

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL CASE NO.158 OF 2003

REPUBLIC PROSECUTOR

VERSUS

MACHARIA KAMAU ACCUSED

JUDGMENT

The Accused before the court is charged with an offence of murder contrary to Section 203 as read with Section 204 of the Penal Code (Cap.63, Laws of Kenya).

It is an immutable principle of Criminal Law that in the cases of murder the prosecution must prove that death has occurred of a human being as a result of voluntary act of the accused person and that the accused had malice aforethought. (See Woolmington V. D.P.P. (1935) A.C at 4821).

The prosecution in this case has shown satisfactorily that the death of the deceased person but has it proved that the said death occurred as a direct result of the voluntary act of the Accused person herein? This I have to determine from the evidence led.

As per Post Mortem report (Ex.2) prepared and produced by Dr. Jane Wasike (PW.6), she found some external injuries on the body of the deceased which were bruises on left arm/elbow lateral, on right hand dorsum and on right forehead. The internal examination did not reveal anything remarkable. On these observations she formed an opinion that the cause of death was unascertained and that there was no alcohol effects toxicity. She then sent blood and urine samples of the deceased, which were sent to Government Chemist, for test on alcohol level.

PW.8 Patrick Ochieng Nyaok, a Government Analyst testified that after he examined those blood and urine samples of the deceased, he found that the blood contained alcohol level of 463 mg per 100 ml of the sample and his urine had alcohol level of 822 mg per 100 ml of the sample. The first figure indicated that there was minimum intake of 11½ half liter bottles of beer or 25 tots of whisky. The figures in urine test indicated that there was minimum intake of 15 half liters bottles of beer or, .33 tots of whisky. According to his opinion, this minimum intake could be fatal. He further explained that those figures were indicative of minimum intake but actual intake could have been much higher.

PW.1 Ziporah Wanyoga has given evidence on how the injuries were sustained. She stated that herself, the deceased, his brother and other friends were drinking at a Bar situate along Pipe Line Estate. At about midnight they left to go home. She and the deceased were ahead of others. On the way a stranger coming from opposite direction crossed in between them and a fight broke out between the deceased and the stranger, she raised an alarm after deceased fell down and brother and friends rushed and separated the two. They all started walking home but nearing the house the deceased was unable to walk or talk. A doctor was called who advised to take him to a hospital. But before they could do so the deceased died. She agreed that the deceased had been drinking even before he left home at 5 p.m. and that since 9 p.m. they were together at the bar having drinks. This fact corroborates the report of Government Analyst on alcohol level in blood and urine of the deceased.

At this juncture, I could have concluded this matter. However, I think that I should as well consider evidence as a whole and determine the case. PW.1 in her testimony further stated that she did not identify

the stranger at the time of the incident but a person came to her afterwards and informed her that he knew the attacker and could show his parents' home. She disclosed in cross-examination the name of the said person as one Kinyozi who came to the scene after brother to the deceased and friends arrived at the scene. In her examination-in-chief she did not give the name of the said person and also stated that the said person was the first to arrive at the scene and tried to separate the two.

She said Kinyozi also led them to the house of Accused's mother who in turn led them to his house where he was sleeping, PW.1 testified further that when she saw the Accused she could then identify his clothes which he was wearing and which she saw from the lights coming from a nearby kiosk. In absence evidence from this Kinyozi, the alleged identification of the accused does not meet the required standard of proof. I cannot find that there is error in view of her evidence.

The blood group of the deceased and that of the Accused person were found to be of group 'O'. The blood stains found on the jacket and the shirt worn by the Accused were also found to be of Group 'O'. No further tests were made to differentiate the origin of those blood stains. Thus once again this test also would not undisputedly point a guilty finger at the Accused.

On the other hand the Accused in his unsworn statement had stated that while he was going home he was attacked by a group of people coming from opposite direction and that he was bleeding from injuries sustained as a result thereof. Thus he has in a way explained presence of blood stains on his clothes.

After elaborating on evidence on record I can safely find that apart from the proof of death of the deceased, the prosecution has failed to link this death to the unlawful act of the Accused person. The cause of death is left in a limbo, in my humble opinion, due to nature of injuries, and cause of death stated on the Post Mortem form as well as the presence of the Alcohol level after tests on urine and blood of the deceased.

I shall thus agree with the Assessors that the Accused is not proved to be guilty of the offence of murder of the deceased in this case. I thus acquit him of the charge leveled against him with direction that he be released forthwith unless held otherwise as per law.

K.H. RAWAL

JUDGE