



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
CRIMINAL CASE NO. 96 OF 2003

REPUBLIC.....PROSECUTOR

Versus

SAMSON WAWERU WAKAGWA.....ACCUSED

JUDGMENT

The Accused person in this case was charged in three counts each alleging Murder contrary to Section 203 as read with Section 204 of the penal Code. In Count I, it was alleged that on the 22nd day of June 2003 at Mitero Village in Nyeri District, Central Province the Accused murdered Zakary Mwangi Gichuki. In Count II it was alleged that on the same date at the same place the Accused murdered Peter Gathuru Kihonge, while in Count III it was alleged that on the same date at the same place he murdered Nderitu Kiiru.

At the close of the Prosecution's case no evidence had been adduced to connect the Accused person with the death of Peter Gathuru Kihonge and Nderitu Kiiru. I therefore recorded a finding of not guilty in respect of count II and count III under Section 306 (1) of the Criminal Procedure Code. I put the Accused on his defence in respect of Count I.

Briefly, the facts were that on 22nd June, 2003 the Accused, an adult then about 26 years, met friends with whom they started taking beer at a local bar from about 3.00 p.m. and went on taking beer until night time. Evidence is not clear as to the type of beer they were taking but there is no dispute that the beer was intoxicating and did make the Accused person intoxicated.

Between 7.00 p.m. and 8.00p.m. John Wakagwa and a brother Patrick Kiruhi Gichuhi went to the same bar to take beer. These two were older than the Accused person and his team. The two elders appear to have met some other elders in the bar and the team of elders appear not to have been at ease in the presence of the Accused's younger team which was by then making noise, and perhaps hauling in the bar. The Accused himself told the court that they were talking loudly as they took a brand of beer known as "Kafara". Sellers at the bar insisted they were selling ordinary beer only.

The elder group led by John Wakagwa the father of the Accused who was by then acting as the area Assistant Chief demanded that the Accused's team should go away from the bar. That did not go down well with the young already intoxicated team of the Accused.

I am restrained to comment at this stage, with all due respect, that the prosecution of this case was not up to the required standard and therefore a number of gaps were left unfilled while many ends were left hanging.

It would appear that the friction between the Accused's team and his father's team in the bar started before P.W.6, Antony Maina Gichuhi, the owner of the bar, went to that bar. It would further appear that following the initial friction, members of the Accused's team started leaving one by one including the Accused himself. That is when people like P.W.2 Hilary Machira Ritho and one Mathai whom P.W.2 mentions in his evidence left.

The evidence of P.W.2 is clear that he was accompanied by one Mathai and the Accused and they walked up to the home of the Accused which was the first one to reach along the route they were taking. He saw and left the Accused enter his home as P.W.2 and Mathai proceeded further to their respective homes. P.W.2, and perhaps Mathai, went to their respective homes and never went back to the bar until perhaps after hearing of the fatalities which had occurred after they had left the bar between 7.00 p.m. and 8.00 p.m. The fatalities, appear to have occurred after 8.00 p.m. Witnesses were not keen on the timing of events.

Further evidence indicate that although people like P.W.2 may not have gone back to the bar until they were informed of what I am now referring to as fatalities, the Accused went back to the bar and it was in this respect that some evidence would seem to be to the effect that he simply went outside the bar building and remained in the compound for a few minutes and returned to the bar to meet the unwelcoming eye of his father who started pushing him out of the bar physically. I was therefore surprised when even the learned State Counsel seemed to have confined herself around the evidence of P.W.6, Antony Maina Gichuhi, and the defence of the Accused person and when I warned the Assessors about this, they simply ignored it as they seemed to have been telling me at the time I was doing the summing up to them, that they did not need that summing up. They had long before made up their minds.

Otherwise, how is the evidence of P.W.I, Julius Gikonyo Muchiri, to be explained. He told the court that he knew the Accused very well, a local boy and perhaps a relative although the latter relationship was not brought out. He told the court that he left the same bar at about 8.10 p.m. to go back to his home after taking some beer. He left all the three deceased persons in the bar. This was a witness who could have strengthened the Prosecution's case, but somehow the Prosecution did not think much of his evidence and therefore it appears he did not give in his evidence all the useful information he had.

