



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**CRIMINAL CASE NO 42 OF 1999**

**REPUBLIC ..... PROSECUTOR**

**VERSUS**

**JACKSON MBURU KAMAU ..... ACCUSED**

**JUDGMENT**

The charge against the accused before this court is Murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that, the accused with others not before this Court on the night of 5th/6th September, 1998 at Kabazi Trading Centre, Subukia in Nakuru District of the Rift Valley Province murdered Jeremiah Mwaura Theuri.

Murder is defined in Section 203 of the Penal Code as follows:

***“Any person who of malice aforethought causes the death of another person by un lawful act or omission is guilty of murder.”***

Malice is further defined as follows:

- (a) An intention to cause the death of the deceased or any other person or
- (b) An intention to cause grievous harm to the deceased or any other person. It is immaterial that the person targeted is not the one who is finally killed or injured.
- (c) An intention to commit a felony.

Failure to prove murder whose mens rea is malice aforethought the accused person may be charged with manslaughter which is defined in Section 202 Penal Code Cap 63 as:

***“Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed manslaughter. ”***

There were two people who died on the fateful night of September 5/6, 1998. The first deceased was a watchman at the Kabazi Old bar, while the second deceased was a customer at the same Old bar, drinking beer on that night.

Briefly, the prosecution case is that at about 2 am on the material night, the Accused with two others came to the Old bar and found the deceased and his colleagues drinking. They sat on a separate table and

drank. After sometime one Accused broke a glass. They became rowdy. The barmaid asked them to pay and leave. They refused to leave. The barmaid asked the deceased and his friends to push them out, which they did. Early in the morning the body of the watchman was found not far from the Old Bar and later, the AP's, following a trail of blood, found the body of the second deceased in the thicket by the river. The Accused was found in an abandoned building nearby, his clothes full of blood.

The Prosecution presented 13 witnesses.

PW 1, Peter Macharia Kamau, testified that he was a customer drinking at the old Bar on the material day from 6 pm. He was alone initially, then joined by other friends including the deceased. At about 11 pm the accused arrived with two other friends, sat on a separate table and drank beer. Someone broke a glass, the bar maid was angry, a quarrel broke out, and the three customers were thrown out. The accused had to be physically thrown out by the deceased and his friends. Similar evidence was given by PW 7, 9 and 11. PW 1 further said these three men attempted to return to the bar, but were refused entry and did not manage to enter. At about 5 am the barmaid went out and was accosted by the three who chased her screaming. PW 1 identified the accused as one of the persons who chased her.

It was the evidence of PW 7, Simon Makara, that on the material day he was in his house, when he heard a lady screaming for help. The screams were from outside the bar which is next to his house. He went outside to assist the lady. He tried looking for the people who had tried to strangle her, but could not find any. On his way back he saw pools of blood, and later the body of the deceased.

PW 7, Simon Makara Kariuki testified that he too saw the body of the deceased in the morning, and that he had stumbled onto blood, as he was headed towards the body.

PW 8, Francis Ndungu, told this court that in the morning he found the accused alone in a deserted house with his clothes stained in blood including shoes. He looked drunk but had no injuries. Some two hundred people had gathered there. He heard people looking for someone at that deserted house. Then the Accused opened the door without any resistance. His clothes and shoes were stained with blood.

The evidence of PW 9 was similar to that of PW 8.

PW 13 I. P. Erastus Gitare, now OCS Isiolo Police Station, who was the investigating officer, related the events of that morning. When he arrived at the abandoned house, he saw the accused lying on the ground unconscious. Members of the public had lynched him and were threatening to burn him alive. He rescued the Accused, and eventually charged him with murder. He saw the accused's clothes stained with blood, and he found blood all over in the house where the accused was found. He confirmed that he did not take any blood samples for examination, nor were the Accused's clothes taken for chemical analysis. He also testified that according to his investigations the accused had voluntarily opened the door when members of the public demanded that he come out.

PW 10, Dr Vitalis Ogutu, performed a post mortem on the deceased body upon identification by PW 3, PW 4, PW 5 and PW 6 PC Francis Karanja. The doctor conducted a post mortem and formed the opinion that the cause of death was "due to cardiopulmonary arrest due to asphyxia due to strangulation with a tight object around the neck."

The accused person, in his defence, chose to give sworn testimony and called one witness (DW 2) Eunice Wanjiru who corroborated his evidence. The accused told the court that on the material night he was out drinking with his friends and girl friend when a fight broke out and they were thrown out of the bar. His girl friend was whisked away by other men and the accused was angry, and very drunk and left for home. He was too drunk to walk home, a distance of 3km. He staggered along, falling several times, and eventually ended up in this abandoned house where he slept until the morning. On waking up the next day he found a crowd of people demanding that he open the door. When he opened, some shouted "he is the one" and others said "No he is not the one". The crowd became violent and beat him up while others threw stones at him. He was injured and bled. He testified that he did not know the deceased before his death.

DW 2 told the court that the accused is a person of good conduct although he had started to drink too much. He was mentally stable before his arrest. It was during the trial when he noticed that the accused suffered from memory loss.

In his submissions, Mr Mutuku, for the state, relying on circumstantial evidence, urged that the prosecution has proved its case beyond reasonable doubt and asked the Court to convict the Accused of Murder.

Meanwhile, Mr Kihiga, for the accused, submitted that the prosecution had not proved its case beyond reasonable doubt. No eye witnesses were called to testify and all the witnesses called contradicted themselves and left many questions unanswered. PW 1 kept changing his evidence by saying he was too drunk and could not see in the dark at the same time he saw the accused chase away the barmaid. PW 7 testified that he did not see anyone after he heard the barmaid scream that someone was strangling her.

This case is based completely on circumstantial evidence. There were no eye-witnesses.

When a case is based on circumstantial evidence alone, the guilt of the accused may be found only after applying the following legal principles outlined in the case of **Kipkering arap Koske vs Republic (1949) 16 EA CA 135** as follows:

***(a) the inculpatory facts must be incapable with the innocence of the accused;***

***(b) they must be capable of no other conclusion or explanation except the guilt of the Accused.***

The facts as we have seen are that the accused went to the bar and was chased out. His attempts to return failed. He was later found in the morning in an abandoned house when the crowd beat him up, others stoned him and his clothes were blood stained. The deceased's body was found not far away from that house in a pool of blood.

There is absolutely nothing to connect the deceased's death with the Accused, other than the fact that there had been a quarrel in the bar, and that the Accused had been thrown out. There were no blood analysis done, and nothing to show that the blood found on his shirt was that of the deceased. The Accused explained that the blood on his clothes could have been his own when he got lynched, or blood that he came into contact with as he staggered along, too drunk to walk. There were no eye witnesses. The Accused's own conduct when members of the public demanded he open the door, does not appear to be one of "a guilty person". He was calm, did not resist, and did not run.

Having evaluated the evidence, there is nothing real left to connect the accused to the death of the deceased except mere suspicion. The suspicion may be strong but this is a game with clear and settled rules of engagement. See Joan Chebichii Sawe vs Republic Nairobi Criminal Appeal No 61 of 1999.

The burden on the prosecution is to prove its case against the accused beyond any reasonable doubt. Mere suspicion, however strong, cannot provide a basis of inferring guilt which must be proven by evidence. In the result, I choose to disagree with the assessors who have found the Accused guilty of Murder and set the accused at liberty forthwith unless otherwise lawfully held.

**Dated and delivered at Nakuru this 26th day of July, 2004.**

**ALNASHIR VISRAM**

**JUDGE**