



REPUBLIC OF KENYA

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

CRIMINAL CASE NO.53 OF 2005

REPUBLIC PROSECUTOR

VERSUS

NAPHTALY KAUNJURA ARAYASON ACCUSED

JUDGEMENT

The Accused Naphtaly Kaujima Arayason is facing a charge of murder contrary to Section 203 as read with Section 204 of the Penal Code (Cap.63 Laws of Kenya). It is alleged against him that on 21st November, 2004 at Ikinu shopping Centre, within Githunguri Division of Central Province he murdered David Kibumu Kagiri.

The Prosecution case is based on the testimonies of Esther Wambui PW.1 (wife of the Deceased), James Muia Kagurani (PW.2), Serah Ngina Ndungu (PW.3) and William Gitau Gakuru (PW.4). The Defence has raised challenges on their evidence on the ground that they all had grudge against him which has led them to implicate him in this case. In the background of these averments this court has to look at their individual testimony.

It has also emerged from the prosecution case through a treatment note (P.Ex.2) that the deceased was “**a known psychotic patient**”. After his check up as per the treatment note the deceased was given pain killers as per prescribed medicine. Apart from this evidence, the court has not evidence as to the treatment on the deceased from Kiambu District Hospital where the deceased was last treated. The explanation given by its non-production by Cpl. Bernard Ruai (PW.7) was, that one P.C. Mwangangi was sent to the hospital to get the record for the deceased but did not get the same. This P.C. Mwangangi is not before the court. I do mention all these facts because, in my view, when the deceased had been mentioned as a psychotic patient and his death occurred in November, 2004 when the incident took place on 23rd October, 2004, the said evidence was very crucial to the prosecution. I do note further that Ex.2 indicates that the Deceased complained that he was assaulted with blows and slaps and was having painful jaw and forehead, painful teeth and had headache.

While I am at the injuries suffered by the deceased, it may be appropriate to dwell on evidence of injuries on the deceased mentioned in Post Mortem report prepared by Dr. Peter Muriuki (PW.6). This witness was allowed to produce and give evidence on the Post Mortem report after a successful application under section 77 read with Section 33 of the Evidence Act (Cap 80 Laws of Kenya) was made by the Learned State Counsel. According to Dr. Njue, he noticed haematoma under the occipital scalp wherein the treatment note mentioned painful forehead. After internal examination Dr. Njue opined that the cause of death was “**raised intracranial pressure, 2^o large, subdural due to blunt force to the head (Head injury)**”. This injury does not strictly correspond to the injuries and complaint on the treatment note. The Post Mortem report does not mention at all the injuries on jaws or teeth. I do, however, quickly observe

that the death occurred after more than a month from the incident of beating evidenced in the court.

None of the witnesses had testified that he or she identified the body to the Doctor/Pathologist performing the Post Mortem. Even though (PW.5) P.C. Wanyoni testified that he escorted PW.1 and a son of the deceased to the City Mortuary for the purposes of identification of the body before Post Mortem, PW.1 was neither asked nor did she testify that she attended the City Mortuary with her son and identified the body to the Pathologist. In view of different version of the injuries not only on the medical documents I do view that the evidence of identification of the body was necessary.

With this backdrop I shall now deal with evidence of witnesses who were either with the deceased after the injuries were sustained or with the deceased at the scene.

PW.1 Esther who was the wife of the deceased saw the deceased resting at home at 6.00 p.m. on 23rd October, 2003 after having been beaten. The deceased informed her that he was beaten by the Accused after he asked him to add two spoons of sugar in his tea while he was in the hotel owned by the Accused. The Accused slapped him, kicked him and pushed him against the wall which hit his head. She did not describe satisfactorily the injuries except the fact that the deceased was complaining of headache. She also admitted that despite the seriousness of his injuries and despite the fact that all their sons (most of them adults) had come specially to check on the deceased's condition, and despite the fact that clinics are at a very close distance from their house, the Accused was not taken to the clinic or the hospital upto 28th October, 2004. Similarly she agreed that the A.P's post is five minutes' walk from her house, but neither the deceased nor her nor her children made any report to that Post. The report to Githunguri Police Station was made by the deceased himself on 25th October, 2004, which fact is corroborated by Cpl. Bernard Ruai (PW.7). I shall come to his evidence later in this judgment, but I may observe that P3 Form was issued to the Accused which is not filled in (Ex.3).

PW.1 also agreed that the deceased was suffering from mental illness for which he was under medication and in one instance, he had taken an overdose thereof. She further agreed to the suggestion made by the Learned Defence Counsel that once the deceased was brought home by villagers after he had fallen down due to his illness.

She said that in November, 2004 he was admitted at the Kiambu District Hospital where he expired.

She did also confirm that she used to supply milk to the Accused for his hotel business which was stopped by the Accused.

PW.2 James is a neighbour to the deceased. He happened to be at the hotel at around 10.00 a.m. to take tea and read news papers. He heard commotion between the Accused and the deceased and latter telling the Accused that he could not push him out as he had not finished having tea which was paid for and that he had paid Shs.100 for the tea which costs Shs.10.00. He said then he saw the Accused going to the table where the deceased was seated and poured his tea and told five customers who were present that the deceased was making noise and he wanted to watch news on T.V. I do note here that it was around 10.00 a.m. as per this witness.

The deceased was pushed out thereafter but he came back and stood at the entrance shouting that he would stand there forever till he was paid his money back. Temper flared and abuses were exchanged when the deceased told the Accused that he would brand the latter a thief. The Accused then went to the deceased and pushed him against a wall between the kitchen and the bar. A little while ago, this witness had stated that the deceased was standing at the entrances of the hotel. He then heard the deceased scream, '**please do not kill me**' and people gathered. He saw some members of the public wiping blood from the deceased's ear and nose. This story coming from this witness is absolutely different from the one told by the deceased to the PW.1.

