar posts. He realized that some of the cedar posts were not to his specifications. He chose 29 posts and rejected the other 25 posts. He however paid the accused, who was accompanied by the deceased the balance of the agreed consideration of Kshs 1,500/=. The accused agreed that he would deliver the remaining 21 posts to PW1 at a later date. According to PW1, whose testimony was corroborated to some extent by the testimony offered by the accused in his defence, the deceased and the accused decided to share the money which was paid to them by PW1. Unfortunately they could not get change at the time. The accused suggested that they go to the house of his sister PW2 Margaret Wamboi Mungai where they could get

change. At the same time, PW1 requested the accused and the deceased to buy him traditional liquor (*chang'aa*). The accused and the deceased acceded to the request made by PW1. PW1 accompanied them to the house of PW2.

The three *i.e.* PW1, the accused and the deceased reached the house of the PW2 at about 10.00 p.m. PW2 was asleep. The accused woke her up and requested her to give them change. PW2 gave them change at which point the accused gave the deceased the sum of Kshs 600/= and retained the sum of Kshs 900/= out of the sum that they were paid by PW1. PW2 was a known *chang'aa* dealer. According to her testimony, after she had given change to the accused and the deceased, the two asked her if she had *chang'aa* which she could sell to them. PW2 answered in the affirmative. According to her evidence, the accused and the deceased, in total bought *chang'aa* worth Kshs 250/=. She recalled that the accused and the deceased each took two cups of *chang'aa*, while PW1 took four cups of *chang'aa*. According to the estimation of the PW1, he drunk an equivalent of about 2¹/₂ litres of *chang'aa*. PW2 testified that the three drunk *chang'aa* until 11.00 p.m. when she told them it was too late and it was time that they left her to sleep. PW2 recalled that the three were drunk when they left her house.

According to PW1, after they had walked for about half a kilometer, the deceased told them that he was tired and sat down. PW1 remained with the deceased at the scene. PW1 testified that the accused told them that he could not wait and went away. It was his testimony that, after a short while, the accused returned armed with a big cooking stick and a panga. The accused hit him using the big cooking stick and relieved him of his wallet. He recalled that in the wallet he had Kshs 10/=. He testified that he was injured when he was attacked by the accused. He however recalled that he had not quarreled with the accused neither had he had any disagreement with him prior to the said attack. He recalled that at the time he was being beaten by the accused, the deceased was seated on the ground. The deceased did not intervene to rescue him. After being beaten, PW1 managed to make good his escape. He went to his house and slept until the following day. He did not see the accused beat the deceased.

On the following day *i.e.* the 28th October 2005, PW1 recalled that the accused went to his homestead at about 8.30 a.m. and collected the donkey together with the posts which he had rejected. At the time PW1 was asleep in his house. A young boy who used to sleep with PW1 in his house, called Ndungu was authorized by PW1 to give to the accused his tools of trade. Later on the same day, PW1 was informed that the deceased had been attacked and seriously injured. According to PW1, it was at that time that he recalled that the accused had assaulted him. He informed the family members of the deceased, who included PW3 Simon Wanjohi Wangacha and PW4 Paul Mwangi Wangacha, that the accused had assaulted him.

The deceased was found lying by the road side by a herdsboy called Kimutai. He did not however offer his testimony before court. According to the prosecution witnesses, PW1, PW3, PW4 and PW6, the deceased had sustained several fractures on his left leg. He was unconscious. The brothers of the deceased *i.e.* PW3 and PW4 made arrangements to take the deceased to hospital. A report was first made to Wanjiko Police post of the injuries that the deceased had sustained. PW5 Cpl. Paul Mwangi received the report and advised the deceased to be taken to hospital. The deceased was taken to the Nyahururu District hospital where he was admitted. All this time, the deceased was unconscious. However PW3 and PW4 testified that at about 3.00 p.m., after the deceased had been x-rayed, he regained consciousness and told them that he had been assaulted by the accused for no apparent reason. Soon thereafter the deceased lapsed into unconsciousness and about one hour later, died.

