



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Case 49 of 2003

REPUBLIC..... PROSECUTOR

VERSUS

PETER MBOGO KAMAU..... ACCUSED

J U D G M E N T

Peter Mbogo Kamau 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 24th day of August 1997 at Kahaini village in Maragua District within Central Province he murdered Peter Ndungu Githira.

This being a criminal case, the burden is entirely upon the prosecution to prove beyond reasonable doubt that the Accused did commit the offence.

A total of 9 witnesses testified on behalf of the prosecution. Their evidence was to the effect that on the night of 24th August 1997 the deceased and Peter Kiarie Kamau (P.W.7) were drinking traditional liquor. At about 8.30 p.m. the two left to go back home. The two and one Mungai decided to pass through the home of Abraham Wainaina Chege (P.W.8). Both P.W.7, Mungai and the deceased were drunk. The deceased created a fracas over a radio which He had sold to P.W.8 but which P.W.8 had not fully paid for Susan Wairimu Chege (P.W.2) who is P.W.8's mother was not amused at the scene being created in her home. She threatened to beat up the deceased or take him to the sub-chief. At that point P.W.7 walked out of the home accompanied by P.W.8 to join Mungai who had already gone out. The deceased remained in the home for a while. He later joined the others who were outside the home chatting with the Accused and Peter Chege Mwangi (P.W.6) whom they had met by the roadside. P.W.6 then asked the deceased why they were making noise. The deceased explained that they had gone to request P.W.8 for his money which P.W.8 had refused to pay and that P.W.8 had talked to him badly.

At that point there is contradictory evidence as to what exactly happened, but it would appear that the deceased in trying to hit P.W.8 missed and hit the Accused, the Accused got annoyed and hit the deceased and the deceased fell down. At that point all the men dispersed leaving the deceased lying down.

The next morning P.W.2 was on her way to buy milk when she saw someone lying down. She ran and called Rose Wambui Njuguna (P.W.4) and together they confirmed that the body was that of the deceased. James Kibera Githira (P.W.1) a brother to the deceased received the news from P.W.2. He went and found the body of the deceased lying on his stomach on the way to P.W.2's home. The deceased was bleeding from the mouth. P.W.1 reported the matter to the police and Inspector Wanjiku Danson (P.W.5) proceeded to the scene.

Later Dr. Kirasi Olumbe carried out a post mortem examination on the body of the deceased. Dr. Kirasi Olumbe noted injuries on the body of the deceased. He formed the opinion that the cause of death was head injury due to a blunt object. The report of Dr. Olumbe was produced in evidence by Dr. Moses Njue Gachoki under Section 77 of the Evidence Act.

In his defence the Accused gave unsworn evidence and called no witness. The Accused explained how on the material night at 8.00 p.m. He parked his vehicle at Kahaini shopping center. As He was walking home He came across a group of 6 boys who were quarrelling over a radio. The boys were drunk. He passed them and went home. The next morning He collected his vehicle and drove to Nakuru. He maintained that P.W.6, 7 & 8 were all cousins and that they all had a grudge against Accused as Accused had previously caused them to be arrested for hijacking the Accused's motor-vehicle at gun point and that they had sworn to make him pay.

Although the accused denied having been involved in the fracas the eye-witnesses i.e. P.W.6, P.W.7 and P.W.8 all confirmed that the Accused was present. The evidence of the eye-witnesses was clear that the deceased person was very drunk and had earlier created a scene at the home of P.W.2 where he had an argument with P.W.8.

P.W.6's evidence was quite clear that the deceased in his drunken state tried to hit P.W.8 with whom he had earlier had an argument. The deceased however missed P.W.8 and mistakenly hit the Accused. Not being amused the Accused retaliated hitting the deceased with his fist and also kicking him and the deceased fell down.

P.W.7 in his evidence in chief was rather confused as to who hit who. However during cross-examination he came out clearly that it was the deceased who was the aggressor intending to hit P.W.8 but missing and hitting the Accused who in turn retaliated.

The version of P.W.8 however was rather different. According to him, the accused told the deceased, P.W.7 and one Mungai to stop making noise. They continued making noise. The Accused then hit P.W.7. The deceased tried to separate them but the Accused hit the deceased with his fist and also kicked him causing the deceased to fall on the ground where there were stones.

Having considered the evidence and assessed the demeanour of the witnesses, I find the evidence of P.W.8 that the deceased was only trying to separate P.W.7 and the Accused not to be true. I believe and accept the version of P.W.6 that the deceased person being drunk, tried to hit P.W.8 with whom he had earlier had an argument but missed and hit the Accused. The Accused being annoyed responded by hitting and kicking the deceased causing the deceased to fall down on stones.

I reject the defence of the Accused that the eye-witnesses lied against him. The evidence of the eye-witnesses was not consistent with a frame-up. All the witnesses were consistent that the Accused person actually hit the deceased.

From the post mortem by Dr. Kirasi Olumbe the deceased's cause of death was head injury using a blunt object. This could have been caused either by the blow inflicted by the Accused on the deceased or it could also have been sustained during the fall. Either way, it is evident that it was the act of the accused of hitting the deceased that caused the deceased to fall and therefore the deceased sustained his injuries as a result of the Accused's actions.

The Accused's actions were not premeditate. His action was simply a reflex action in response to the assault on him by the deceased.

I find that the Accused person did not have any malice aforethought.

I do therefore concur with the majority opinion of the Assessors and find the Accused person guilty of the offence of manslaughter contrary to section 202 (1) of the Penal Code. I accordingly convict the Accused of the offence of manslaughter under section 322(3) of the Criminal Procedure Code.

Dated signed and delivered this 14th day of June 2006

H. M. OKWENGU

JUDGE