



REPUBLIC OF KENYA

IN THE HIGH OF KENYA

AT NYERI

CRIMINAL APPEAL 26 OF 2006

REPUBLIC PROSECUTOR

VERSUS

CHARLES MWANGI KARIUKI ACCUSED

J U D G M E N T

Charles Mwangi Kariuki (hereinafter referred to as the Accused) is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. It is alleged that on the night of 17th and 18th June, 2006 at Nyaribo trading center in Nyeri District within Central Province he murdered **NAFTALI MUHORO MAINA**.

The prosecution case briefly stated was that:

On the night of 17th June 2006, **Jane Wangechi Maina**, (P.W.3) a sister to the deceased was asleep in her house when she was informed by some village youth that her brother had been stabbed at “feel at home bar” in Nyaribo trading center. She immediately accompanied them to the shopping center and there she found her brother lying outside the bar bleeding profusely. She immediately arranged for a motor vehicle to take to him to hospital. On the way to hospital however, the deceased passed on. She then proceeded to Nyeri Police station reported the incident and thereafter took the deceased body to Nyeri Mortuary. Later on she accompanied the police as they went to arrest the accused. She identified the accused in court and confirmed that he was from her village.

P.W.4, **Jared Irungu Nderitu**, was the bar attendant at “Feel at home bar.” He testified that whilst on duty on the night of 17th and 18th June, 2006 at about 10 p.m. the accused in the company of **James Kimondo Maina** (P.W.5) came into the bar. Soon thereafter the deceased also entered. The witness then left briefly for his house at the back of the bar. Whilst there he heard some commotion and noise from the bar. He rushed back and found the deceased and the accused being separated by bar patrons. Apparently the two had been fighting. The witness then ordered the accused out of the bar. He actually escorted him out. According to the witness neither the accused or the deceased had ordered any drinks from the bar. However they appeared drunk as they entered the bar. The witness did not know how the deceased left the bar once he had escorted the accused out of his bar.

The witness went on to state that soon thereafter **Nahashon Ngatunyi Wanja** (P.W.9) came to him asking for a torch. The witness accompanied P.W.9 and found the deceased lying in a pool of blood, 6 metres from the bar. Under cross-examination, the witness stated that he was not aware that there had been a fight between Kimondo and the deceased nor whether the deceased had quarrelled with Kimondo

earlier on. That once he escorted the accused out of the bar, the accused never came back. That he escorted the accused out because he was the less troublesome. That when he and Ngatunyi came across the deceased outside, they also saw Kimondo and some other people there as well. Finally he maintained that he never saw the deceased leave the bar nor did he hear any screams from outside the bar.

P.W.5 was **James Kimondo Maina**. He testified that on the material day at about 9.30 p.m. he had gone to Nyaribo trading center to watch football. He went to “Feel at home bar” in the company of the accused and had drinks upto 10 p.m. It was then that the deceased came into the bar and demanded a cigarette from him. He continued bothering him asking him unnecessary questions forcing the witness to leave the bar. At this juncture, Ms Ngalyuka, learned state counsel applied to have the witness declared a hostile witness as he had completely departed from the statement he had recorded with the police in his testimony. The application was allowed. As the evidence of a witness who has been declared a hostile is of little or no evidential value, it is not necessary to consider further the evidence of this witness.

P.W.6. **David Mwangi Nderitu** is the owner of the “feel at home bar”. He testified that on the material day at about 10.30 p.m. he was in a room behind the bar when he heard noise from the bar. He went to the bar and found the accused, deceased and Kimondo quarrelling. He told the trio to stop quarrelling and the accused together with Kimondo left the bar. He was left with the deceased as he counseled him against fighting. Soon thereafter he left for his house leaving his brother (P.W.4) closing the bar. A few minutes later he had **Ngatunyi** (P.W.9) asking for a torch. P.W.4 gave him the torch and together they found the deceased groaning in pain on the ground. As they were looking for a motor vehicle to take the deceased to hospital, his sister (P.W.3) came. They managed to get the vehicle and the deceased was ferried to hospital.