PW8 Dr. John Weru performed the post-mortem on the body of the deceased. On external examination he saw that the deceased had sustained a dislocation of the left elbow joint. The left humerus bone was fractured. Two bones of the left leg were fractured. There were bruises on the left buttock, the left chest and the left cheek. There was a deep subcutaneous bruise on the left side of the head. There was bleeding on the surface of the brain. According to Dr. Weru, the deceased died as a result of severe head injury. The post-mortem report was produced as *prosecution's exhibit No. 1*. The accused was examined by Dr. Mburu who formed the opinion that the accused was mentally fit to stand trial. The P3 form was produced as *prosecution's exhibit No. 2*.

PW6 Zachary Mutai, the area Chief of Muthengera Location Laikipia District testified that on the 28th October 2005 at about 9.00 p.m. as he was walking to his place of work from his residence, he saw a crowd of people who had converged near the tarmac road. He went to investigate and established that the deceased had been injured. He organized for the deceased to be taken to Nyahururu District Hospital for treatment. Before the deceased was taken to hospital, PW6 ensured that the relatives of the deceased had made a report of the deceased's condition to the police at Wanjiko police post. PW7 PC Edward Mundia was manning the report office at the Wanjiko police post on the 30th October 2005 at noon when the accused surrendered himself to the police. PW7 arrested him and detained him at the police post. Later, the accused was taken to Rumuruti police station where he was charged with the current offence.

PW5 Cpl. Paul Mwangi, the investigating officer in this case testified that he was instructed to take over the conduct of the case once the report of the death of the deceased was made to the police station. Upon conclusion of his investigations, he reached a decision to charge the accused. He testified that he relied on the testimony of PW1 and that of the dying declaration of the deceased as was heard by his brothers, PW3 and PW4. He however conceded that there were many loose ends in the case which either required further investigations or raised doubt in the prosecution's case.

When the accused was put on his defence, he chose to give sworn evidence. He corroborated the testimony of PW1 in so far as it related to the circumstances under which PW1 hired him to procure cider posts from the forest. He testified that upon delivering the said cider posts to the house of PW1, a decision was made by the accused, the deceased and PW1 to go to the house of PW2 where chang'aa was being sold. They went to the house of PW2 and took chang'aa. At the time they left the house of PW2, they were all drunk. The accused testified that PW1 and the deceased were unwilling to go home. They still wanted to partake further chang'aa at the house of one David. He testified that he left the deceased and PW1 while they were going to the house of the said David. He went to his house and slept until the following day when he went to the house of PW1 and collected his donkey and tools of trade. While at his home, he learnt that the deceased had been injured. He denied that he had anything to do with the death of the deceased.

In criminal cases, it is the duty of the prosecution to prove its case against an accused person to the required standard of proof beyond reasonable doubt. This burden of proof has to be discharged by the prosecution. An accused person is under no obligation to establish his innocence. In the present case, the prosecution adduced two pieces of evidence in its bid to establish the charge of murder against the accused person. The first piece of evidence is the testimony of PW1 who testified that on the night of the 27th October 2005, he went on a drinking spree with the deceased and the accused. In his testimony, he testified that he took about 2¹/₂ litres of chang'aa and was drunk by the time he left the house of PW2.

PW1 testified that while they were walking home, the accused pretended to walk away from them but later returned and assaulted him using a big cooking stick and a panga. He testified that the accused robbed him of his wallet which contained Kshs 10/=. He recalled that he managed to escape and ran to his home where he slept until the following day. He did not see the accused assault the deceased but testified that as the accused was assaulting him, the deceased was seated by the roadside next to him. PW1 conceded that while they were on a drinking spree with the deceased and the accused, no disagreement arose between them. In fact, PW1 testified that on the following day *i.e.* the 28th October 2005, the accused went to his house and collected his donkey together with the cart and his tools of trade. He recalled that at the time when the accused collected his donkey he was asleep with him in his house but was woken up by the accused. PW1 authorized a boy who used to sleep with him in his house called Ndungu to release the properties that were kept by the accused in his house to the accused.