This witness saw the deceased sitting by the road near his home, at 6.00 p.m., at which time, as per PW.1, she found him lying on the bed having been beaten. He saw right side of the head swollen and bruises on the face without any blood. Once again, this description of deceased's injuries is at a complete variance

with that told by PW.1.

He obviously denied that he had a grudge against the Accused as he was arrested on complaint of theft by him of electronic goods from his hotel.

He agreed that although he was deceased's neighbour he did not help him or intervene during the fight, although members of public totally unknown to the deceased did so. His testimony thus lacks strength not only because of allegations of grudge between the two but also due to total different version of the story narrated by PW.1. This witness did not mention quarrel over sugar demanded by the deceased. The Accused in his sworn statement which was not challenged had also stated that this witness has not stepped foot in the hotel since his arrest by C.I.D. Kiambu on the charge of selling stolen electronics goods.

PW.3 is Serah who happened to be at Ikinu stage at around 10.00 a.m. on the material day. According to her, she saw Accused holding the deceased outside the shops and near the stage beating him with fists. She intervened and the Accused stopped. The deceased came near the stage spitting blood from mouth. She asked the deceased to go home before boarding a matatu. After she heard of his death on 23rd November, 2004, she went to his home on 30th November, 2004 for funeral preparation. This witness is the wife of one Ndungu Wainaina who is, as per the Accused, a political rival. I do note that she did not state how she was close to the deceased's family to help in burial arrangement. She was also not aware that the Accused had mental problem. Once again I have to pause and observe that this witness has given a total different place and version of the incident.

PW.4 William, the last witness to have been around the scene on the material day is an owner of the Bar adjacent to the hotel. According to him it was at 10.30 a.m. that he heard noise while in the bar and when he came out he saw two people struggling and abusing each other. The Accused stopped beating the deceased on his asking but after sometime he (the Accused) once again came back with a stick and chased the deceased and also hit him with a stick on the back of his neck as well as kicked him. Once more, this is a different version of the incident from the versions so far given which themselves in any event are different to each other. In short the court has four different versions of the same incident.

This witness tried to connect his version with that of PW.3 by saying that the Accused then stood outside his hotel holding a metal bar and the deceased ran towards the stage and ladies standing at the stage asked the Accused to stop scaring an old man. By this evidence, his attempt to do so has totally failed as that is not the evidence from PW.3. This witness denied having any dispute with the Accused as regards an open space between his bar and the hotel. In his statement he had mentioned that he saw the deceased on 22nd November, 2004 at 8.00 p.m. but that cannot be correct as he was already dead previous to that day.

PW.6 Dr. Muriuki while giving evidence on the Post Mortem Report prepared by Dr. Njue also agreed that the injuries seen on the body could result from a fall on blunt object and further agreed that it was necessary to see the previous medical reports on the deceased which was not done in the present case especially when the deceased is said to have been suffering from mental illness.

PW.7 Cpl. Bernard stated that when the deceased came to report the case of an assault he informed (the Accused) him witnesses that he was beaten by a hotel attendant. I must pause here and note that the deceased knew the Accused very well and still did not give his name in his report and also did not tell him that he knew the assailant as per this police witness. Moreover he named the assailant as a attendant. This witness however, confirmed that the deceased knew the Accused. He thereupon gave him P3 form to be filled in, which as I have observed earlier was not filled in. I have also commented upon the treatment note of 25th October, 2004 and the fact that the deceased was admitted at the Kiambu. District Hospital but its medical report is not made available to the court on very unsustainable explanation by this witness.

Against this inconsistent and contradictory evidence led by the Prosecution, the Accused gave a sworn testimony. He said that on the material day after buying and delivering food stuff for Naff Restaurant run by his wife, he went to Nairobi to look after his other businesses. His wife is assisted by many helpers in

the hotel business. He gave in detail how all the four witnesses (PW.1 to PW.4) had grudge against him which could be the reason for their testimony against him. He stated that PW.2 had not entered the hotel since 2000 and PW.4 since 2001.

He called a witness Njoroge Njuguna (DW.2) who stated that he was reading newspaper at Naff Restaurant while waiting for a customer of his transport business. He knows the Accused, the deceased and all the civilian witnesses before the court. He showed that he was closer to the deceased than to the Accused. He positively declared that the deceased had mental problem to the extent that he could wear three jackets at one time. He stressed also that he did not see the Accused in the Restaurant on the material day. He also stated that when he went to the police to record his statement he was chased away under a threat of his arrest.

This in short is the evidence before the court.

I have sufficiently placed the case of the Prosecution which is marred by inconsistent versions of the same incident. This court cannot take their evidence as the whole truth simply because more than reasonable doubt has arisen as a result of contradiction in the relevant parts in their testimonies.

On the other hand, the Accused in his sworn testimony has explained in detail the reasons for the four witnesses implicating him in this matter. The averments were not scathed by the cross-examination and thus more than reasonable doubt is created in the court's mind as to credibility of their evidence which in any event is far from being consistent as observed in earlier part of this judgment.

I may not go any further and properly find that the Prosecution has failed to prove the guilt of the Accused as per required standard of proof, i.e. beyond reasonable doubt.

I thus enter a finding of not guilty against the Accused and acquit him of the charge of offence of murder as leveled against

him.

I also direct that he be released forthwith unless held otherwise as per law.

I may note also that the Assessors also gave opinion of not guilty in favour of the Accused.

Dated and signed at Nairobi this 7th day of March, 2006.

K.H. RAWAL

JUDGE

7.3.06