He said that as he was walking back home, he met with the Accused who was going towards the opposite direction, the direction where the bar was. The time was between 8.00 p.m. and 9.00 p.m. That must have been the time the Accused was returning to the bar from his home where he had gone when in the company of P.W.2.

The Accused person obstructed P.W.1. When P.W.1 inquired to know why the Accused was obstructing him, the Accused pushed P.W.1. The witness told the court and this is what I recorded:

“He told me he would not allow those old men take beer in peace.

He then stabbed me with a knife on my back. I screamed and as

he pulled the knife I fell down.”

That was not all. The Accused went on to cause other injuries on P.W.1 and the evidence of the medical officer who examined P.W.1 confirms that position.

While on the ground P.W.1 heard some people who appeared to have been running going where he was while in low voices mentioning the name Kan'garu, Kan'garu, in reference to the Accused who is sometimes called by that name. Those people were two or three, and the Accused told them he had finished P.W.1. Those people then left together with the Accused. P.W.1 was not able to recognize the voices of those two to three people who left with the Accused.

Thereafter some people who included a woman removed P.W.1 from the footpath where he had been left lying and took him to a maize plantation. P.W.1 did not also recognize any of those people. But those

people warned P.W.1 against screaming adding that it was not safe to do so at that place.

As only bits of the evidence of this witness were brought out, ends of those bits were left hanging and even the finishing is not there. I hope the Prosecution was not expecting the court to do the undone Prosecution's job. If that is what was being expected, it was a wrong expectation as that is never the work of the court. It is the Prosecution's duty to prove its case, including all allegations against the Accused, beyond reasonable doubt and the court has no part to play in that duty. The court has its own role to play and that role does not include any part of the prosecution's duty to prove its case against an accused person beyond reasonable doubt. The charge in these proceedings was murder and the Prosecution had the duty to prove murder. Otherwise they ought not to have brought that charge against the Accused.

Back to P.W.1, he was collected by the Police from where he had been left lying in a maize plantation and was taken to hospital where he was admitted for sometime before he was discharged and does not seem to remember that he was collected together with deceased persons to the hospital as a Police witness testified.

P.W.1 emphasised in court he knew the Accused before the incident and recognized the Accused at the time of the attack and that there was no mistake about it although it was at night. Recognised voice and appearance. He said the night was not very dark and he could see and recognize the Accused.

So that was the Accused person who after "finishing with" P.W.1, walked back into the bar to renew his struggle with his father in the presence of the deceased Zakary Mwangi Gichuki. There were other people in the bar during the incident who are alive today, but the prosecution decided to rely on the evidence of P.W.6 only and the evidence of P.W.6, a paternal uncle of the Accused, concerned the deceased Zakary Mwangi Gichuki only. That deceased person was portrayed as a person who was stabbed when he was attempting to assist the father of the Accused disarm the Accused who was armed with a knife the Accused claims was in the first instance possessed by the deceased. P.W.6's evidence is that it was the Accused who produced the knife. The defence is to the effect that the Accused had no knife and that therefore it is the deceased's knife which killed deceased. The question is: how about the knife the Accused had just used against P.W.1? My view is that the knife belonged to the Accused who had armed himself with the knife from his home and went with it to that bar to ensure that the old men do not take beer in peace. I do not accept his defence that the Deceased had the knife.

P.W. 6 talked of a see saw scenario where the father of the Accused would push the Accused from the counter up to the door and the Accused would push his father from the door back to the counter up to three or more rounds before the Accused took out his knife and held it in the air ready to strike his father with the knife. The Deceased Zakary Mwangi Gichuki sensing danger to John Wakagwa rushed to join the struggle in an effort to assist the John Wakagwa disarm the Accused. The Accused did not only stab the Deceased but evidence is that he also stabbed his own father luckily not fatally. The father is said to have first hit the Accused with a torch but evidence is not clear whether that was during the first struggle before the accused went home with P.W.2 or it was during the second struggle when stabbings took place.

