



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL CASE NO. 75 OF 2014

REPUBLIC.....STATE

VERSUS

PETER ONCHIRI MAGAMBO.....ACCUSED

JUDGMENT

PETER ONCHIRI MANG'ABO alias MASAA alias MUKAKA is charged with the offence of Murder, contrary to *Section 203* as read with *Section 204* of the *Penal Code*.

The particulars of the offence are that on the 19th day of September, 2014 at Hawaii village within Uasin Gishu County, the accused murdered Eliud Kipkoech.

The prosecution case is that on 19/9/2014 at about 10.00 p.m, PW-1, PW-2 and the deceased in this case, were at Kenja, in Hawaii. PW-2 urged the deceased person to buy him a beer. They went to Kosgei bar. The deceased bought one bottle of Kenya Cane beer of which PW-1 and PW-2 shared. The deceased took a sprite soda. They left later on at about 10.30 p.m, heading towards their respective houses. On the way and while still together, they heard a woman who was crying for help. A man was beating her. According to PW-1, the woman said, "forgive me if I have wronged you." She then spoke in Nandi Language and said, "help me, don't let Masaa kill me." According to PW-2, she used Swahili language and said, "Masaa, Masaa, forgive me. You want to kill me." PW-8 was also nearby getting charcoal into his shop and heard the woman crying in Kalenjin saying, "there are no friends who can help me?" The deceased expressed that they should help the lady and he crossed the road towards that direction. PW-2 followed to cross the road and had not seen a vehicle along the said road. PW-1 held him back. The vehicle driver applied brakes and made noise at PW-2 before he moved on. The deceased went and pushed Masaa (the accused herein) away from the lady he was attacking. The accused went to a nearby stall and drew out a stick from it. He then went to where the deceased was and struck him with it on the head. The deceased fell down. The accused then turn on PW-1. He tried to attack him with the said stick. PW-1 held it and asked him, "Masaa, what have you done?" The accused then dropped the stick and ran away towards the railway line. PW-2 pursued him. Ahead, he tripped him prompting him to fall down. The two fought. A friend of the accused went and raised PW-2 from where he had sat on the accused. PW-2 was then hit on the head and fell down unconscious.

Members of the public turned up at the scene. They got a motorbike and rushed the deceased to Hawaii clinic. They were told his case was serious and referred to Moi Teaching and Referral Hospital (MTRH). PW-4 called the deceased's brother (PW-4) who went with PW-3. They took the deceased to MTRH. PW-1 got back to the scene. He found the lady who had been beaten by the accused still there. Those present said she had a love relationship with the accused. PW-1 noted her name was Chesang.

PW-1 later went to Moi Teaching and Referral Hospital. When he narrated about the incident to a woman who had taken a patient there, the said woman pointed to a woman on a wheelchair and said she was Chesang. PW-1 went upto her and told her she is the one who made deceased be injured. She denied it.

At Moi Teaching Referral Hospital an X-ray and CT Scan were done on the deceased. The doctor advised that he be taken to the ICU. ICU's at Moi Teaching Referral Hospital, Reale and Mediheal hospital were all full. They got space at Eldoret Hospital where he was admitted. The following day at 11.00 a.m he passed on.

PW-1 and PW-2 knew the accused before then. They were able to see him at night as there were premises nearby which had security lights on. There were also vehicles moving along the road. PW-1 knew Masaa before then as he was selling glasses at Hawahii. He knew him since childhood. PW-2 was staying with Masaa at Hawahii. They knew him only by the name of Masaa. PW-8, the other eye witness, had not known the accused before then.

The post mortem was conducted on the body of the deceased on 25/9/2014. PW-5, who is the deceased's wife, identified the body to PW-6, the doctor who performed the postmortem. The doctor opined that the cause of death was severe head injury due to assault with a blunt

object.

The suspect had gone underground and the police were pursuing him using informers. On 13/11/2014 he was traced in Huruma area, in Eldoret. He was arrested and taken to Kapsoya police station where he was charged with the offence of murder.

The accused in his defence stated that he is called Peter Mang'abo and is a farmer and also a sign writer. He is married to DW-2. In the year 2014 he was living in Nakuru. On 19/9/2014 he was in his farm in Nakuru weeding tomatoes. At midday he went to write a sign board and returned home at 6.30 p.m. He was in Nakuru upto 13/11/2014 doing his normal duties. On 12/11/2014 he got a job in Eldoret at Huruma. He travelled to Eldoret on 13/11/2014. He was to write on the wall of Joymax Academy in Eldoret. He was arrested at the place by police officers. It was alleged he committed murder on 19/9/2014. He denied that he is known as Peter Onchiri Mang'abo alias Masaa, alias Mukaka, and alleged he is only known as Peter Mang'abo, the name carried on his identification card. He as well alleged that he has never lived in Hawaii and does not even know where Hawaii is. He was not selling glasses at the place or even elsewhere. He as well denied knowledge of Irene Chesang.

