



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**Criminal Case 39-92 of 2004**

**REPUBLIC .....**  
**PROSECUTOR**

**VERSUS**

**DICKSON MWANDIKI M'OBICI .....**  
**ACCUSED**

**EVANS NDUNGU KURIA**

**JUDGMENT**

The two accused persons were tried together for the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. It is alleged that on 25th December, 2003 at Banana Trading Centre in Kiambu Division within Central Province, they jointly murdered Daniel Kimani Ngugi.

In my opinion the Prosecution has sufficiently proved the death of the deceased herein by producing post mortem report by Dr. Jane Wasike (PW.6); who performed the autopsy on the body of the deceased. She testified that she observed haematoma of the scalp. On internal examination she found depressed skull fracture on occipital bone. She then formed an opinion that the cause of death was head injury due to blunt object.

PW.1 David Kamau who saw the deceased at his house before his death observed that deceased's head was swollen. He also identified body before the post mortem.

PW.7 PC Francis Njuguna also saw similar injury.

The prosecution case was that the deceased was drinking at a Bar called Sports and Grill Bar on the material night with PW.2 Peter Karanja and PW.3 Peter Ndungu, and sustained injuries which resulted in his death. It is not in dispute that Evans Ndungu Kuria (referred to as 2nd Accused hereinafter) was the owner of the said Bar and Dickson Mwandiki M'Obici (referred to as 1st Accused hereinafter) was the watchman of the said bar employed by the 2nd Accused.

PW.2 was at the Bar at about 8.00 p.m. on 25th December, 2003 and he stressed that he had not taken any drinks before he went to the Bar. He was joined in by PW.3 and the deceased at about 8.30 p.m. The deceased got up to go to Gents toilets which are outside the Bar. The Bar evidently is situated at the first floor and as per this witness there is a wall between the Bar and the corridor where stair case is situate. After some time he heard shouts and he went out to check. On reaching the place he saw the 1st Accused holding the deceased and before he could do anything he saw 2nd Accused coming with an iron bar

(described as a colourless pipe 2” in width) and hit the deceased at the back of his head. The 1st Accused then pushed the deceased down the stairs.

In cross-examination he stated that the Bar was new to him and that no one served them. The drinks were bought by them straight from the counter. This fact will be relevant when evidence of PW.4 the barmaid working for 2nd Accused shall be considered.

In cross-examination he further added that he had taken two beers and that he could not have seen what was happening outside from the Bar. What he saw and heard was that the 1st Accused was holding the deceased and latter was asking 1st Accused to leave him alone and then 2nd Accused came without any conversation he just hit the deceased on his neck. The watchman pushed him from stairs and deceased landed at the end of the staircase. He rushed the deceased to hospital but had to pass through Karuri Police Station to set authority before he could be treated. After being treated, the deceased was taken to his home and next evening he was informed that the deceased had died. He also specified that except him and PW.3, no one saw the deceased being hit.

There was no other incident at the Bar which he saw except the one on hand. He denied suggestions from the Learned Defence Counsel that the 1st Accused could not have been at the Bar as he was looking after the parking and that 2nd Accused was not present at the Bar at the material time. He also stated that before the deceased was taken to hospital police did talk to him while he was in a taxi. He denied strongly a suggestion that he was implicating two Accuseds because he was working for father of the 2nd Accused and had serious problems with him. He denied ever working as a tout. I must note that this suggestion was not at all specified as to the nature of his problems with 2nd Accused’s father. It was just put to the witness.

PW.3 Peter Ndungu went to the Bar on the material night with the deceased. He repeated what PW.2 stated and moreover stated:

***“Before we could get to know what was happening Evans came and hit Kimani with an iron bar. I was at a distance of 2 to 3 feet. The watchman then pushed him outside the Bar and he fell from the staircase and landed on the ground.”***

He identified the 1st Accused as watchman and had known the 2nd Accused for two years.

