



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei - J

CRIMINAL (MURDER) CASE NO. 45 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

ANTHONY KYALO NDAKA.....1ST ACCUSED

MICHAEL KITHEKA MUTUA.....2ND ACCUSED

JUDGEMENT

1. Both accused herein **Anthony Kyalo Ndaka** and **Michael Kitheka Mutua** were charged jointly with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars are that on the 18th day of May, 2015 at Iiaani Market, Iiaani Sub-Location, Kivaa Location in Masinga Sub-County within Machakos County jointly with another not before the court murdered **Onesmus Kisuna Munuve**.

2. The prosecution called ten (10) witnesses in support of its case. **PW.1** was **Michael Kimanathi Wambua** who stated that on the material date while at his Migingo Island bar within Iiaani market, the deceased herein who had been his regular customer sauntered in and requested to be served and was duly served with his regular beer brand. After a short while a certain lady named Nduku joined him and requested him to join her at her place whereupon the deceased informed her that he would join her later on. It was his evidence that the deceased later left his bar in company of the said lady and that he was surprised to find the deceased the following day lying down with injuries and who informed him that he had been injured by one Kyalo. On cross-examination, he confirmed that he did not witness the incident.

3. **Anastacia Kathini Munuve (PW.2)** is the wife of the deceased. She stated that earlier on her husband had travelled to Matuu Town to look for money with which to pay school fees for the children and that he later arrived home only to claim that he had lost his money while drinking at Mombasa Raha bar and suspected the proprietor one Nduku to have been responsible and that he had visited the said bar on the material date to confront her over the lost money. Her husband however did not come home that night and was shocked the following day to learn that he had been attacked. She rushed to the scene outside Mombasa raha bar and found him bleeding profusely from the nose and who informed her that he had been attacked by the two accused persons. She assisted him to Matuu hospital where he passed on. On cross – examination, she confirmed that the deceased used to drink alcohol excessively and that she did not witness the incident.

4. **Kitonyi Mwanzui (PW.3)** is a brother to the deceased. He stated that on learning that the deceased had been attacked, he rushed to the scene and found that he had injuries and who informed him that the two accused persons were responsible. He assisted him to hospital and later participated in the post mortem examination of the body.

5. **Zipporah Ndinda Munyao (PW.4)** testified that she saw the two accused persons pushing the deceased to the ground outside Mombasa Raha bar. She stated that she saw the 1st accused kicking the deceased before he was joined in by the 2nd accused. On cross – examination she maintained that she saw the two accused persons attacking the deceased and that she had come to court to give the truth and was not fabricating evidence.

6. **No.36358 PC. Mohammed Isoka (PW.5)** testified that he was on standby duties when the wife of the deceased reported the deceased had been assaulted and he rushed to Kikumini dispensary where he found the deceased with injuries and who implicated the accused persons as his assailants.

7. **Joseph Kyalo Makau (PW.6)** who was having a drink at Mombasa Raha bar on the 18/05/2015 in the company of the two accused persons and two other patrons when a fight arose between the deceased and the 1st accused. He stated that it was the 1st accused who kicked off the fight by slapping the deceased. He stated that he together with the other patrons intervened and managed to assist the deceased who

was then visibly drunk to reach outside the bar where they placed him there and returned to the bar. He later witnessed the 1st accused stepping on the deceased's stomach and head before a police officer who was within the scene intervened and ordered him to leave the drunken deceased. He added that he found the deceased still lying outside Mombasa Raha bar the following day and bleeding from the mouth. On cross – examination, he stated that he found the deceased in company of both accused taking alcohol. He also stated that he was surprised that the 2nd accused was charged yet he had teamed up with him to escort the deceased outside the bar.

8. Dr. Silvester Maingi (PW. 7) was the Pathologist based at Embu Level Five Hospital. He stated that he had conducted a post mortem on the body of the deceased on the 26/05/2015 where he noted multiple abrasions on the external part of the body which he opined could have been caused by external objects. He noted that both sides of the base of the skull were fractured and that there was internal bleeding in the brain and formed the opinion that there must have been some blunt trauma on the back of the head. His conclusion is that the cause of death was excessive blood loss, head injury due to blunt trauma. He produced the post mortem as exhibit No.1. On cross – examination, he stated that it was not possible to detect the type of weapon used but that the force was blunt. On re-examination, he testified that the deceased fell on the front but got injured on the back by another blunt force trauma.

