



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 123 OF 2017**

**REPUBLIC.....PROSECUTION**

**VERSUS**

**PATRICK MUTUA NZIOKA.....ACCUSED**

**RULING**

1. **Patrick Mutua** hereinafter referred to as the “accused” stands charged with the offence of murder contrary to section 203 as read with section 204 of the penal code. The particulars are that the accused on the 25<sup>th</sup> day of May, 2015 at Bondeni bar in Ikutani market, Kiou sub-location, Kwale location in Mukaa district within Makueni county, murdered Kimilu Ngoloma.
2. He denied the charge and the prosecution called seven (7) witnesses to establish its case. PW7 **Dr. David Kasanga** of Makindu subcounty hospital with the permission of the defence produced the post mortem report filled and signed by Dr. Makani (EXB1). The cause of death was found to be cardio-pulmonary arrest occasioned by bleeding in the head contributed by blunt trauma to the head. He added that the blood vessel weakening could be contributed to by age or alcoholism. The balloon can be formed by the above and any pressure on it would be fatal.
3. PW7 further explained that once the brain stem is destabilized the entire system stops functioning and this can cause sudden death. The deceased had acquired this condition.
4. The cause of death of the deceased was therefore established by the post mortem report and the evidence of PW7. The fact of death was confirmed by PW3 and PW5 who attended the post mortem and by PW2, PW3 and PW6 who saw the deceased’s body.
5. The main issue for determination is whether the accused committed or omitted any act that led to the death of the deceased. PW1 is a boda boda operator. He testified that on 25<sup>th</sup> May 2015 at 8.00 pm he was at the Utawalla market when he was called by the deceased who asked him to pick him from the said market. He complied and thereafter took him to Utaani market. The deceased was drunk. They went to Mbodeni club where there were two people i.e. the waiter and the deceased.
6. PW1 remained at the doorstep of the club as he waited to be paid Kshs 50/= which was never to be. There were kerosene lamps at the counter and he saw the accused slapping the deceased three (3) times. He left for home and heard news of the deceased’s death the next day.
7. PW2-PW5 did not witness anything besides seeing the dead body after receiving reports of the death. PW6 **No. 59086 Cpl Richard Langat** who was the investigating officer testified that he was assigned this case to investigate on 26<sup>th</sup> May 2015 at 2 pm. He visited the scene together with I.P. Chepkurui and the two (2) reportees.
8. They found the deceased lying dead in the 2<sup>nd</sup> room of the bar and was bleeding from the nose and ears. They found no witness but they were able to remove the body. He explained that PW1 informed him that upon reaching Utaani market with the deceased, he stopped at the bar near the door, while the deceased entered the bar. The accused then slapped the deceased twice and the latter fell down. PW1 took off while the bar maid and the accused disappeared.
9. The accused was arrested on 27<sup>th</sup> August 2015 but the bar maid has never been arrested to date. In cross examination he said he did not visit the accused’s home on the date of incident. He also said that the owner of the bar is the accused’s sister. She was very unco-operative in the investigation of this matter. She even refused to give the details of her barmaid.
10. He also confirmed that the deceased’s body was found in the room and not the bar. He said the deceased had vomited githeri, alcohol and blood but none was taken for examination. He admitted that a drunk person may fall down and be injured. Besides the bleeding from the nose and mouth, he said the deceased had no visible injuries.
11. After the close of the prosecution case learned counsel Mr. Kihara said he would not submit but rely on the evidence on record.

12. Learned counsel Mr. Kamollo for the accused in his written submissions urged the court to acquit the accused as no prima facie case had been established against him by the prosecution. Counsel has criticized PW1's evidence saying he was not inside the bar to see what was happening therein and neither did he state the nature of the light that enabled him to see what went on in the bar. He further pointed out that PW1 did not scream to inform anyone of what he had seen but instead took off.

