



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL CASE 147 OF 2004

REPUBLIC PROSECUTOR

VERSUS

JOSEPH NJOROGE KAMAU ACCUSED

JUDGMENT

The Accused Joseph Njoroge Kamau is charged with an offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. It is alleged that on 17th April, 2004 at Ciuguini Kawangware within Nairobi, he murdered James Muchiri Gathoni.

First ingredient of the offence i.e. death is in my humble view, proved beyond doubt. Dr. Jane Wasike (PW.2) performed the autopsy on the body of the deceased after the same was identified by witnesses mentioned in her report (Ex.1), PW.6 Jennifer being one of them. She found on external examination, a penetrating wound anterior chest walls left 2nd Inches, and on internal examination she found a perforated left lung upper lobe and perforated right ventricular. After such observations, she formed an opinion that the death was penetrating chest injury due to sharp object.

It now becomes necessary to find whether the death was caused by voluntary act of the Accused and that the same was done with malice.

The prosecution called 9 witnesses to prove the charge against the Accused. I have already dealt with evidence of Dr. J. Wasike (Pw.2) hereinbefore.

PW.1 David Murage Kinyua is a taxi driver whose vehicle was hired by three people to transport the deceased to Kenyatta National Hospital. While he was waiting at the hospital, the three came out and informed him that the injured person had passed away. He named the two persons out of those three as Eric and Mwaura (PW.3 and PW.5).

Eric Ngare Gathoni (PW.3) is brother to the deceased. He recalled that around midnight of 6th and 7th April, 2004 while he was sleeping in his mother's house, he heard noise outside. He got up and went out to the corridor where he found his brother James Muchiri (the Deceased) lying down and his two friends Mwaura (PW.5) and Kamau (not before the court) were with him. They informed him that the deceased was stabbed by Njoroge. He found a stab wound on the chest of the deceased. I shall quote a part of his testimony given thereafter.

“We took him to Mid-way Hospital at Kawangware. I saw

Njoroge running ahead of us. I saw him at the corridor.

There was security bulb which was switched on. Then we

***took him to the hospital. On advice from staff of that hospital
the deceased was taken to Kenyatta National Hospital in a taxi
and the Doctor who attended him at the Casualty told us that he
had passed away.”***

In cross-examination he reiterated that he saw Njoroge running away at the corridor and that he believed what he was told by Mwaura and Kamau. He also described the clothing of Njoroge as Orange T-shirt and black trousers. He further stated that;

“ I saw when I came out he (the Accused) was not there as the house had a corner and I saw him at the other side of the house corridor”.

PW.5 Stanley Mwaura was with the deceased on the material night. As per his evidence on 6th April, 2004 at about 10.00 p.m. he went to see the deceased at Kawangware and saw him at a Bar in the said area called Tumaini Bar. They drank traditional beer called fruit punch. They were in the Bar for about three to four hours. A lady who was with Njoroge (Accused) started arguing with Ebrahim (PW.8) and the deceased asked her what was happening. The Accused intervened and a quarrel ensued. The lady challenged the deceased to come out and she herself went out. The Accused followed her and challenged the deceased to come out when he approached the door of the Bar. When the deceased followed them, he sensed danger and thus also left the Bar following them. When all of them were in a place described by him as **‘a bit dark’** he saw the deceased falling down and saying **‘you Njoroge, I am stabbed’**

The Accused ran away. The deceased tried to follow him but could not and fell down. The brother to the deceased (PW.3) and another friend Kamau came and they took him first to Midway Hospital where they were advised to take them to Kenyatta National Hospital which they did by hiring a taxi. But on reaching the casualty, he was pronounced dead. This witness described injury on the deceased as stab wound near the heart which corresponds to the injury found during the Post Mortem.

In cross-examination he reiterated what he testified but agreed that he did not see the Accused stabbing the deceased but insisted that it was the Accused who committed the crime as he followed them.

PW.7 Jane Ngina Mungai is owner of the Bar where all concerned parties were drinking at the material night. She stated that the Accused came with two ladies named Wanjiru and Abbi Wanjiru and the deceased had some quarrel and the Accused also had some disagreement with the deceased. She then stated that Ebrahim (PW.8) was given Shs.10 by one of the customers to buy a drink and when he did, Wanjiru told him that the money was for her drink and tried to snatch the same from Ebrahim. In so doing she stepped on Ebrahim’s trousers making them dirty, but later on she promised to clean the same for him. Then she saw the Accused challenging the deceased to come out if he was man enough. The deceased followed him. Later she was informed that the deceased was stabbed and had died. She also reiterated in cross-examination that the deceased and the Accused quarreled earlier over issue of Ebrahim with Wanjiru.