He also denied very vehemently the suggestions by the Learned Defence Counsel that either he or PW.2 ever worked with 2nd Accused in his matatu business. Once again no details of suggested problem or fall out were coming forth except simple suggestion that they had problems.

He also testified that other people had come when the deceased had already fallen, but then said others were there when he was being beaten. He was also asked questions on distance between the Bar and Karuri Police Station as well as Hospital. He said the two are almost at the same distance from the Bar.

They both denied that the watchman (1st Accused) helped the deceased by lifting him when he fell.

Much stress has been laid by the Defence on the issue that the two did not ask for help or did not know the reason why the two Accuseds had assaulted the deceased. It is evident that the incident happened in a Bar and that too at Christmas night. It is on record that the Bar was very busy. As per the evidence of these two witnesses, which I could not fault, the incident occurred very fast and I also note that the police went to the Bar next evening when the report of assault became that of a murder.

As against the evidence of these two witnesses who had also made their statements the very next day of the incident, there is evidence of PW.4 Nancy Wambui who was working as the barmaid at the material time. Despite agreeing that it was a busy night due to Christmas she gave very detailed and timed activities of PW.2, PW.3 and the deceased. According to her she served them and that they drank upto 11 p.m. then she said and I quote:

**“Other two were left in the Bar. He went down stairs and when he reached last but one step, he fell down ..... His friends came to help him. They asked him whether he was injured and he said no. They took him away.”**

But after this evidence in cross-examination she said ***“I saw myself that the watchman assisted that man by lifting him”***.

No question was asked when PW.2 and PW.3 stated that the Bar had a well and when someone was inside the Bar, he/she could not see what was happening outside the Bar. This witness despite his uncontroverted evidence did not explain how she could have seen the deceased falling from ***“last but one stairs”*** from the Bar. I am thus not impressed by her evidence that she saw him falling from ***‘last but one stair’***. It is also not stated by her why and how she concentrated on these three customers only when she was the only one who was serving all the customers and the Bar was not only full but was in the joyous or festive mood of Christmas.

She also stated that 2nd Accused was not present since 24th December, 2003 to 2nd January, 2004. She also stated that distance between the Bar and Karuri Police Station is 100 metres which distance is stated as 1 and ¼ k.m by PC Francis Njuguna (PW.7).

For reasons I have stated hereinbefore and also looking at her demeanors during her testimony which were faltering, I do not find her as creditworthy and truthful witness.

I shall now deal with the evidence led by Police Witnesses. PW.7 PC Francis Njuguna received report of assault and around 2 a.m. on 26th December, 2003 and stated that it was alleged by the deceased that he was hit by an iron bar at Spart Grill Bar. He issued him with a treatment note. This treatment note had been mentioned by PW.2 as P3 form and I do not agree with the contentions by the Defence that this discrepancy is material or relevant so as to cast doubt on credence of his evidence. This witness also corroborated the evidence of PW.2 and PW.3 that he went out to the deceased and took his statement. This witness also saw the deceased with a swollen face.

In cross-examination he said he did not ask the deceased who hit him as he found his position serious.

PW.8 Inspector Michael Misati received report of death and went to the scene. He specifically stated that the report of assault was made on 25th December, 2003 and that it was mentioned that he was assaulted by a watchman and the owner of Sparts Bar. He arrested the 1st Accused on 26th December, 2003 on the basis of that report.

In cross-examination he denied that the 2nd Accused came to Karuri Police Station on the 2nd January, 2004 and that he was told that 2nd Accused was on Safari and that he showed him a document to prove that contention. He was shown (DEx.1) a receipt dated 25th December, 2003 issued in the name of the 2nd Accused from a Chambari Hotel, Narok. He categorically responded that he was seeing that receipt for the first time.

