



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Case 107 of 2004

REPUBLIC.....PROSECUTOR

VERSUS

SIMON GITONGA TIAMPATI.....ACCUSED

JUDGMENT

The accused, Simon Gitonga Tiampati 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 night of the 27th of October 2004 at Nairagie Enkare Trading Centre, the accused murdered Keronya Tanyasis (*hereinafter referred to as the deceased*). The accused pleaded not guilty to the charge when he was arraigned before this court. After the assessors were empanelled, the hearing of the case commenced. The prosecution called a total of twelve witnesses in its bid to prove the charge against the accused. After the close of the prosecution's case this court ruled that the accused had a case to answer. He gave sworn testimony in his defence.

The facts of this case according to the evidence which was adduced by the prosecution witnesses are as follows: On the 27th of October 2004, the deceased went to have a drink at a bar called Tosheka Bar within Nairagie Enkare Trading Centre. According to PW3 Benjamin Mangeti, the owner of the bar, the deceased went to the bar at about 3.00 p.m. and drank beer with three friends namely Mainai, Michael and a lady called Julia. The three friends of the deceased left him at about 7.30 p.m. The deceased continued drinking beer. PW3 testified that at about the same time, the accused came to the bar and went and spoke to the deceased. According to PW4 Juliana Muthoni Mungai, when the accused arrived at the bar, he danced to music before approaching the deceased. PW3 and PW4 both testified that a quarrel ensued between the deceased and the accused. PW3 testified that he heard the deceased tell the accused that if he was not buying any beer he should get out of the bar.

The quarrel continued and after a few minutes, PW3 and PW4 saw the deceased pick a glass of beer which was on the table and pour its contents on the accused. Whereas PW4 testified that the said beer was poured on the chest of the accused, PW3 testified that the deceased poured the beer on the face and head of the accused. Thereafter PW3 testified that he intervened and upon the request by the deceased, he ordered the accused to get out of the bar. After a while, the deceased walked out of the bar. At the entrance to the bar PW3 heard the deceased say "*kumbe hii mtu bado iko nje*" meaning this man was still outside here. Shortly thereafter PW3 and PW4 saw the deceased return to the bar. He had a cut wound injury on his left hand near the wrist. According to PW4, when she inquired from the deceased who had cut him, the deceased told her that it was the accused. PW3 was not however certain who had cut the deceased. They both testified that when the deceased came back to the bar, they administered first aid on him and thereafter sought help to have him taken to hospital for treatment.

Meanwhile, PW5 John Kuria Saisoo, who was at Nairagie Enkare at the time, with PW9 Zacharia Ngige Karambu and another man called Charagu, were requested by PW4 to take the deceased to hospital. PW5 was a friend of the deceased. They took the deceased to Nairagie Enkare dispensary where unfortunately the deceased did not receive any treatment because PW2 Harriet Kalkere, the Clinical officer in charge of the dispensary, upon examining the injury, formed the opinion that the said injury could only be attended to by a doctor.

In that regard, she advised PW5 and PW9 to take the deceased to Narok District Hospital where the deceased could receive proper treatment. PW2 testified that she saw the injury that the deceased had sustained to be a deep cut wound on his left hand near the wrist. She testified that the wound was bleeding and attempts to stop the bleeding both by herself and by the people who administered first aid, was frustrated because of the deep cut. PW2 and PW5 testified that one of the men who had accompanied the deceased to hospital called Charagu, was sent to fetch a vehicle to take the deceased to Narok District hospital but he did not return back. PW2 testified that the deceased was then taken out of the dispensary by the people who had brought him but was later found abandoned on the road leading to the dispensary the following day having succumbed to his injuries.

