



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
Criminal Case 63 of 2004

REPUBLIC.....PROSECUTOR

VERSUS

RICHARD KIPSANG LANGAT.....ACCUSED

JUDGMENT

The accused, Richard Kipsang Langat was charged with **murder contrary to Section 203 as read with 204 of the Penal Code**. The particulars of the charge were that on the night of the 7th and 8th March 2004 within Olenguruone Township, the accused murdered No. 60636 PC Samson Namba Lepasore (*hereinafter referred to as the deceased*). When the accused was arraigned before this court, he pleaded not guilty to the charge. The prosecution called seven witnesses to prove its case against the accused. When the accused was put on his defence after the close of the prosecution case, he opted to give an unsworn statement.

The prosecution's case as put forward by its witnesses is as follows: PW4 James Cheruiyot Langat testified that he used to own a bar at Olenguruone called Karumaido Bar. He testified that the accused used to be his customer and usually became abusive and violent when he got drunk. He testified that the accused's behaviour became so bad that the other patrons who used to frequent his bar instructed PW4 to bar the accused from going to the bar. PW4 testified that the accused only stopped going to his bar when he refused to sell any beer to him. Two days later, the accused was involved in the incident that led to the death of the deceased and his subsequent arraignment before court.

PW1 Jonathan Kipkorir arap Kirui operates a bar and butchery called Kapchorua Bar at Olenguruone. He recalled that on the 7th of March 2004, at about 5.00 p.m., he was at his bar serving his customers. He testified that the accused came to the bar at about 7.00 p.m. when he was already very drunk. Among the patrons who were at the bar at the time, was the deceased who PW1 knew very well as a police officer attached to Olenguruone Police Station. He testified that when the accused entered the bar, he started disturbing other patrons by being abusive and a nuisance. PW1 requested the accused to go away from the bar. He managed to push him outside the bar and lock the door of the bar with a nail. It was his testimony that the accused then kicked the door open and again entered into the bar. It was at this point that the deceased arrested the accused and handcuffed him. He told the accused to sit on the floor as he finished the beer that he was drinking. After the deceased had finished taking his beer, he left the bar accompanied by the accused who was handcuffed. The accused and the deceased left the bar at about 8.00 p.m. PW1 testified that the distance from the bar to the police station was about a kilometer. He closed his bar as usual at 10.00 p.m. and went home to sleep. On the following day, he learnt that the deceased had been found dead between the police station and his bar. He recalled that when the accused was handcuffed and told to sit down, he complied with the order and was not violent.

PW2 Elizabeth Akinyi, a bar attendant at Buffalo Inn Bar at Olenguruone recalled that on the 7th of

March 2004, at about 11.30 p.m., the accused, who was a regular customer and was known to her, went to the bar and ordered a Malta beer with one Safire sachet (*a type of whisky*). She testified that the accused found three other patrons in the bar and ordered a round of beer for them. PW2 testified that the accused paid for the drinks. It was while the accused was drinking the beer, that one of the customers observed that the accused had handcuffs on one of his hands. PW2 saw the handcuffs. She testified that the accused drunk at the bar until 3.00 a.m., when PW2 told him that she was closing up. The accused then left the bar allowing PW2 to close the bar.

PW3 Catherine Chelangat Korir recalled that on the 7th of March 2004 at about 12.00 noon, the deceased went to her place of business at Olenguruone and requested her to return the P3 form which he had issued to her after she had made a complaint of an assault. She testified that she gave the P3 form to the deceased at Kapchorua Bar at about 3.00 p.m. On the following day, she heard that the deceased had been killed on an open field near the DEB Primary School Olenguruone. She went to the scene and saw the deceased. Next to the deceased was the P3 form which she had handed over to the deceased the previous day. PW5 Charles Kipngeno Cheruiyot testified that on the 8th of March 2004 at about 1.30 p.m., he was at his home, when he saw the accused approaching his house. He appeared to be drunk and had a pair of handcuffs. When PW5 asked him why he was in possession of handcuffs yet he was not a police officer, the accused threatened to arrest him. At that time, about seven police officers arrived at the scene and arrested the accused.

PW7 Dr. Joseph Kabii Mungai performed a post-mortem on the body of the deceased. He observed that the head of the deceased had been crushed both on the left and the right side. The skull was fractured with fragments both at the parietal and the temporal regions. The meninges had been torn. There was massive intracranial bleeding which was the cause of the death of the deceased. The post-mortem report was produced as *prosecution's exhibit No. 1*.

PW6 Chief Inspector of Police Xyplugus Wanyama Lubokhwa was at the material time the officer in charge of Olenguruone Police station. He recalled that on the 8th of March 2004 about 7.30 a.m., he received information that one of his police officers had been killed. He immediately visited the scene where the deceased's body had been found lying. He was with PC Mugambi. He testified that at the scene, he found that the deceased's head had been bashed in by a piece of wood which measured about one and a half feet long and about two inches thick. The piece of wood was at the scene. He testified that there appeared to have been a struggle as the ground was disturbed. He testified that he ordered the body of the deceased to be taken to the mortuary after which he commenced investigation.

He was able to retrace the movements of the deceased up to the point where he was seen leaving Kapchorua Bar with the accused under arrest. He testified that he instructed his police officers to look for the accused. The accused was later arrested and brought to the police station with the handcuff still on one of his hands. He testified that the other handcuff was damaged because it was forcefully opened. He testified that the handcuffs which were found on the accused had been issued to the deceased. He further testified that the deceased had not been issued with any firearm on the material day. He testified that it was his belief that the deceased was killed by the accused with assistance of other people. However his investigation could not identify the persons who could have assisted the accused to escape from the custody of the deceased.

