



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Criminal Appeal 20 of 2003

REPUBLIC.....PROSECUTOR

VERSUS

BENARD KARIUKI MWAURA.....1ST ACCUSED

JAMES NGETHE KARIUKI.....2ND ACCUSED

PETER KINYANJUI MWAURA.....3RD ACCUSED

JUDGMENT

The accused were charged with murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence were that between the 16th and 17th June 2002 at Miti Tano area in Nyandarua District within Central Province, jointly with others not before court, murdered Joel Achochi Maturu hereinafter referred to as “*the deceased*”. In a ruling that was delivered on 4th August 2006, the second and third accused were acquitted under **Section 210** of the **Criminal Procedure Code** for lack of prima facie evidence to connect them with the death of the deceased. This judgment is therefore in respect of the first accused only.

The evidence that was adduced was as follows:-

The first accused is a contractor and sometimes in the year 2002 he was engaged by Isaack Mathenge, popularly known as “*Baba Linus*”, to do some work for him at Nyahururu. On 16th June 2002, the first accused engaged a group of about 15 men to offload stones from a lorry and a tractor. The building materials were to be taken to a building site of Baba Linus.

According to the evidence of **Joseph Otara Maturu, PW1**, the first accused gave him Kshs.200/- to buy lunch for the casual workers. After they took lunch, they found that the tractor had gone to work elsewhere. PW1 and his colleagues decided to wait for the tractor at a place known as Rironi. The tractor arrived at about 7.30 p.m. and the workers boarded it. On the way, about 500 metres from Rironi, the tractor was driven to a certain home where it was to stay overnight. PW1 and the other casual workers decided to walk to their respective homes.

On the way, PW1 realised that his brother, the deceased, with whom they were working together, was not there. PW1 decided to go back to Rironi to look for him. He found him in a certain bar. The first accused and about ten other people were beating him. PW1 did not know the other people except the accused. PW1 testified that he asked the first accused why they were beating the deceased but he was not

given any answer. PW1 held his brother but the group that was beating the deceased now turned their anger against PW1 and his brother and started beating both of them. PW1 tried to escape but all the doors were closed. Later the door was opened and they ran away. Near the home of Baba Linus, PW1 and the deceased met the accused and other people and they started beating PW1 and the deceased. They pulled the deceased to the compound of Baba Linus and the accused and his group continued to beat him up.

Gideon Njoroge, PW2, who was staying at the home of Baba Linus escorted the deceased and PW1 out of the home but a few metres from the home the accused and the group he was with began to beat them again. PW1 said that the deceased died as a result of the said assault.

PW2 supported the evidence of PW1 that he saw the accused and a group of people fighting with PW1 and the deceased. The accused was saying that PW1 and his brother were thugs. PW1 said that they were not thugs. The deceased had by that time been beaten severely and could not walk properly. On the following day, PW2 heard that the deceased had died.

Julius Mbau Waichungo, PW3, was the village elder. He testified that on 16th June 2002 at around 1.00 a.m., he was woken up by the accused's son. He told him that the accused had been beaten up by thugs. PW3 went to the home of the accused and found a person lying outside the house of the accused and the accused was seated outside next to the deceased, who had serious injuries by then. When PW3 asked the accused what had happened between himself and the deceased, the accused said that he had given some work to the deceased and one other person and the two had waylaid him. Shortly thereafter it began to rain and they took the deceased to the kitchen of the accused. In the morning, PW1 and PW3 saw that the deceased was still in a bad condition and decided to go and report the matter to a nearby administration police camp. The accused also decided to hire a vehicle to take the deceased to a hospital for treatment. However, by the time the vehicle got to the accused's home, the deceased had died.

In cross examination by the defence counsel, PW3 said that he did not know who assaulted the deceased. He further stated that the accused was very drunk and his clothes were very muddy.

Ayub Njoroge Mutura, PW4, told the court that on 16th June 2002, the first accused engaged a group of about fifteen men to offload stones from a lorry and a tractor. The workers were riding in a tractor which was heading to the home of Baba Linus. When they reached a place known as Rironi, the tractor driver refused to continue with the journey because some of the casual workers were very drunk and could fall off the tractor. The workers started demanding money from the accused who promised to pay them the following day.

The accused, PW4, and some other people went to a local bar and ordered some sodas. The deceased and his brother followed up the accused and started demanding payment. An argument started between the deceased and the customers. The deceased poured beer on some customers in the bar and a scuffle arose. The deceased then ran out of the bar. The witness said that he left and went home and on the following day he heard that the deceased had died. He did not know how the deceased met this death. PW4 was stood down to be cross examined during the next hearing but when hearing resumed, the prosecution was unable to avail him until the close of the hearing. No reason was given for that.

The prosecution called **Dr. Moses Ngugi, PW5**, who produced P3 examination forms in respect of the accused persons. The accused was found to be of sound mind. PW5 said that the post mortem on the body of the deceased was conducted by one Dr. Muia. PW5 said that according to the post mortem report, the cause of the deceased's death was consistent to head injury due to trauma but he did not produce the post mortem report. The same was marked for identification and was intended to be produced by the said Dr. Muia but the prosecution closed its case before calling the said doctor. No reason was given for that. The investigating officer and other material witnesses who were said to have recorded their statements were also not called by the prosecution.

