



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL CASE NO. 8 OF 2015

REPUBLIC.....PROSECUTION

VERSUS

MUTUNGA MBINDYO KIMWELE.....1ST ACCUSED

JAMES NGUI.....2ND ACCUSED

RULING

1. The accused persons are charged with offence of murder contrary to section 203 as read with section 204 of the Penal Code Cap. 63 Laws of Kenya.
2. Particulars being that on night of 21st and 22nd March 2015 at Kasten market, Mbuvu Sub-Location, Mbuvu Location of Mwingi East Sub-County within Kitui County, jointly murdered Nzau Nzui.
3. The accused persons pleaded not guilty and matter went into trial.
4. The prosecution called 9 witnesses. None of the witnesses witnessed the killing of the deceased. The only incident reported between accused 1 and deceased was a bar at Kasten market where PW2 Teresia Nduku Kilonzo separated a fight between deceased and accused 1 at about 10.30pm.
5. The two were drunk before quarreling and exchanging blows i.e. fist fight according to the witness. She asked them to go home. They each left on his own and the witness remained working upto 11pm when she closed the bar. The incident was witnessed by PW4 Richard Mati Musya.
6. In the morning next day at 7am she received call from one Joseph Mutisya who informed her that he found deceased laying down beaten. She went to the scene and found him lying down with injuries and naked. There was crowd of people at the scene. He was still alive. The police were called and they took the victim to the hospital. She learned later that he died. She did not know who attacked the deceased after he left the bar.
7. PW1 the father of deceased also learned via a call by his son that the deceased had been found lying beaten and naked. He proceeded there with his wife PW6 Anne Kalunda. They saw him oozing blood from the mouth. Police came to the scene and took him to hospital. He died later as he underwent treatment in Mwingi Hospital. Him and his wife PW6 didn't know who injured their son.
8. PW3 stated that on the material night while with PW5 he saw the 2 accused persons between 1am – 2am by roadside 100m from where deceased was to be found lying injured. He did not see the deceased and he could not connect the 2 with the attack of the deceased.
9. PW7 Simon Syengo Mati on the morning of 22/3/2015 at 6am found victim lying on the ground at Kasten Bus Stage groaning in pain. He never knew who attacked the deceased.
10. PW8 was called by PW7 who told her of how he found victim lying at Bus Stage injured and naked. She proceeded to the scene and saw him in a state where he was breathing but not talking.
11. PW9 was the investigating officer who produced the postmortem and stated that the report of attack was reported but were still investigating the incident.
12. The court is called to determine whether the accused persons have a case to answer. The prosecution is bound to prove a prima facie basis that the ingredients of murder to the effect that; the fact that the death occurred. That the same was caused by unlawful act of the accused

persons and that the same was exacted with malice aforethought.

13. Once a prima facie basis the said elements are established, then the accused persons can be put on their defence to defend themselves.

14. The first element is not contested. The postmortem produced by PW9 indicated that the victim died of severe chest injuries and head injuries attended by fracture of scalp hematoma with brain confusion due to multiple blunt force trauma to the chest and head which inflicted fatal injuries. Thus, the prove of fact of death was proved beyond reasonable doubt.

15. The contest is as to who did inflict the aforesaid injuries. First the entire prosecution's case exonerates accused No. 2. The only person who has been mentioned is accused No. 1 who was according to PW2 and PW3 fought at a bar with the deceased before separation. The 2nd accused and deceased had a brief encounter where they exchanged blows before separation and they went away each on his own way. No other evidence connects the 2 constant encounters thereafter.

16. PW3 and PW5 narrate that they saw accused 1 and 2 about 100m to the scene on material night at 1am – 2am where the victim was to be found in the morning. PW3 and PW5 did not see the victim nor do they connect the attack to the two. The exchange of blow of accused 1 and victim at the bar did not inflict the injuries disclosed in the postmortem. They were separated without notable injuries. The injuries in the postmortem were inflicted elsewhere not in the course of the exchange of the blows (fist fight) by the 2.

17. The circumstantial evidence does not put the 2 accused persons in circumstances to point the 2 as the perpetrators of the crime charged. The fight of the 2 was stated to be a common bar brawl arising between 2 drunkards with no motive disclosed.

18. After separation the 2 went each on their way. This was between 10.30pm and 11pm. Anybody could have attacked the victim.

19. The court finds that there is no prima facie case established to warrant the 2 accused persons on their defence.

20. Thus, I make the following orders: -

i The accused persons are acquitted and to be released forthwith unless otherwise lawfully held.

DATED, DELIVERED AND SIGNED AT GARISSA THIS 2ND DAY OF APRIL, 2020.

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C. KARIUKI

JUDGE