



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROB
CRIMINAL DIVISION**

CRIMINAL CASE 10 OF 2004

REPUBLIC PROSECUTOR

VERSUS

MARTIN MWANGI GITAU ACCUSED

PATRICK GITAU KABUGU..... ACCUSED

JUDGEMENT

The two Accused persons are charged with an offence of murder contrary to Section 203 as read with Section 204 of the Penal Code (Cap 63 Laws of Kenya), in that it is alleged that they jointly murdered Peter Mwaura Mwangi on 16th December, 2003 at Kanyoni Trading Centre.

It is on record that the two Accused persons were members of vigilante group of Kanyoni Village and the deceased immediately before his death, was drinking at a Bar. He was found lying down with a stab wound from which he did not recover and died the next day at the hospital.

It is trite law that to prove a case of murder the prosecution has to prove the death and further that the said death occurred due to voluntary act or omission by the Accused which was committed with malice.

I can safely find that the death was sufficiently proved by the Prosecution in this case. Samuel Mwangi Kamau (PW.6) a brother of the deceased identified the body of the deceased to Dr. Garoma at Gatundu District Hospital before he performed autopsy on the body. The post mortem report (Ex.1) was produced by PC Julius Kivuva after an application made by the learned State Counsel under Section 77 as read with Section 33 of the Evidence Act (Cap 80 Laws of Kenya) was allowed after the same was considered by me and not objected to by the Learned Defence Counsel. The cause of death was mentioned as penetrating abdominal injury by Dr. Garama who performed the Post Mortem. Several witnesses like Michael Karanja (PW.1), Timothy Musyoka (PW.2), Michael Gateri (PW.3), Peter Mugo Mwangi (PW.6) also described injury on the deceased which corresponds to the injury mentioned in the Post Mortem report. I thus rely on the aforesaid facts to arrive at my finding that the death is proved by the prosecution.

Now I shall deal with the issue whether the second ingredient is proved by the prosecution. PW.1, PW.3 and PW.4 were at the Bar where the deceased was having his drinks. I shall summarize the evidence of all these witnesses.

PW.1 Michael Karanja was serving drinks to the customers on the material day (or night). At about 10.00 p.m. he was upstairs of the Bar and saw Martin (1st Accused) beckoning the deceased to come out. The deceased did so. They both went out and after sometimes he heard some noises outside the Bar, and saw a watchman (PW.2) entering the Bar and informing Gitau (PW.3), Mugo (PW.4) as well as Kimani

and Gathogo (who are not before the court) that the deceased had been stabbed outside.

He also went out together with those people to check. According to him he saw the deceased lying on the ground at a distance of about 300 metres from the Bar. He saw the deceased from a security light of a shop near where the deceased was so lying. The deceased was alone and they were the first ones to arrive at the scene. The deceased informed them that Martin (1st Accused) stabbed him and he was with Gitau (2nd Accused) and one Kariuki (not before the court). He accompanied PW.4 and other two to take the deceased to the hospital, after the incident was reported at Thika Police Station. He learnt later that the deceased died the next day at the hospital. He also mentioned that PW.2 had a torch and it was also used to look at the deceased. However, he reiterated that he could see the deceased from the security light from a shop.

PW.2 Timothy Musyoka was on duty as a watchman that night and his version is different from other witnesses i.e. PW.1, PW.3 and PW.4. He testified that at about 10.00 p.m. he saw some people coming out from the Bar and were making noise in drunken stupor. Out of them one person called him and started coming towards him. He also went in his direction and they met outside a shop. The person then informed him that he was stabbed. He saw that his intestines had come out. He went to the others who were still shouting and abusing each other and informed them that a shoe-shiner had been stabbed. He went back with them to the scene and thereafter went to call another watchman who is neither named nor called before the court. He did not hear the deceased telling name of his assailant.

PW.3 Michael Gateri was drinking from 9.00 p.m. at the Bar with PW.1 and PW.4 and one Gathogo. While they were drinking they were called by a watchman (PW.2) and informed that the deceased had been stabbed. He knew the deceased as a shoe-shiner and a friend. They went out and he saw the deceased stabbed in the stomach. The deceased was in a position to talk and informed them that he was stabbed by Martin and Gitau (1st and 2nd Accused). The deceased was taken to hospital.