Nahashon Ngatunyi Wanja testified as P.W.9. He stated that on the night in question, as a miraa dealer, he was meant to deliver to the deceased, miraa worth 20/= at “Feel at home bar”. He went to the bar and found the deceased exchanging words with Kimondo (P.W.5) outside the bar. However they never fought. That Kimondo told the deceased that they could not fight as they were childhood friends. That it was at this juncture that the accused intervened and without any provocation hit the deceased on the nose and went back to the bar. The deceased then picked a stone and followed the accused to the bar and also hit him on the head. The accused held the deceased by the neck and wrestled him to the ground and the stone fell. The bartenders then intervened, separated the two and ordered the accused out of the bar. According to this witness the deceased was spoiling for a fight and swore not to leave the accused alone. Despite being prevailed upon not to fight by this witness and P.W.5, the deceased could not hear of it. After 5 minutes the deceased left the bar when this witness had gone to buy cigarettes. Soon thereafter he heard someone saying in Kikuyu “..... **Muhoro ni ui no Ngunine**” meaning “**you know Muhoro I can kill you**”. The witness recognized the voice as that of the accused. He went out and found the accused lying on top of the deceased. He then pulled the accused from the deceased. The deceased then told him to take him to hospital. The witness asked for a torch from P.W.4 and noted the injuries sustained by the deceased. He went and called the deceased’s sister (P.W.3). Together they got a motor vehicle and took the deceased to hospital. However he passed on before they could reach the hospital. They then reported the matter to the police station and then took the body to the mortuary. Thereafter they proceeded with the police to the accused’s house. In the house of the accused a jacket with blood stains was recovered as well a knife. He had seen the jacket earlier with the accused. However the witness was not certain that the jacket which was shown to him in court was the same jacket recovered in the accused’s house. Under cross-examination, the witness stated that he found Kimondo and the deceased quarrelling outside the bar. He also stated that he never saw the deceased leave the bar. That the deceased was drunk. That when he went out he saw the accused with the deceased fighting next to the verandah. Finally he stated under cross-examination that the jacket before the court may not have been the one in possession of the accused on the material night.

On the very same night, **P.C. Charles Muthomi** (P.W.8) was at Kiganjo Police Station on duty. At around midnight he was ordered by area divisional commander SSP Tom Mutisya to accompany him to Nyaribo shopping center. In the vehicle, there were 2 civilians who informed them that their brother had been murdered. They proceeded to the accused’s house who refused to open for them. The police officers forced open the door and arrested him. They also conducted a search and recovered a jacket

which had bloodstains and a knife. The jacket was violet in colour. The accused was then escorted to Kiganjo police station. Later on the witness attended the postmortem and took blood samples of the deceased as well as that of the accused. He then forwarded the two blood samples together with the jacket and the knife to the government analyst examination. Later he received a report of the Government analyst. In court the witness identified the jacket and the knife and produced them as exhibits.

P.W.2, **Dr. Ibrahim Gatangi** (P.W.2) at the request of Kiganjo Police Station conducted a postmortem on the deceased. The body was identified to him by P.W.7 **Stephen Njagi Maina** and **James Wanjao Maina**. On examination of the body, he noted 3 stab wounds on the chest wall. As a result of the examination he formed the opinion that the cause of death was severe hemorrhage due to 3 stab wounds on the chest. The accused was examined by **Dr. Samuel Owino Ong'ang'a** (P.W.1) a Psychiatrist attached to Nyeri Provincial Hospital. He found the Accused to be mentally stable. Although his father suffered mental illness. He filled a P.3 form regarding the accused which he produced as exhibit.

At the conclusion of the prosecution case, the court found that the prosecution had made out a case to warrant the accused being put on his fence.