PW6 PC William Muturi, a police officer based at Nairagie Enkare Police Station received a report at about 9.00 a.m. on the 28th of October 2004 that the body of the deceased had been found lying in a maize plantation near the dispensary. PW6 accompanied by the OCS went to the scene where the body of the deceased was lying. He testified that the previous night it had rained heavily and he saw signs of a struggle at the scene. The body of the deceased was collected from the scene by the police and taken to Narok District Hospital Mortuary. PW6 and PC (w) Wanjiru conducted the initial investigation and established that the deceased had been injured after a quarrel at Tosheka bar. They were not able to recover the weapon which was used to cut the deceased. PW6 testified that the accused was later taken to the police station by members of the public who had arrested him.

PW7 PC John Kipyego, a police officer then attached to the Narok CID office, testified that he was the investigating officer in this case. He testified that he conducted the investigation and established that it was the accused person who had cut the deceased on his left hand causing him to sustain fatal injuries. He testified that after the said assault of the deceased, the accused disappeared from the area and was arrested by the members of the public some ten kilometres away from Nairagie Enkare at a place called Naribo. PW10 Joseph Kadipo Puywe was at Naribo when he saw the accused whom he knew was a suspect in the killing of the deceased and was being sought by the police. He apprehended the accused with the assistance with other members of the public and escorted him to Nairagie Enkare Police Station where the accused was re-arrested and detained by the police.

PW7 PC John Kipyego testified that he was at the Narok District Hospital Mortuary when the post-mortem was conducted on the body of the deceased by PW1 Dr. Abakalwa Gerishom. The body of the deceased was identified to the doctor by PW11 Njoe Tanyasis, the brother of the deceased. PW1 observed that there was a 12cm long cut wound that traversed the left hand of the deceased from the root of the thumb to the end of the ulna bone. The wrist bones were cut and displaced. The hand was severed. It was his opinion that the cause of death of the deceased was shock due to severe haemorrhage due to a cut wound of the hand. The post-mortem report was produced as prosecution's exhibit No. 1. PW1 also examined the accused and determined that the accused was mentally fit to stand trial. The P3 form was produced as prosecution's exhibit No. 2.

When the accused was put on his defence he denied that he had killed the deceased. He testified that on the material evening, he had gone to Tosheka Bar where he bought a drink worth Kshs 60/=. He testified that he bought an alcoholic drink called the Amario's spirit. He testified that as he was drinking, the deceased approached him and requested him to buy him (*the deceased*) beer. The accused testified that he told the deceased that he did not have any money. The deceased was annoyed and picked the glass which contained the spirit that the accused was drinking. He then poured its contents on the accused.

He testified that he did not react to the provocation and when he was instructed by the owner of the bar,

PW3, to get out of the bar, he left the bar and went to his home. He denied that he had cut the deceased's hand therefore causing him fatal injuries. He testified that on the following day, when he woke up, he went to a place called Naribo to look for maize for sale. He was there for three weeks. He denied that he had run away from Nairagie Enkare because he knew he had caused the injuries to the deceased. He testified that when he was informed that he was required by the police, he did not refuse to accompany the members of the public to Nairagie Enkare police where he was detained and later charged. He testified that he was innocent and did not know who had caused the fatal injuries to 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 an 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 which was 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 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, the prosecution relied on circumstantial evidence to prove its case on the charge of murder against the accused. No one saw the accused cut the deceased. The prosecution however adduced evidence which established the circumstances under which the deceased came to be cut on his hand. PW3 and PW4 testified that the deceased had drunk beer with his friends from about 3.00 p.m. on the fateful day. At about 7.30 p.m., the accused went to the bar and demanded to be bought beer by the deceased. This was after he had danced at the bar to the music which was being played from the radio.

When he demanded to be bought beer, the deceased did not take kindly to the request and became annoyed. He poured the beer which was in a glass on the face of the accused. The accused was unhappy and quarreled with the deceased. The deceased requested PW3 to have the accused removed from the bar. PW3 spoke to the accused and persuaded him to go out of the bar. After a few minutes, the deceased walked out of the bar. When he reached the door of the bar, PW3 heard the deceased say “*kumbe hii mtu bado iko nje*” meaning this person is still outside here. Thereafter the deceased went outside and returned shortly to the bar. He had a cut injury on his left hand. The deceased told PW4, the lady who was selling beer at the bar at the time, that it was the accused who had cut him. The weapon that was used to assault the deceased was however not recovered.