PW.4 Peter Mugo has been referred to by PW.1 and PW.3 as being in the Bar drinking at about 10.00 p.m. He like PW.1 and unlike PW.3 stated that he was drinking with the deceased and also unlike PW.2 and PW.3 testified that the deceased was called out by the 1st Accused when they were drinking. After three minutes PW.2 came inside the Bar and informed them that the deceased was stabbed. They went out and saw the deceased lying at a distance of only 20 metres from the Bar. He testified that as there was no light they used torch. He further stated that the deceased told them that he was stabbed by the 1st Accused.

The rest were police witnesses. P.C Julius Ikiara (PW.7) testified that at 12.30 a.m. on 16th December, 2003, (I can safely presume here that it was at the night of 16th and 17th, December, 2003) two Accused persons with one Kariuki came to him at Gakoe Police Station and reported that they were youth wingers and received information that the deceased was selling illicit brew and went to check on him at around 9.30 p.m. They met the deceased in company of others holding **“lethal weapons”** and the deceased was injured when those persons accompanying the deceased attacked them. He went to the scene but found the deceased already taken to the hospital. On receipt of death report and names of suspects (1st and 2nd Accused), he also received information that the two suspects were hiding in a church. They apprehended the 1st and 2nd Accused at the church. I shall consider the versions given by the two Accused of their arrest later in my judgment.

PW.8 P.C. Julius Kivuva simply rearrested the two Accuseds and escorted relatives to Thika District Hospital before Post Mortem was performed. PW.9 P.C. Raphael Mwaka received reports from Members of Public on the commission of the crime. Although he testified that as per his report the deceased was called out by one **‘Nduma, and another’**, these persons were not identified. After short time of the deceased going away with them, they heard screams and found the deceased **“writhing in pain with a stab wound in the stomach”**. He did not testify as to whether the reportees were given the names of his assailants. I note this in particular, because PW.1, PW.3 and PW.4 were with the deceased when they reported the matter before taking the deceased to the hospital and they all have stated that the deceased gave them names of his assailant. This is, without doubt material factor to the prosecution case.

The two Accused persons gave sworn testimonies. Although there are several discrepancies which are material in their respective testimonies, I shall narrate the same in short. They stated that they were members of vigilante group of the village and were in search of the persons selling illicit brew that night in a group of 10. They were in the same group which was to cover Kanyoni Trading Centre. They found some people drinking changaa and bhangia at a place where video was being shown. They managed to apprehend some but others managed to escape. While they were escorting the apprehended persons to Gakoye Police Post, others returned with weapons like sticks (not lethal weapons as has been stated by PW.7). The fight ensued between the two groups as the persons with weapons wanted them to release the persons apprehended by them which they (Accuseds) refused to do. According to 1st Accused, it was one Samson Gathoka who removed the knife aimed at him and as per 2nd Accused it was Nduma who did so. 1st Accused heard the deceased saying to Gathoka **'You have stabbed me'** and 2nd Accused heard him saying, **"Nduma you have stabbed me."** I do not know whether the two names are of the same person or whether they were different persons. 2nd Accused went further to state that he did not see Nduma stabbing the deceased as the deceased was held by the 1st Accused.

I may pause here and note that none of the Prosecution witnesses have been asked questions by the Defence Counsel that there was a fight between the two groups and one of the persons who came back demanding release stabbed the deceased while aiming at the 1st Accused. This is the report in any event sought to be given to PW.7 by the Accused persons and yet it has not come out during cross-examination.

The two Accused persons also explained how they were arrested. According to them they were helping police to apprehend the assailants of the deceased and they agreed to meet at the church at 8.00 a.m. The police arrived at 10.00 a.m. and they went to Kanyoni Trading Centre with them finding no one. They were asked to record their statements to Gakoye Police Post but instead they were arrested.

I may not give much credence to the testimonies of the two Accused persons due to material discrepancies between the two testimonies. But only because of this, I cannot find against them. It is the prosecution who has irretrievable onus to prove the guilt of the two Accused persons beyond reasonable doubt and I should find so or otherwise before I can proceed to enter my findings in the matter.