Put on his defence, the accused elected to give an unsworn statement. The accused stated that on 17th June, 2006 he left home for Gitegi shopping center and entered a bar at about 7 p.m. He was joined by Kimondo and together they proceeded to "Feel at home bar". They proceeded to order Allsops beer which they mixed with Kenya Cane. Within no time, the deceased joined the two and a quarrel ensued between the deceased and Kimondo. It got to a point where the two were about to fight. However, they were separated. It was then Ngatunyi joined the fray. Mr. Irungu, the bar tender then ordered the accused to leave the bar. He left for home thereafter. Later that night he was forced out of his house by police officers and taken to Kiganjo Police Station. The accused further testified that Kimondo too was arrested and was detained for 4 days before he was released after recording the statement. The accused stated further that the jacket and knife exhibited court did not belong to him. In conclusion, the accused testified that Ngatunyi sells miraa. He had fallen out with the accused father as the latter felt that he was a bad influence on the accused. He had been warned by the accused's father never to step in his home.

Mr. Njuguna learned counsel for the accused submitted that the prosecution had not proved its case beyond reasonable doubt. That the principal witness, **Ngatunyi** (P.W.9) was remandee on a charge of peddling in drugs and therefore his evidence should be taken with abundant caution. That the evidence of P.W.9 was contrary to the evidence of P.W.5 and 6 regarding where the quarrel between Kimondo and the deceased occurred. Further according to P.w.5, the deceased became aggressive when he was denied a cigarette by Kimondo. That although **Ngatunyi** said that he went outside the bar with **Kimondo** after hearing the screams and found the accused lying on the deceased, **Kimondo** never said or saw such a thing nor the bartender. Counsel submitted that nobody knows for certain when the deceased left the bar. That the accused left the bar and 15 minutes later **Ngatunyi** came asking for a torch. Nobody saw the accused hit the deceased with a stone other than **Ngatunyi**. As regards the jacket, counsel submitted that the jacket produced did not belong to the accused. From the evidence both accused and deceased were drunk. The evidence of the accused according to learned counsel was straightforward and consistent. If the court believes the evidence of **Ngatunyi**, a verdict of manslaughter should be returned as both the deceased as well as the accused were drunk. Finally counsel pointed out that the deceased hit the accused with a stone, hence there was provocation.

In response, **Ms Ngalyuka**, learned state counsel submitted that the prosecution had proved its case beyond reasonable doubt. That the evidence of P.W.9 was clear and candid. The sequence of events given by this witness suggest that there was a disagreement between the accused and the deceased. The accused was forced out of the bar and shortly thereafter the deceased was found stabbed. Counsel further submitted that the contradictions alluded to by counsel for the accused were immaterial as they related to the extent of disagreement. With regard to the colour of the jacket, the court according to the state counsel would have no reasons to disbelieve the evidence of P.W.8 and since it was recovered at night, the witness might have mistaken the colour. That P.W.9 had no reason to lie to court as there was no hostility between the accused and the witness. Counsel concluded her submissions by stating that the

defence given was a mere denial which ought to be disregarded.

The court then summed up the case for the assessors. Following a one day's deliberations the assessors came back with a unanimous verdict that the accused was guilty as charged. Their verdict was based on the grounds, that the accused had earlier said he would kill the deceased, that when the police went to the accused's house he refused to open the door voluntarily, that the accused had been seen by one of the witnesses beating the deceased. The assessors also considered the fact that a knife said to have been used in stabbing the deceased had been found in the house of the accused. Finally it was the view of the assessors that the deceased's blood sample was found on the accused's jacket.

This being a criminal case, it is the duty of the prosecution to prove its case beyond reasonable doubt before a conviction can be entered against the accused. The accused does not have to prove anything, and may even choose to remain quiet. The state must prove guilt, leaving no doubts at all in the mind of the court that nobody, other than the accused, caused the death of the deceased and in doing so he had malice aforethought. If any doubt remains in the mind of the court then the accused cannot be found guilty of the charge.