PW3 and PW4 then administered first aid to the deceased. The deceased was later taken to Nairagie Enkare Dispensary where he did not receive any treatment and succumbed to his injuries because he had bled profusely. PW1 Dr. Abakalwa Gerishom testified that if the deceased had been attended to by a doctor he could have survived. He formed the opinion that the deceased had died from severe hemorrhage due to the cut wound of the hand. The evidence of the prosecution that the deceased ran away from the scene of the crime can also be interpreted to mean that the accused knew what he had done and was escaping from justice. The accused denies the allegation that he had cut the deceased. He states that after the altercation with the deceased, he left the bar and went home.

Does the evidence adduced by the prosecution prove that it was the accused person, and only him, who could have inflicted the fatal injuries on the deceased? The accused had a motive. He was not happy that the deceased had humiliated him by pouring beer on him when the deceased refused to buy him beer. He was spoiling for a fight but was stopped by PW3 who ordered him to get out of the bar. When the deceased walked out of the bar, a few minutes thereafter, he stood at the door and made comments referring to someone. When he came back shortly thereafter to the bar, after being cut, he told PW4 that it was the accused who had cut him. The evidence adduced by the prosecution establishes that it was no one else other than the accused who could have cut the deceased. It was obvious that the deceased was referring to the accused when he mentioned that there was someone, who he was familiar with, who was standing outside the bar.

The accused in this case, being annoyed, and having been told to leave the bar by the owner, went outside the bar, armed himself with a sword, and waited for the deceased to come out of the bar. The accused intended to seriously injure the deceased. The accused had an opportunity to cool off his anger and therefore the subsequent assault of the deceased was calculated and premeditated. The resultant death of the deceased could not be said therefore to be unforeseen. The deceased clearly told PW4 that it was the accused who had cut him. I have no doubt that the deceased had identified the accused as his assailant. The circumstantial evidence points to no other, other than the accused; he had the motive and the will to harm the deceased. The evidence of PW3 and PW4 coupled with the dying declaration of the deceased which he told to PW4 points to the fact that it was the accused who cut him on the hand and thus fatally injuring him.

Having carefully evaluated the evidence adduced by the prosecution and the evidence offered by the accused in his defence, it is clear that the accused had the intention to seriously injure the deceased. He attacked the deceased with a sword, cut him with such a force that it severed the wrist of the deceased. The deceased thereafter bled to death. The force that was used in the attack coupled with the motive, i.e. that the accused intended to revenge the humiliation he had suffered at the hands of the deceased, clearly points to the fact that the accused had malice aforethought. The evidence adduced by the accused in his defence did not in any way dent the strong prosecution case against him. Although he testified that after the altercation with the deceased he left the bar and went home, his subsequent behaviour of disappearing from his residence is a pointer to the fact that he knew what he had done. I therefore find him guilty as charged on the charge of murder.

The three assessors who assisted this court disagreed on their verdict. Whereas two of them evaluated the evidence and found that the evidence did not establish the guilt of the accused, one assessor was of the view that the accused was guilty of the charge of murder. The explanation given by the two assessors when giving their verdict of not guilty clearly shows that they misapprehended the direction of this court as relates to under what circumstances an accused person can be convicted on the evidence of circumstantial evidence.

I have given the reasons for my judgment hereinabove which clearly established that the prosecution had proved its case on the charge of murder to the required standard of proof beyond reasonable doubt. The accused is accordingly convicted on the charge of murder.

DATED at NAKURU this 2nd day of June 2006.

L. KIMARU

JUDGE