DW-2, the accused's wife stated that on 19/9/2014 she was with her husband in Nakuru and that night he never left the house. On 13/11/2014 he said he was to work in Eldoret. He travelled to Eldoret. Later on when she failed to get him on phone she was told by her father in law that he had been arrested. She later travelled to Eldoret and found him. It was alleged that he had killed a person.

At this point the court must now determine as to whether the offence against the accused is proved by the prosecution beyond reasonable doubt.

In doing so I have weighed the charge in place, evidence adduced by both sides and the submissions by the accused's person. The only disputed issue and which need be weighed by this court is of the claimed recognition of the accused person as the culprit by PW-1 and PW-2, and of which he vehemently denies.

The incident happened at night at around 11.00 p.m. PW-1, PW-2 and the deceased were from Kosgei Bar. They alleged they shared one bottle of Kenya Cane beer while the deceased took a sprite soda. Though the two claims they were not drunk, PW-8 on cross examination revealed that they were drunk and making noise. I don't know much about beers but to just have an idea have resulted to Google which reveals that:-

“Kenya Cane Original 750 ml is smooth and light. A 40% ABV triple distilled spirit, proudly made in Kenya, by Kenyans. It has been around since 1976. K.C is a versatile spirit, with a wide variety of cocktail applications.”

In my view, given that Kenya Cane is a spirit, and its volume, two persons taking a whole bottle are likely to get drunk on it. The evidence of PW-8 that they were drunk cannot therefore be wished away. There is a greater possibility that PW-1 and PW-2 were drunk on the night of the alleged incident.

The two witnesses states were able to see and recognize the accused whom they referred to as Masaa using security lights which were at premises nearby. PW-1 stated the said lights were about 6 metres away, while PW-2 talked of about 50 metres. The discrepancy on the distance was not reconciled. We were not told where the incident exactly took place in relation to the said light sources and also in relation to the lights of the motor vehicles along the road then. There is evidence that PW-2 was not even very alert as he was almost hit by a vehicle at the place while trying to cross the road. There is a possibility, given the scenario, that their perception of facts was blurred by the alcohol intake and or inadequacy of light. This fact is further buttressed by the different versions given by each on what the lady allegedly assaulted by the accused said while crying for help.

The two witnesses, PW-1 and PW-2 are not the ones who identified the accused to the police during his arrest on 13/11/2014. The investigating officer said they were led to his arrest by informers. How the said informers knew he was the one, is in doubt. The police did not conduct an identification parade to confirm whether he was actually the one referred to by PW-1 and PW-2 as Masaa. The name Masaa was not confirmed to be his by any other independent source, save for the allegation by PW-1 and PW-2. There is no evidence that he was well described by the two witnesses when they reported the case at the police station and in their statements to the police. Independent evidence was not sourced as to whether he had lived in Hawaii and done business there of selling glasses. The lady whose evidence would have been of great help, as she is claimed to have been his girlfriend, one by the name of Chesang, was not called as a witness.

The accused defence, that at the time of the offence he was in Nakuru, is well corroborated by the evidence of his witness, his wife. The prosecution on cross examination of the defence witness did not shake the raised alibi defence. All the foregoing facts when weighed together raises doubt as to whether the accused was properly recognized. In the case relied on by defence in submissions on the issue, of **R - vs- Turnbull [1976] 3 All E.R 549**, Lord Widgery C.J expressed that:-

“Recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made”

Having observed that, the available evidence does not make it certain that it is the accused who committed the alleged offence; or put in ordinary legal terms, does not establish beyond reasonable doubt that it is the accused person who committed the alleged offence. I do resolve the existing doubt in his favour, and is accordingly acquitted of the offence.

Surety is discharged.

S. M GITHINJI

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 1ST DAY OF JULY, 2021

In the presence of:-

The accused

Mr. Barongo for the accused person

Ms Limo for state

Ms Gladys - Court assistant

Mr. Barongo:-

We apply for certified copies of the proceedings and judgment.

Court:-

Application is allowed.

SIGNED

S.M GITHINJI

JUDGE

1/7/2021