9. No. 94022905 Cpl Albanus Muia Noah (PW.8) was the then officer in charge Iiaani Ap Post and who stated that on the material date he was at Mombasa Raha bar when he saw the 1st accused attacking the deceased outside the bar. He ordered the bar closed and came the following day and received a report that the deceased had not managed to leave the scene and he rushed there and saw him bleeding from the mouth and he advised his family to rush him to hospital. On cross – examination, he testified that the 1st accused had a disagreement with the deceased. He further stated that the 2nd accused was trying to intervene and help out by preventing the 1st accused from attacking the deceased and was surprised why he had been charged. On re-examination, he stated that upon ordering the bar closed, the deceased and 1st accused dispersed and that he did not know the circumstances that led the deceased to come back to the scene again.

10. No. 59973 Cpl. David Sang (PW.9) was the investigating officer. He stated that upon receipt of the report that the deceased had died while recuperating at his home after coming from hospital, he rushed there and found the body. He had it ferried in a police land rover and proceeded to look for the assailants and managed to re-arrest the 1st accused who was already in police custody. Again, on 1/1/2016 he managed to arrest the 2nd accused. He added that his investigations revealed that the 1st accused and the deceased were lovers to the proprietor of Mombasa Raha bar and that the 2nd accused was a son to the said proprietor. On cross-examination he stated that the 1st accused was the landlord to the proprietor of the Mombasa Raha bar and who had a sexual relationship with the deceased. He also stated that he could not tell if the deceased was further attacked during the night after the bar had been closed for the night.

11. Annah Nduku Mutua (PW.10) was the proprietor of Mombasa Raha bar who stated that on the material date (18/05/2015) the deceased in company of his friends had turned up at her premises and consumed alcohol without paying for the same. She followed them upto to Milingo bar where he confronted him for her money and that he allowed her to keep his bag at her bar as he promised to visit her bar to clear the bill. She testified that the deceased later visited her bar at around 8 p.m and enquired from her as to whether any man had flirted with her and which she denied. She went on to state that she later saw the 1st accused fighting with the deceased outside the bar and that members of public intervened. Due to the fracas she had to close the bar and went away and came back the following day only to find the deceased lying outside her premises and who informed her that the 1st accused had overpowered him the previous night. She confirmed that the 2nd accused who is her son had tried to separate the two combatants. On cross-examination, she confirmed that the deceased had been in the habit of fighting people and insulting them whenever he was drunk. She also confirmed that the deceased was complaining that the 1st accused had been sweet talking her.

12. The prosecution then closed its case. A prima facie case was later established to have been made and that both accused were placed on their offence. They opted to tender sworn testimonies and called one witness in support of their case.

13. Kyalo Ndaka (DW.1) is the 1st accused herein. His case is that on the material date around 9 p.m. he had gone to Mombasa Raha bar to see the proprietor one Annah Nduku Mutua who was his tenant as he needed to be paid rent. He sat at the back of the premises and took a drink as he waited for the proprietor only for the deceased to saunter in and start insulting the proprietor and then extended the insults to him by alleging that he (1st accused) was seducing the proprietor. It was his case that the deceased got hold of his neck and they both scuffled towards the bar entrance where other patrons intervened and separated them and that the deceased was later ejected out of the bar. He denied attacking the deceased who was then too drunk and who fell down and injured himself. He maintained that he had no ill will against him prior to the incident. On cross-examination, he admitted that that he and the deceased had a disagreement and which was witnessed by other bar patrons.

14. Mutua Daudi (DW.2) testified that he was at Mombasa Raha on the material date enjoying a drink and was then seated at the bar counter when the 1st accused arrived and proceeded to the rear of the bar to join the proprietor one Annah Nduku Mutua who happens to be his tenant. He testified that the deceased turned up and demanded to see the proprietor and was directed to the rear of the bar only for the deceased and 1st accused to start fighting and he joined the 2nd accused and other patrons in separating the two combatants. It was then that a police officer who was present ordered the bar closed and everyone was ordered to leave for their homes. He stated that he escorted the 1st accused to his shop; on cross–examination, he confirmed that the 1st accused and deceased had a disagreement and both scuffled. He also added that the 2nd accused did not assault the deceased.

15. Michael Kitheka Mutua (DW.3) is the 2nd accused. His case is that on the material date the deceased enquired from him on the whereabouts of the proprietor who happens to be his (2nd accused's) mother and he referred him to the rear of the bar. It was his case that he heard noise and on rushing to the back of the bar he saw the 1st accused and deceased scuffling and he together with other patrons intervened and separated them and that a police officer who was among the patrons led the deceased outside the bar. He denied assaulting the deceased. On cross – examination, he confirmed that if a fracas took place within the bar then he would take action. He added that the police officer who was one of the patrons ordered for the closure of the bar and everyone to go to their homes.