13. Counsel has submitted that failure to call the barmaid dealt a blow to the prosecution case as her evidence was crucial. He has referred to the case of **Dickson Kiplangat v Republic [2020] eKLR** which reiterated the holding in the case of **Enid Kaari Ng'ang'a v Republic [2006] eKLR** stating that:

***“The prosecution must make available all the witnesses necessary to establish the truth, even if their evidence was inconsistent. Where the evidence called is barely adequate the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.”***

14. Its his further submission that PW1's purported theory of assault is not supported by the evidence of the doctor (PW7) who produced the postmortem report.

#### **Analysis and determination**

15. From the evidence of PW1 the people who were at the scene were himself, the deceased and a bar maid. He told the court that the deceased was already drunk when he picked him from Utawala market for Utaani market. According to PW1 after dropping the deceased he remained outside the club on the doorstep as he waited for his payment.

16. While outside and with the help of light from some kerosene lamps at the counter he saw the accused slap the deceased. Its not clear whether the slapping was twice or thrice because in his evidence in chief he said it was thrice. However, in cross examination he said it was twice.

17. PW1 did not even state on what part of the body the deceased was slapped. He did not mention if there was any struggle between the two men. Besides the slapping PW1 did not witness anything else and he left without his pay of 50/= and/or informing anyone.

18. It was therefore surprising when the investigating officer (PW6) testified saying that the deceased was slapped and he fell down. PW1 who allegedly told him that did not give any evidence to that effect. The evidence therefore remains that PW1 only witnessed the accused slapping the deceased on an unnamed part of the body.

19. The other person who was allegedly present was the unknown bar maid who did not record a statement or testify. According to the investigating officer (PW6) the said bar maid disappeared soon after the incident. Furthermore, her employer who is a sister to the accused was so uncooperative and even refused to give particulars of the said bar maid.

20. In other words, PW6 was saying he was so helpless to the extent that even the law could not help. Be as it may, the barmaid having been at the scene was a very crucial witness. She was not availed by the prosecution to support its case.

21. The bar maid's evidence was very critical in this case because the evidence of PW1 is so shallow. All that PW1 says is that the deceased was slapped without even stating what part of the body was slapped. Furthermore, a slap alone cannot rupture one's brain.

22. Failure to call the barmaid left the prosecution with PW1's evidence alone which was already weak. This failure could be interpreted to mean her evidence could have been adverse to the prosecution case as no good reason was given for the inability of PW6 to avail her.

23. The cited cases of **Dickson Kiplangat (supra)** and **Eliud Kaari Ng'ang'a (supra)** clearly speak to this. In the earlier case of **Bukenya & others v Uganda [1972] E.A. 549** the Court of Appeal addressed itself thus;

***(ii) the prosecution must make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent;***

***(iii) the court has the right, and the duty, to call witnesses whose evidence appears essential to the just decision of the case;***

***(iv) where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.***

24. As was stated in the case of **Keter v Republic [2007] 1 EA 135** there is no legal requirement for the prosecution to call a given number of witnesses. However, where the adduced evidence is inadequate another relevant witness may be called to fill up the gaps.

25. In the present case PW1's evidence was inadequate. His evidence is not even supported by the medical evidence in the post mortem report (EXB1).

26. The definition of a prima facie case as stated in the celebrated case of **R. T. Bhat v. Republic [1957] E.A. 332 – 335** and other cases is to the effect that;

***“A prima facie case is one on which a reasonable tribunal properly directing its mind to the law and evidence could convict if no explanation is offered by the defence.”***

27. After doing the above analysis I do find that the prosecution did not establish a prima facie case to warrant the accused being placed on his defence. For my part I find the accused not guilty and acquit him of the charge of murder under **Section 306(1) of the Criminal Procedure Code**.

28. He will be set free unless otherwise lawfully held under a separate warrant.

Signed and dated this 19<sup>th</sup> day of May, 2021 at Milimani, Nairobi by:

**H. I. ONG'UDI**

**JUDGE**

Delivered on this 17<sup>th</sup> day of June, 2021 in open court at Makueni by:

**GEORGE DULU**

**JUDGE**