The case of the prosecution was predicated upon circumstantial evidence. It has been said that often circumstantial evidence is the best evidence. It is evidence of witnesses on certain facts and aspects of the case such that if they are all tied together, they will point to the suspect as the perpetrator of the crime. In the case of **Republic v/s Taylor, Weaver and Donovan (1928) 21 Cr. Appeal R. 20** the Principle as regards the application of circumstantial evidence was enunciated in these words:

“circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which by intensified examination, is capable of proving a proposition with accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial.”

In my judgment I have doubts whether the appellant was clearly involved in this heinous crime. The circumstances do not just add up. Nobody saw the accused kill the deceased. No malice aforethought or indeed any intention was established by the prosecution. The witness who came close to connecting the accused to the crime was P.W.9.

However it should not escape our attention that this particular witness was in remand custody having been charged with drug trafficking. This same witness had also been drinking and chewing miraa on the day or night of that incident. It is this witness who claimed that he saw the accused lying on the deceased and when he separated them and turned the deceased, he saw that the deceased had been stabbed. This very same witness claimed to have heard the accused say in Kikuyu language words to this effect **“you know Muhoro I can kill you.”** He claims to have recognized the voice as that of the accused. However he never told the court the basis upon which he was able to recognize the accused's voice. Further it is also important to note that of all the witnesses who were in the bar including **Kimondo, (P.W.5) Jared Irungu (P.W.4) and David Mwangi Nderitu (P.W.7)**, it is only this witness who heard the accused in altercation with the deceased. It is also important to note that although P.W.9 claimed to have seen the accused fight with the deceased, he never mentioned the accused's name to the deceased's sister when he went to call her. There is evidence that when P.W.9 went for the torch from P.W.4, he went back to the scene with both P.W.4 and P.W.6, yet those two other witnesses never saw the accused at the scene nor lying on the deceased. Indeed in their evidence, they were categorical that the only person they saw at the scene was **Kimondo** and not the accused.

Earlier on there had been altercation between the deceased and **Kimondo** when this witness first came across them. It was during that exchange that suddenly the accused picked a stone and without any provocation hit the deceased. If there had been no disagreement between the accused and the deceased, could the accused have formed the intention to kill the deceased. I seriously entertain my own doubts whether the accused had the necessary intention to kill the deceased and what would have been the reason.

It was Kimondo who had a misunderstanding with the deceased. Indeed according to P.W.9 the said Kimondo was still at the scene where the deceased was found. In those circumstances it cannot be ruled out completely that the said Kimondo may not have had a hand in the death of the deceased. It is also not lost on the court that Kimondo had initially been arrested as a suspect in the murder and locked up for about 4 days. Is possible he recorded the statement so as to endear himself to the police officers investigating the case to secure his liberty.

The conduct of the deceased should also come into focus. He walked into the bar and easily picked a quarrel with Kimondo. He even became aggressive when advised by P.W.4 and P.W.6 against picking fights unnecessarily. He even followed the accused into the bar and hit him. Was this a conduct of a normal person or was he drunk. P.W.3 conceded that the deceased never used to drink alcohol but on this occasion he had done so. P.W.4 also confirmed that the deceased appeared drunk. Nobody in the bar seem to have known how and when he left. What is clear however is that the accused, was ordered out of the bar and was indeed escorted out by P.W.4. There was no evidence that the accused thereafter came back to the bar or even way laid the deceased. What is certain however is that Kimondo, the accused and the deceased all appeared to be drunk. Is it possible that in this drunken stupor, the deceased could have picked up a quarrel with somebody else? After all the deceased was spoiling for a fight.

P.W.8 arrested the accused and recovered a jacket which had blood stains which P.W.10 stated that they matched, the blood sample of the deceased. He also formed the opinion that these bloodstains could have come from the deceased after injury. However as it is evident from the record, there was a dispute as to whether the jacket recovered from the accused's house was the same one tendered in court. Mr. Ngatunyi had his own doubts yet he was present during the recovery. The court does not buy the submission by the learned state counsel that since the recovery was at night the likelihood of mistaking colours cannot be ruled out completely and that P.W.8 would have no reason to plant a case upon the accused. Further even if I was to accept that indeed the jacket recovered with the deceased's bloodstains belonged to the accused, I am aware from the evidence on record that the accused fought with the deceased twice outside the bar. Could the blood stains have been as a result of any of these earlier fights. This was long before the deceased was found lying outside the bar. This possibility was not eliminated. I also note that the knife which was also recovered from the accused's house was not subjected to any analysis by government chemist. No explanation was forthcoming from the prosecution for this omission.