Pw.1 and PW.4 have testified that they saw 1st Accused calling the deceased out of the Bar, but PW.3 does not state that. Instead he simply said that while he was drinking with PW.1 and PW.4 the watchman (PW.2) came in and informed them that the deceased was stabbed. Thus PW.3 does not place the 1st Accused at the hotel prior to the commission of crime. None of the witnesses found anyone when they went to the scene.

As against the above versions, PW.2 has something else to state. According to him he saw persons outside the Bar shouting and abusing each other. Out of them one called him who turned out to be the deceased with a stab wound. He then went to those drunk people outside the bar and informed them. He never mentioned that he entered the Bar. This in my view is not an irrelevant discrepancy.

Furthermore PW.1, PW.3 and PW.4 testified that the deceased gave names of his assailant and all of them gave names and numbers which are different. Only common name is that of the 1st Accused.

PW.2 did not mention that either before the others came when he was alone with the deceased he gave any name of his assailant or even after he went with others to the scene he heard the deceased giving any name. PW.9 who received reports also did not testify that he was given name of anyone as assailant of the deceased. He also did not state that the reportees reported that the assailant was known to them.

With the aforesaid observations now I come to the legal aspect of the case. It is indisputable that the prosecution case rests on what is termed as dying declaration of the deceased as there was no one who saw the deceased being stabbed. I have already made my observations as to discrepancy in the evidence as relates to that of dying declaration. The incident also occurred at night and as per PW.4 it was dark outside and as per PW.2 the persons outside the Bar were drunk and were hurling abuses and shouting at each other. Amidst them he saw a person calling him and coming towards him. That person according to him did not mention name of his assailant. They were known to each other and PW.2 was the first one

who saw the deceased with the injury.

Considering these facts I would hesitate to rely solely on dying declaration allegedly made to the other witnesses whose evidence also vary in particulars. It shall be unsafe to do so.

I shall base my aforesaid finding on observations made in various cases which are capitulated in the case of Choge V. Republic (1995) KLR at 44 – 45:

“The caution with which this kind of testimony should be received has often been commented upon. The test of cross examination may be wholly wanting; and ... the particulars of the violence may have occurred under circumstances of confusion and surprise calculated to prevent their being accurately observed... The deceased may have stated inferences from facts concerning which he may have omitted important particulars, from not having his attention called to them (Ramazani bin Mirandu (1934) 1 EACA 107; R. v Okulu s/o Eloku (1938) 5 EACA 39; R. v Muyovya bin Msuma (Supra).

Particular caution must be exercised when an attack takes place in darkness when identification of the assailant is, usually, more difficult than in daylight (R v Ramazan bin Mirandu (supra); R.v Muyovya bin Msuma (supra). The fact that the deceased told different persons that the appellant was the assailant is evidence of the consistency of his belief that such was the case: it is not guarantee for accuracy (ibi). It is not a rule of law that, in order to support a conviction, there must be corroboration of a dying declaration (R v Eligu s/o Odel and another (1943) 10 EACA 9; Re Guruswani [1940] Mad 158, and there may be circumstances which go to show that the deceased could not have been mistaken in his identification of the accused. See for instance the case of the second accused in R v Eligu s/o Odel and Epongu s/o Ewunyu (1943) 10 EACA 90). But it is, generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person, made in the absence of the accused and not subject of the cross-examination, unless there is satisfactory corroboration. (R. v Mgundulwa s/o Jalo (1946) 13 EACA 169, 171)”

After considering aforesaid observations, I can only find that the Prosecution has failed to prove the case against any of the two Accused persons beyond reasonable doubt, benefit whereof I am duty bound to give to the Accused persons.

Although I have strong suspicion as to the guilt of two Accused persons but I cannot rely on that to find otherwise. I can only base my findings on the weight of evidence as per law.

In the premises I enter findings of not guilty against both the Accused persons and acquit them of the charge of murder as leveled against them. They be released forthwith unless held otherwise as per law. The Assessors have also given opinion of not guilty.

Dated and signed at Nairobi this 11th day of October, 2005.

K.H. RAWAL

JUDGE

11.10.2005