As against the aforesaid evidence, in his Defence 1st Accused testified that he was on duty at parking area on the night of 25th December, 2003 and heard some noise at about 11.00 p.m. but did not state what was that noise all about or that a person fell down from the stairs or that he assisted to carry him. On the contrary, he stated in crossexamination that he did not know that anyone was hurt that night. He stated that 2nd Accused was not at the Bar that night and he saw him on 2nd January, 2004, but did not tell where as it is evident that he was in police cells since 26th December, 2003.

2nd Accused gave defence of alibi. He produced DEx.1 the receipt from the hotel aforesaid issued in his name for 25th December, 2003. Although he stated he stayed out for 9 days he only showed one receipt of his whereabouts for all these days. He also stated that the Investigation Officer (PW.8) had told him that he and 1st Accused were named in assault. Thus he has corroborated evidence of PW.8 to that effect. He stated also that Peter Karanja (PW.2) was his driver and he sacked him because he was reckless. But I do note that PW.2 was asked during cross-examination whether he had serious problems

with 2nd Accused's father when he was working with him as a tout. As a matter of fact it was PW.3 Peter Ndungu who was asked whether he was a driver. 2nd Accused did not mention any rivalry with PW.3.

In any event, I do not agree with the implications hinted by the Defence that dispute between the two was so serious that these two witnesses shall implicate him as well as his watchman for this serious crime.

I am aware that once the Accused has raised a defence of alibi, I have to consider that it is a special defence and that does not cast any burden on the Accused for its proof. Court of Appeal in the case of Leonard Aniseth Versus Republic (1963) EACA 206 at 208 observed and do consider the same...

**“In other words, if the evidence adduced in support of an alibi raises a reasonable doubt as to guilt of the Accused person, it is sufficient to serve an acquittal.”**

In other words unless court is satisfied that the Defence of alibi deserves to be rejected, the benefit thereof has to be given to the Accused.

However, in this case the said defence falls short of that requirement. Considering the evidence as a whole and the Defence put forth, I am not at all impressed by the defence which in my opinion is nothing but an afterthought and I do find the same to be so, and reject it.

I have found earlier that I do not find the evidence of PW.4 truthful and also find that I am unable to find any discrepancies or any reason to fault the consistent and candid evidence both of PW.2 and PW.3 who were with the deceased on the fateful night.

The 2nd Accused used an iron bar to hit the deceased with an intention to cause death of or to cause grievous harm to him and had knowledge or ought to have known that his act will probably cause death of or cause grievous harm to the deceased. That constitutes malice aforethought.

1st Accused was holding the deceased when the 2nd Accused hit the deceased. Not only that he also pushed him down the stairs after he was so hit. This is common intention in both.

The following passage from the English case of R.-V- Betts Ridley has been verbatim adopted in case of Njoroge -V- R. (1987-88) 1 KAR 142 at page 147.

**“If several persons combine for an unlawful purpose and one of them in the prosecution of it kills a man, it is murder in all who are present whether they actually aided or abetted or not, provided that the death was caused by the act of someone of the party in the cause of his endeavours to affect the common object of the assembly.”**

However I do at this stage also note that the subsequent conduct or acts of the coaccused would be relevant in finding whether there was a common intention.

In Wanjiru -V- R.(1955) 22 EACA 521 it was observed by the court and I quote:

**”‘Common Intention’ generally implies a pre-arranged plan, but this does not rule out the possibility of a common intention developing in the course of events though it might not have been present to start with.”**

In this case, I am satisfied that the 2nd Accused hit the deceased on the neck while the 1st Accused was holding him who later on pushed him down the stairs. This, in my view, is common intention pure and simple. I do not have any evidence to suggest any provocation or otherwise from the deceased to the Accuseds also.

In the premises aforesaid, I enter a finding of guilty against both the Accused persons as charged for the offence of murder of Daniel Kimani Ngugi.

As per the law of the land both the Accused are sentenced to death.

Right of Appeal within 14 days.

**Dated and signed at Nairobi, this 20th July, 2005.**

**K.H. RAWAL**

**JUDGE**

**20.7.05**