The conduct of the accused following the commission of the alleged offence also calls for scrutiny. If the accused had committed the offence, would he simply walk to his house and sleep as if nothing had happened? One would imagine that having committed such serious and heinous offence, he would have attempted to flee or take such action as would have made it difficult for him to be arrested easily. After all the deceased was from the same village as the accused. He was arrested on the same night that he is alleged to have committed the offence and from his house..

As stated earlier, this case is to be resolved on the basis of *circumstantial evidence*. On that basis I will now pose this one question to myself. Do the circumstances brought out in the testimonies of the eight witnesses, point clearly and unambiguously to the *accused*, as the person who killed the deceased during the night of 17th and 18th June 2006? From my evaluation of the evidence the answer is clearly in the negative. I am therefore unable to reach the same verdict as the assessors.

The Assessors were convinced that the accused committed the offence firstly because the accused had earlier said that he would kill the deceased. To my mind the assessors seem to have misapprehended the evidence. There was no such evidence. What P.W.9 stated was that after the deceased had been left behind in a bar and he had gone to buy cigarettes he heard someone saying in kikuyu words to he effect that "**You know Muhoro I can kill you.**" Although P.W.9 claimed to have recognised the voice as the accused, the witness was not able to tell the court how he was able to recognize the accused's voice. Further the evidence was discredited in that of all the people who were in the bar, it was only P.W.9 who was able to hear those words? The Assessors were also of the view that the conduct of the accused was inconsistent with his innocence in that he refused to open the door when visited by the police. In my view and I have already held, the conduct of the appellant was consistent with his innocence. Knowing that he had committed such a serious offence, I doubt whether the accused would have

proceeded to his house and slept off. It should be remembered that the person killed was a fellow villager. It does appear that the police visited the accused's house late in the night. The accused was sleeping. From the evidence of P.W.8 it is not clear whether he gave the accused person opportunity to open the door. In any event P.W.3 who was present during the arrest of the accused did not testify that the accused refused to open the door. The assessors also took the view that the accused had been seen by one of the witnesses beating the accused. The evidence on record is that the accused fought with the deceased twice, inside and outside the bar. This was long before the deceased was found lying in a pool of blood outside the bar. The accused had long been escorted out of the bar by P.W.4. Indeed the deceased had been left behind with P.W.6 who was calming him down. Finally the assessors were persuaded to return the opinion that the accused was guilty as charged on the ground that the blood sample found on the accused's jacket was the deceased's. However as I have already indicated, the possibility that that blood sample could have found itself on the jacket of the

accused as a result of the two earlier fights was not eliminated. Finally the assessors also believed that the knife recovered from the accused house was the one used to stab the deceased. My response to this is simple, there was no such evidence. There was no evidence that the knife recovered as aforesaid was the one used to stab the deceased. Further the said knife had no blood stains nor was it subjected to any examination and or analysis.

In conclusion, I must say, that the investigations into this case left a lot to be desired. This would not have been a case of circumstantial evidence. There were eye witnesses to the crime. The village boys who went to call the deceased sister P.W.3 witnessed the fight involving the deceased. However despite the fact that the said boys came from the same village as the deceased and accused, the police made no efforts at all to track them down so that they could testify.

In the upshot, I entertain doubts as to the accused's culpability. I resolve those doubts in favour of the accused. Accordingly I hold that the prosecution have not proved its case against the accused beyond reasonable doubt. The accused is therefore entitled to an acquittal. It is so ordered.

Dated and delivered at Nyeri this 12th June 2007

M. S. A. MAKHANDIA

JUDGE