The accused gave a sworn defence. He testified that before 16th June 2002, he was working in Nairobi as a contractor. Mr. Isaac Mathenge also known as Baba Linus engaged him to do some work for him at Nyahururu. Prior to that Baba Linus had another contractor whose supervisor was PW2 and the wife of

Baba Linus. Baba Linus was not happy with the way in which building materials were being used and that is why he changed his contractors. The accused did not know the deceased prior to his engagement by Baba Linus but he got to know him in the course of his work.

The accused further testified that on 16th June 2002, they carried two trips of sand. After the first trip the accused left his casual workers at Rironi trading centre. They had refused to go for another trip. The accused said that he returned at about 6.00 p.m. and found the casual workers very drunk. When he arrived the casual workers climbed on the tractor but the driver refused to drive it as the workers were very drunk and could fall off. The workers were asking for their payment for the first trip. The accused said that he would pay them the following day. He thereafter went to a bar with the driver and James Kariuki and started taking beer. They stayed there up to about 10.30 p.m. when the accused heard PW4 calling him. By that time the accused had slept on a table because he was very drunk. PW4 told him that fighting had broken out. The deceased and the other casual workers had got into a fight with the bar patrons after the deceased hit a table and people's beer poured down.

The accused said that he left for home at about 11.00 p.m. On reaching his home he slept in the sitting room and at about 1.00 a.m., he was woken up by his wife. His wife told him that there was someone sleeping outside their house. When the accused went out he saw his son and somebody else looking at a man who was lying outside the house and he recognized him as the deceased. The accused tried to talk to the deceased but he did not respond as he was very drunk. He said that the deceased had no shirt and he was bleeding from the mouth and nose. The accused decided to send for the village elder, PW3. When PW3 came, they decided to put the deceased in the accused's kitchen. The accused said that he did not know what had happened to the deceased. In the morning, the accused realized that the deceased was not in a good condition and he decided to call PW3 so that they could go and report the matter to the police. The police advised him to take the deceased to a hospital for treatment. The accused went and hired a vehicle and went to his home to pick the deceased but on arriving there, he found that he had died. The accused went back to the police and reported and the body of the deceased was removed to a mortuary.

The accused faulted the evidence of PW2 saying that he invented the evidence after he was locked up by the police on 26th June 2002, as a suspect regarding the death of the deceased. The accused said that there existed differences between him and PW2 from the time when the accused was engaged by Baba Linus to be in charge of supervision of building materials. The accused further stated that it had come to his knowledge that PW2 was having an affair with the wife of Baba Linus. The accused denied having assaulted the deceased or having murdered him.

In his submissions, Mr. Ndegwa for the accused urged the court to find that the prosecution had failed to prove its case against the accused beyond reasonable doubt. He wondered why the prosecution had not called several key witnesses including the investigating officer, Dr. Muia and Baba Linus. He urged the court to find that the reason why those material witnesses were not called was that their evidence could have been prejudicial to the prosecution case. He cited the Court of Appeal decision in **JOSEPH PEITUNI LOSUR VS REPUBLIC**, *Criminal Appeal No. 168 of 2001 at Nakuru (unreported)*, where the court referred to an earlier decision in **BUKENYA VS UGANGA [1972] EA 549**, where it was held that if the prosecution fails to call a material witness and no explanation is offered for such failure, the court would be entitled to draw the inference that had such witness been called, his evidence would have been adverse to the prosecution.

Mr. Ndegwa further submitted that failure to call Dr. Muia and to produce the post mortem report was a fatal omission on the part of the prosecution as the cause of the deceased's death had not been established. He cited the Court of Appeal decision in **NDUNGU VS REPUBLIC [1985] KLR 487**. In that case, it was held that although there were cases in which death could be established without medical evidence relating to its cause, like where there were obvious and grave injuries, medical evidence was still required to be adduced in such cases to show the effect of such injuries as opinion expert evidence and as evidence supporting the cause of death alleged by the prosecution. He further pointed out that there were material contradictions that were adduced in the prosecution evidence and in particular in the evidence of PW1 and PW4. Regarding the evidence of PW2, Mr. Ndegwa submitted that the witness did not report to the police that one of the people whom he saw assaulting the deceased was the first accused.

He only stated that in court.

Mr. Koech, learned stated counsel, submitted that the prosecution had proved its case against the accused beyond all reasonable doubt. He sought to rely on the evidence of PW1 as an eye witness. He further submitted that the deceased was found outside the house of the accused a few hours before he died. He further submitted that it was not important to call Baba Linus as a witness because he was not there when the offence was committed. Mr. Koech admitted that the prosecution had failed to call some witnesses whom it intended to call and who had recorded statements. The statements had been provided to the defence counsel. However, a charge of murder could still be established in the absence of a post mortem report, Mr. Koech submitted.