I have evaluated this evidence of PW1. It is clear that PW1 was drunk at the time he alleged to have been assaulted by the accused. It is not clear from the evidence of the prosecution if there was sufficient light which would have enabled PW1 to identify the accused as his assailant. From the testimony of PW2, the accused, the deceased and PW1 left her homestead some minutes after 10.30 p.m. She testified that when the three went to her house at about 9.30 p.m., it was too dark that she had initially refused to open the door to the three until they had assured her that they had a matchbox which could be used to light the

hurricane lamp. It is therefore clear that it was dark during the material night.

None of the witnesses testified that there was moonlight which could have enabled PW1 to be certain that he had identified the accused. Further there were contradictions between the testimony of PW2 and that of PW1. PW2 was categorical that when the accused left her homestead, he was unarmed. PW1 confirmed this fact in his testimony. He however testified that when the accused attacked him, he had a big cooking stick and a panga. It is unclear where the accused person could have secured the said cooking stick and panga putting into consideration the fact that the accused person, the deceased and PW1 were in a place which was far off from the nearest homestead.

Further, upon evaluation of the prosecution's evidence, this court was unable to agree with the theory posited by the testimony of PW1 that the accused attacked him because he desired to rob him. PW1 testified that he was robbed of his wallet which had Kshs 10/= in it. Having analysed the evidence adduced, I do hold that the accused was aware before the three of them embarked on the drinking spree that PW1 was penniless. This was because PW1 requested the accused and the deceased to buy him chang'aa. PW2 testified that it was the accused and the deceased who bought PW1 chang'aa. The accused confirmed in his sworn testimony that he and the deceased bought chang'aa for PW1. It was therefore inconceivable that the accused could have attacked PW1 with a view of robbing him. It was further inconceivable that the accused could have attacked the deceased so that he could rob him of the Kshs 600/= which he had just given to him a few hours earlier as the cost of his labour. I do hold that the prosecution failed to prove that the accused could have been motivated on account of robbery to assault the deceased and PW1.

The second piece of evidence is the alleged dying declaration by the deceased. It was the prosecution's case that the deceased identified the accused as the person who assaulted him causing him to sustain injuries that ultimately caused his death. PW3 and PW4, the brothers of the deceased testified that before the deceased died, while they were at Nyahururu District Hospital, the deceased regained consciousness and told them that it was the accused who had assaulted him. PW5 and PW6 testified that when they saw the deceased in the morning of the 28th October 2005, the deceased was unconscious. PW6 assisted the members of the family of the deceased to take the deceased to hospital. The journey to the hospital took a period of about two hours. During this entire period, the deceased was unconscious and the only words that he could mutter were incoherent blabber. PW3, PW4 and PW6 testified that when the deceased was being taken to hospital, he was unconscious and was mumbling. It was the prosecution's case that this court should accept that the deceased was in such a state of mind that he was able to positively identify his assailant when he spoke to PW3 and PW4 when he briefly regained consciousness before he died.

The law as regard the admission of the evidence of a dying declaration was set out by the Court of Appeal in the case of Okethi Okale & others –vs- Republic [1965]EA 555 at page 558 para E;

“In this respect we would quote the following passage from the judgment of the court in Jasunga Akumu –vs- R. ((1954)21EACA at page 334): ‘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 FIELD ON EVIDENCE (7thEdn.) 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 particulars of the violence may have occurred under circumstances of confusion and surprise calculated to prevent their being accurately observed...the deceased may have stated his inferences from facts concerning which he may have omitted important particulars, from not having his attention called to them.’ (Ramzani bin Mirandu (3); R. –vs- Okulu Eloku (4); R. –vs- Munyovya bin Musuma (5)). Particular caution must be exercised when at attack takes place in darkness when identification of the assailant is, usually, more difficult than in daylight (Ramzani bin Mirandu (3); Munyovya bin Musuma (5)). The fact that the deceased told different persons that the appellant was the assailant is evidence of the consistency of his belief that such was the case: it is no guarantee of accuracy (ibid). It is not a rule of law that, in order to support a conviction, there must be corroboration of a dying declaration (R. –vs- Eligu odel (6); Re

Guruswami (7), and their may be circumstances which go to show that the deceased could have been mistaken in his identification of the accused. (See, for instance the case of the second accused in R. – vs- Eliku Odel (6) and R. –vs- Epongu Ewunyu (8)). But it is, generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person, made in the absence of the accused and not subject to cross examination, unless there is satisfactory corroboration.”