Ebrahim Mbuthia Njage (PW.8) gave evidence as to what transpired at that night. He went to the Bar with his friend called Rasta at about 10.00 p.m. on 6th April, 2004. While he was drinking a person identified by him as Fringo gave him Shs.10 to buy himself a drink. He did so but a lady who was with the Accused came to him and told him that the money given was for her drink. He denied the suggestion and in this scuffle, the lady dirtied his trousers. The deceased came out and asked her why she was troubling a person of her father’s age. The witness also told her that he knew her father from Uganda and the lady apologized and told him that she would clean his trousers. While he was still outside the Bar he saw the Accused shouting, **“If you are a man follow me”**. He saw the deceased and Mwaura (PW.5) also coming out. He left the Bar thereafter to go to sleep. At home he heard someone stating **‘Njoroge had stabbed Muchiri’**. In Crossexamination he stated that he did not know whether there was any quarrel between the Accused and the deceased while they were inside the Bar as he would not hear the same. He

also stated that he did not know why the Accused called the deceased outside the Bar.

PW.9 Inspector Reuben Muthoka received report of murder on 7th April, 2004 and visited the scene that day. The reportees named the Accused as the assailant and the Accused was arrested within two hours of the report.

Accused on the other hand simply stated that he was in the Bar at the material night with two ladies up to 10.30 p.m. and after drinking left the Bar with the two ladies.

Next day at about 1.00 p.m. he was arrested by members of public. He named the two ladies, who were with him at the Bar.

As against this evidence, the learned Defence Counsel submitted that the Prosecution has failed to prove malice and that there is no witness who had seen the Accused stabbing the deceased. Moreover none of the ladies who were with the Accused is called as witness before this court. According to him those ladies were very crucial to the prosecution case and thus there is no case made against the Accused as per law.

The Assessors also gave their opinion that the Accused is not guilty of the offence of murder. They relied on the discrepancies in time given by PW.1 and PW.3 which was midnight while others had placed the time at 10.30 p.m.

However, I do note that according to PW.5 they had drinks for about 2 to 4 hours since 10.00 p.m. All the witnesses who were in the Bar have stated in one voice that the Accused challenged the Deceased to come out if he was man enough and the deceased did accept the challenge. It is also on record that there was quarrel first between the Accused, the deceased and a lady called Wanjiru (Ciro as identified by the Accused) over Ebrahim (PW.8). PW.5, PW.7 and PW.8 also have stated that the deceased was challenged to come out by the Accused, which has not been challenged as has been earlier observed.

PW.5 has furthermore stated that seeing danger after the challenge he followed them. He saw the deceased fall down and shouting. He also heard him giving name of Njoroge (the Accused) before the Accused started running. PW.5 was candid and honest enough to say that what he saw and heard was in a place which was 'a bit dark'. He did not state nor was he asked in cross-examination whether there were other persons in the place where the deceased fell down.

He was not questioned on veracity of his evidence to the effect that he followed the Accused and the Deceased after the Deceased was challenged. What he was asked was that he was too drunk to see or hear what he did see and hear. Even the testimony of PW.8 that he saw the deceased and PW.5 come out of the Bar after the challenge, was not questioned. Thus the fact that PW.5 followed them has not been challenged and has to be accepted as true.

The evidence that the Accused challenged the Accused to come out once again was never questioned and thus has to be accepted as unscathed.

The only issue before me is whether I should rely on the evidence of PW.5 as a witness who could be loosely termed as an eye witness?

PW.7 owner of the Bar talked about one Chege who is alleged to have intervened after the deceased and Wanjiru were quarreling. The said Chege (who has not been called as a witness in this case) according to her intervened and the Accused told Chege that he was also looking for him (Chege). Chege in turn asked the Accused to fight with him. But the Accused did not accept the challenge and Chege sat down. This witness did not mention this Chege when she testified that the quarrel ensued upon Ebrahim. Other witnesses like PW.5 and PW.8 did not mention this Chege. Will this fact affect the facts of this case?

To resolve the aforesaid issue, I shall recall evidence of PW.3 Eric and PW.5 Stanley Mwaura.

PW.5 talks about the incident taking place in a (place which was '*a bit dark*'). He also stated in his cross-examination that, "*Eric came from his house which is nearby. Eric came when we held the deceased.*" He found us assisting the deceased."

As against this PW.3 stated that he went out to a corridor and found his brother lying down. He saw Njoroge running away from the other corridor running away from the scene. He also stated that there was a security bulb which was switched on and thus he could see Njoroge running away.

He did not mention any ladies and gave his testimony as if the scene was at the corridor of his house 10 metres from the door of the home.

PW.5 stated that there was no light outside the Bar and he heard the deceased in a place which was '*a bit dark*'. He did not mention any corridor or security light. This creates doubt as to the place where the deceased was actually stabbed and by whom.

Due to discrepancy in the evidence of these two material witnesses on very relevant fact, I shall have to find that the prosecution has failed to prove beyond reasonable doubt that it was the Accused who actually killed the deceased despite evidence adduced as to his motive or malice. The prosecution should have at least called Chege and Kamau who were on friendly terms with the deceased. Kamau who was with the deceased, PW.3 and PW.5 that night could have shed more light on the happening of this incident which is gruesome.

In the premises, I do agree, for reasons given hereinabove, with opinion of the Assessors and enter finding of not guilty against the Accused herein, and acquit him of the charge of offence of murder as leveled against him.

I also direct that he be released forthwith unless held otherwise as per law.

Dated and Signed at Nairobi this 21st day of September, 2005.

K.H. RAWAL

JUDGE

21.9.2005