After the summing up of the evidence to the assessors, each of the two assessors were of the view that the accused was guilty of murder. The third assessor had been disqualified because of his absence to attend court during part of the hearing. It is trite law that a judge is not bound by the opinion of assessors but where he differs with their opinion, he is required to state that reasons for so doing, see *KIHARA VS REPUBLIC [1986] KLR 473*.

I have carefully considered all the evidence that was adduced before this court as well as the submissions that were made by both the state counsel and the defence counsel.

PW1 testified that he saw the accused and about ten other people beating the deceased. PW1 did not know the other people except the accused. PW1 did not know why the deceased, who was also his brother, was being beaten. He further testified that after he and the deceased were assaulted at Rironi, they took off and as they arrived near the home of Baba Linus, they were again beaten by the accused and other people. The accused had been left at the bar and it was not explained how he had suddenly gone ahead of PW1 and the deceased.

PW2, also testified that he saw a group of people fighting with PW1 and the deceased. He did not know why they were fighting. PW2 said that the accused was saying that PW1 and his brother, the deceased, were thugs. However, when PW2 went to make a report to the police, he did not record that. He did not explain why he omitted such important information in his report to the police.

According to PW4, there was an argument between the deceased and some bar customers at Rironi. The deceased had poured beer on some customers in the bar and a scuffle arose. It was apparent that the deceased was beaten by the other customers because of what he had done. PW4 did not testify that he saw the accused beating the deceased. What he witnessed was an argument between the deceased and some other workers on the one hand and the accused on the other hand when they were demanding payment from the accused. After the incident at the bar, PW4 went home and he did not know what transpired thereafter.

PW3 was not an eye witness but was merely called by the accused when the deceased was found lying outside the accused's house at night. He therefore did not know what had transpired there before.

From the totality of the evidence that was adduced by the prosecution, it is clear that there was an argument between the accused and his casual workers as they demanded money from the accused. It is also not in dispute that the deceased and the other casual workers including PW1 and PW4 were all taking alcohol at a bar in Rironi together with the accused. There was sufficient evidence that the deceased was beaten by some people in that bar. What was disputed was whether the accused was one of the people who assaulted the deceased. According to PW1, he found the accused and many other people beating up his brother, the deceased. He did not know why the deceased was being beaten. After that incident, PW1 and the deceased decided to go home. According to PW1 they were again accosted by the accused and other people when they were near the home of Baba Linus and were given another thorough beating. But according to PW2, what he saw was a fight between PW1 and the deceased on the one hand and the accused and some other people on the other hand. That may or may not have been correct. If it was correct, the accused was not simply assaulting the deceased, it was a fight involving a big group of people who were all drunk and PW2 did not know the cause of that fight. However, that evidence of PW2 ought

to be considered in light of the fact that his relationship with the accused was not the best and as earlier stated, he did not report that to the police.

The fact that the deceased was found lying outside the house of the accused sometimes in the night, does not necessarily mean that the accused was responsible for the death of the deceased. The deceased had serious injuries as a result of the assault incident at the bar or elsewhere and he was also quite drunk. The action that was taken by the accused in sending his son to call PW3, the village elder, was appropriate in the circumstances. Although the accused was also admittedly very drunk when he arrived in his house, he did his best to take care of the deceased when he was informed that he was lying outside his house with serious injuries. His decision to report the matter to the police on the following day did not portray the picture of a person who had any intention of causing death to the deceased.

In a murder case, the prosecution must prove that there was malice aforethought on the part of an accused person. The prosecution did not adduce sufficient evidence to show that there was malice aforethought on the part of the accused because the cause of the deceased's death was not shown to have been premeditated by the accused. The death of the deceased as a result of the fight that took place between him and the accused and some other people was not something that was planned and orchestrated by the accused. All the people who were involved were very drunk and the bar brawl could not have been blamed on the accused entirely. There was evidence that the deceased poured alcohol on some people in the bar and they were obviously upset by his action.

Failure by the prosecution to adduce medical evidence as to the cause of the deceased's death was fatal to the prosecution's case. In the absence of such evidence it is unclear to this court what actually caused the death of the deceased. I agree with the submissions by Mr. Ndegwa that such evidence was vital as was stated by the Court of Appeal in *NDUNGU VS REPUBLIC (supra)*. The Court of Appeal reached a similar conclusion in the case of *BENSON NGUNYE NUNDU VS REPUBLIC* Criminal Appeal No. 171 of 1984 at Nairobi. No sufficient reason was stated by the prosecution as to why the post mortem report was not produced or why Dr. Muia was not called to testify.

In conclusion, I find that the prosecution did not prove the charge of murder as against the accused person. Perhaps the accused should have been charged with any other suitable offence as the facts of the case would have disclosed but not murder. In the circumstances, I acquit the accused of the charge of murder of the deceased. He should be set at liberty forthwith unless otherwise lawfully held.

DATED, SIGNED and DELIVERED at Nakuru this 20th day of December, 2006.

D. MUSINGA

JUDGE

Judgment delivered in open court in the presence of the accused, Mr. Ndegwa for the deceased and Miss Opati for the state.

D. MUSINGA

JUDGE