It is clear from the testimony of PW3 and PW4 that the deceased was confused when he was alleged to have identified the accused as the person who assaulted him. This court is unable to reach a finding that the deceased was in such a state of mind that this court can reach undoubted finding that the deceased had identified the accused in his dying declaration. It is evident that the deceased was drunk when he sustained the injuries that later proved to be fatal. It is further evident that it was at night when the alleged assault occurred. None of the prosecution witnesses testified that there was moonlight which could have enabled the deceased to identify the accused as the person who assaulted him.

Taking into account the totality of the evidence adduced, this court is unable to discern the motive that could have made the accused assault the deceased. The accused and the deceased had worked together for a period of nearly forty-eight (48) hours before the alleged assault of the deceased. In fact, the accused and the deceased had amicably shared the proceeds of their work a few hours before the said alleged assault. The deceased received the sum of Kshs 600/= from the accused in the presence of PW2 without raising any complaint. They took chang’aa together in harmony in the house of PW2. They walked out of the house of PW2 without having had any disagreement. PW2 confirmed that the accused, the deceased and PW1 were drunk when they left her house.

This court can only convict the accused person based on the evidence of a dying declaration if that evidence is corroborated. In this case there was no corroboration of the said testimony of a dying declaration. This court is unable to accept the prosecution’s case that when the accused identified the accused a few moments before he died he was lucid enough to be believed that he was telling the truth. PW3 and PW4 confirmed that the deceased was in pain when he uttered the said words identifying the accused. It cannot therefore be ruled out that the pain which the deceased was enduring at the time was such that it impaired his thought process. I do hold that the said testimony of a dying declaration is not sufficient to enable this court reach a finding that it is the accused that caused the death of the deceased.

An interesting aspect of this case is the evidence that was adduced by the doctor who performed the post-mortem on the body of the deceased on the nature of injuries that the deceased sustained. PW8 Dr. John Weru testified that the deceased sustained the following injuries:

“dislocation of the left elbow, fracture of the left humerus, fracture of the left tibia and fibular, bruises on the left on the left buttock, there were also bruises on his left cheek. There was also a fracture of the left temporal bone.”

The doctor was of the opinion that the cause of death of the deceased was cardio-pulmonary arrest due to severe head injury. If this court were to accept that the accused assaulted the deceased while he was drunk, it would be a miracle that the accused was able to cause injuries to the left side of the body of the deceased. It is the view of this court that the police did not investigate the possibility that the deceased could have sustained the said injuries as a result of being hit by a hit and run motor vehicle.

Evidence was adduced of how the deceased was found lying in the middle of the tarmac road by one Kimutai who dragged him off the road. The said Kimutai did not however offer his testimony before court. It is the view of this court that the said injuries sustained by the deceased were consistent with the injuries sustained by a person who has been hit by a force directed to one part of his anatomy. In this case, the deceased was hit by such a force on the left side of his body. PW5, the investigating officer conceded that there were many loose ends in this case. I agree with him. One of the loose ends was that the police failed to rule out the fact that the deceased could have sustained the fatal injuries from a speeding motor vehicle.

The upshot of the above reasons is that the prosecution has failed to establish that the accused killed the

deceased. The three assessors who assisted this court during the hearing of this murder case all reached a verdict that the accused was not guilty. I agree with them. The accused is consequently acquitted of the charge of murder. He is ordered set at liberty and released from prison forthwith unless otherwise lawfully held.

DATED at NAKURU this 26th day of February 2007.

L. KIMARU

JUDGE