According to what P.W.6 and the Accused himself told the court, the Deceased and the father of the Accused were each stabbed once. But look at what Dr. Lawrence Kioko stated in his evidence as exhibited in the relevant Postmortem Form produced as exhibit 21. The doctor found six deep wounds, each fatal some penetrating up to the heart and lung. From that scenario where is evidence of accidental stabbing or stabbing which is not intentional? An accidental or a non intentional stabbing could have been done only once and definitely not more than twice in the then prevailing circumstances.

In the instant case the question of a person getting annoyed up to the point of stabbing another person on the heat of the moment does not arise. The Accused had not been the only young man around. He was in a team of other young men who were also not pleased when elders asked, nay, ordered them to leave the bar because the young men were noisy and probably seemed disrespectful to the elders present. Other young men yielded and left as they were required to do thereby complying with the reality that they had to respect elders. The Accused who may not by then have been armed with the killer knife, refused to yield. He did not respect elders. He left together with his team. Went to his home and probably fetched

the killer knife and returned to the bar to ensure that the elders do not take their beer in peace. He did not stab one person with that knife. He at least stabbed three people including his own father who has not been brought to give evidence in this case. One stab wound inflicted upon each of those three victims could not appease him. That was why P.W.1 received more than one stabbing and the Deceased received six. Even if the Accused was no respecter of elders, even if he was an adult and was entitled to take beer like anybody else and was buying his own beer without bothering elders for the beers he took, all that did not entitle him to kill anybody. His father may have struck him with a torch yes, but that did not warrant the violent activities the Accused engaged in against the victims of his violence particularly the Deceased Zakary Mwangi Gichuki.

As to the claim that the Accused was so intoxicated he did not know that what he was doing was wrong because he became temporarily insane, this court does not have evidence to that effect and the court should not act on assumptions. There has to be clear and acceptable evidence proving temporary insanity because of intoxication and that evidence must include medical evidence. This court has nothing like that on that issue. Whatever the doctor said in this court on that issue was a mere general statement following a question from the Accused's counsel, seeking the doctor's general statement. That doctor, P.W.10, did not say anywhere that he had found the Accused to have been so temporarily insane. He did not even attempt to examine the Accused for that purpose. That issue does not therefore arise in this case.

The question of misadventure, as for the reasons I have given against the claim for accidental injury, does not also arise in this case.

But the case having been apparently prosecuted with the aim of making it manslaughter and Assessors having returned a unanimous verdict of guilty to manslaughter, I see no point in saying more except to add that I will go by the decision of Assessors.

Accordingly, I do hereby reduce the charge of Murder contrary to *Section 203* as read with *Section 204* of the Penal Code in Count I to the charge of Manslaughter contrary to *Section 202* as read with *Section 205* of the Penal Code and find the Accused guilty of Manslaughter and convict the Accused person for Manslaughter.

Dated this 1st day of December, 2004.

J. M. KHAMONI

JUDGE

M/S Ngalyuka:

I have no record of the Accused person. He may be treated as a first offender.

J. M. KHAMONI

JUDGE

Mr. Mugambi:

In mitigation, I wish to say the accused is a young person with a young family to lead. He is married with one wife and two children.

The court be lenient to the Accused. That is all.

J. M. KHAMONI

JUDGE

SENTENCE

The Accused has been found guilty of Manslaughter and convicted.

I take into account that he is being treated as a first offender. I also take into account what has been said on his behalf in mitigation.

But I am also mindful of the fact that the offence the Accused committed is of a serious nature.

Human life was lost and the Deceased must also have had a family and relatives whom he was forced to leave when he lost his life through criminal activities of the Accused person. This court has to look on both sides and not on the side of the Accused only.

If it is a question of leniency, from what I have said in the judgment leniency should straight away be seen from the fact that I accepted to reduce the charge of murder to the charge of manslaughter. Otherwise the Accused should now be facing a more serious punishment than the mere imprisonment I have made him to be entitled to. I will, however, be more lenient and restrain myself from sentencing him to life imprisonment as that is the maximum sentence allowed against people found guilty of manslaughter.

Accordingly, the accused is hereby sentenced to seven(7) years imprisonment.

Right of appeal in 14 days.

Dated this 1st day of December 2004.

J. M. KHAMONI

JUDGE

1.12.2004