When the accused was put on his defence he gave an unsworn statement. He testified that he could not recall what had transpired on the material night because he was drunk. He only remembered that he was attacked and beaten until he became unconscious while he was going home. He was later arrested by the police and accused of having killed someone. He could not recollect what had happened on the material night. He denied that he had killed the deceased.

The issue for determination by this court is whether the prosecution has established that it was the accused who killed the deceased with malice aforethought. The onus of proof in criminal cases is always on the prosecution. The prosecution has to prove the guilt of the accused based on the evidence adduced in court. In the instant case, the prosecution has relied on circumstantial evidence in its bid to establish that it is the accused who killed the deceased with malice aforethought. There was no direct evidence

adduced by the prosecution to establish the guilt of the accused. It is often said that circumstantial evidence is the best evidence because it excludes any other person other than the accused person as the person who could have committed the offence. In Mwangi –vs- Republic [1983] KLR 522 the Court of Appeal held at page 531 that:

“An offence like murder can be established by evidence tendered directly proving it or by evidence of facts from which a reasonable person can draw the inference that murder had been committed. It is well established that in a case depending exclusively upon circumstantial evidence the court must, before deciding upon a conviction, find that inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilt; Peter Kubaita Paul –vs- Republic Cr Appeal No. 71 of 1979 (unreported). In Musoke –vs- R [1958] EA 715 the predecessor of this court said:

“It is also necessary before drawing the inference of the accused’s guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.”

In the instant case, no one saw the accused kill the deceased. No direct evidence was adduced by the prosecution to establish that the accused killed the deceased. The evidence that was adduced against the accused was circumstantial evidence. PW1 saw the accused leave his bar accompanied by the deceased. The accused was drunk and was under arrest. He had been handcuffed by the deceased. The time the accused and the deceased left PW1’s bar was about 8.00 p.m. At about 11.30 p.m. PW2 testified that the accused went to the bar where she was selling beer and ordered several drinks. She observed that the accused had handcuffs on one of his hands. On the following day, at about 7.30 a.m. the deceased was found dead between the police station and PW1’s bar. His head had been bashed in with a piece of wood causing him to sustain fatal injuries.

From the investigations conducted by PW6, it is apparent that the deceased met his death between the time he left the bar at 8.00 p.m. and the time that the accused was seen by PW2 at Buffalo Inn Bar at 11.30 p.m. The prosecution adduced evidence to the effect that the fact that the accused was found with the handcuffs, which were later identified to be the ones which had been issued to the deceased, establishes his guilt on the charge of murder. The deceased was unarmed. However PW1 and PW2 testified that during the material period, the accused appeared drunk. Now, is it possible that the accused, who was drunk, and who had been handcuffed by the deceased, could have overpowered the deceased, forcefully removed the handcuff from one of his hands, and then picked a piece of wood and hit the deceased on the head and fatally injure him?

The evidence by the investigating officer, PW6, that the accused could not have attacked the deceased alone is thus plausible. The accused had the motive to attack the deceased. He wanted his freedom. The evidence adduced by the prosecution witnesses and particularly PW4, PW5 and PW1 establishes that the accused was a person who was prone to violent conduct when he became drunk. The evidence adduced by the prosecution therefore that he could have attacked the deceased even when he was under restraint with handcuffs is plausible. The alcoholic drinks gave him courage and strength to attempt and indeed succeed in executing a task that appeared to be impossible on the first sight. It is possible that the deceased had not properly secured the handcuff on one hand of the accused and therefore this enabled the accused to free himself and thereafter fatally injure the deceased. There is evidence that the deceased had drunk from about 3.00 p.m. to 8.00 p.m. at Kapchorua Bar when he left the bar. He was not therefore sober or very alert. PW6 testified that the hand of the accused which had handcuffs, was swollen. On evaluation of this evidence it is plausible that the hand became swollen during the struggle between the accused and the deceased and also as the accused attempted to free his other hand. The accused testified that he could not recall what transpired on the material night because he was drunk.

Having evaluated the evidence adduced by the prosecution, it is clear that the accused is the one who killed the deceased. He had the motive. The deceased had arrested him and was taking him to the police station where most probably the accused would have been charged. It is apparent that the deceased had not properly handcuffed the accused and therefore when the two of them were walking, the accused took

the opportunity to release one of his hand from the handcuff, picked a piece of wood, attacked the deceased and fatally injured him. Evidence was adduced by the prosecution witnesses and particularly PW1 and PW2 that the accused became abusive and violent when he was drunk. The assault of the deceased by the accused therefore falls within his pattern of behaviour when he became drunk. The accused testified that he could not recall what transpired on the night he was arrested by the deceased because he was too drunk. The fact of the drunkenness of the accused was confirmed by the prosecution witnesses.

In the circumstances therefore, having found that it is the accused who killed the deceased, my evaluation of the evidence leads me to hold that the accused killed the deceased without the requisite *mens rea*. He killed the deceased when he was drunk and which therefore diminished his culpability. However, it is apparent that the accused was aware of his propensity to violence once he became drunk. He however did not desist from drinking excessively and thereby becoming abusive and violent. I therefore find the accused guilty of the lesser charge of manslaughter. The two assessors who assisted this court during the hearing of this case entered a verdict of not guilty. In my opinion however, the said two assessors put too much emphasis on the evidence adduced by the investigating officer who testified that the accused could not have single handedly killed the deceased. Even if this court were to accept the proposition that other people assisted the accused to kill the deceased, it is clear that they did so to assist the accused escape from lawful custody. The accused was therefore their accomplice.

The accused is therefore accordingly convicted for the lesser charge of manslaughter in accordance with **Section 202 as read with Section 205 of the Penal Code.**

DATED at NAKURU this 23rd day of June 2006.

L. KIMARU

JUDGE