16. Learned counsels for the parties filed written submissions. Mr. Mwihi for the 1st accused submitted that the prosecution witnesses gave contradictory testimonies and that the alleged dying declaration by the deceased was not corroborated at all by the witnesses. It was also submitted that there was no malice aforethought established against the 1st accused whose defence evidence clearly showed that the 1st accused had first been attacked by the deceased before he pushed him from the separate room he was with PW.10 and that the deceased was escorted out of the bar by patrons. It was also submitted that the evidence established that the 1st accused and deceased had no history of an existing grudge between them and hence no premeditation to kill him and that any involvement by the 1st accused if any was in self defence. Reliance was placed in the case of **Ahmed Mohammed & 5 others –vs- Republic [2014] eKLR** and **Pius Jasunga s/o Akumu –vs- Republic [1954] 21 EACA 331**.

17. Mr. Mwangera for the prosecution submitted that the prosecution has proved all the essential ingredients of the offence namely the cause and death of the deceased, involvement of the accused persons in the crime and finally that the accused had the requisite malice aforethought. He urged this court to find the accused guilty of the offence of murder. Reliance was placed in the case of **Republic –vs- Anthony Nyaga Mutegi [2018] eKLR**.

18. There were no submissions on record by counsel for the 2nd accused.

19. I have considered the evidence presented by the prosecution as well as the defence. I have also considered the submissions by learned counsels. The offence of murder is defined by section 203 of the penal code as:

“Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.” Section 206 of the Penal Code provides as follows:

Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:-

a. an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

b. knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

c. an intent to commit a felony;

d. an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

20. The burden of proof rests squarely upon the shoulders of the prosecution. The three ingredients of the offence of murder which they must establish beyond reasonable doubt under section 203 as read with section 206 of the Penal Code are as follows:-

a. proof of the fact that and the cause of death of the deceased.

b. That the cause of deceased’s death was as a result of the direct consequences of the accused’s unlawful act or omission which is the actus reus of the offence.

c. Proof that the unlawful act or omission was committed with malice aforethought.

21. As regards the first ingredient of the offence, it is noted that the same has been established by the prosecution. The evidence of Dr. Sylvester Maingi (PW.7) is clear that the deceased met his death as a result of assault. The said doctor produced the post mortem report as an exhibit and he formed the opinion that the cause of death was exsanguination (massive haemoperitoneum) and subdural haematoma due to blunt head and abdominal injuries. The doctor noted multiple abrasions on both knees, legs, right elbow as well as fracture of base of the skull. He also noted rupture of intestines and formed the opinion that a blunt object must have been the assault weapon. PW.2 and PW.3 identified the body of the deceased before the autopsy was conducted.

22. As regards the second ingredient, the evidence of PW.4 and PW.6 placed both accused at the scene of crime. According to the evidence of PW.4 she had been working at a nearby hotel when she heard noise from Mombasa Raha bar and on coming out she saw both accused assaulting the deceased. On the other hand, the evidence of PW.6 is that he was at Mombasa Raha bar when a fight broke out between the 1st accused and the deceased and that he saw the 1st accused slapping the deceased and later pursuing him outside where he stepped on the deceased’s head and stomach. It was further the evidence of PW.6 that he together with the 2nd accused had assisted in separating the 1st accused and deceased and that he was surprised to find that the 2nd accused had been charged yet he had not been involved at all in the crime. PW.10 who was the proprietor of Mombasa Raha bar also confirmed that she saw the 1st accused attacking the deceased. PW.6 stated in his evidence that the deceased was his uncle and thus I find he had no reason to implicate the 2nd accused whom he claimed was one of the patrons who assisted in separating the 1st accused from further injuring the deceased. I am therefore inclined to trust the evidence of PW.6 since he was at the scene of crime unlike PW.4 who was about ten metres away and at night. From the evidence of PW.6 and PW.10, I am satisfied that the 1st accused was placed squarely at the scene of the crime whereas the involvement of the 2nd accused appears to be in doubt in view of the fact that the evidence of PW.6 and PW.10 is more believable than that of PW.4 regarding the involvement of the 2nd accused. Indeed the 2nd accused gave an account of himself during the material date and shifted the blame on the 1st accused whom he

confirmed to have scuffled with the deceased. The 1st accused in his sworn defence evidence and that of his witness (DW.2) confirmed that an altercation ensued between him and the deceased leading to a fight. He does not deny the fact of that encounter and the fact that other patrons came to separate him and the deceased. Even though the 1st accused maintains that after being separated he remained inside the bar, the evidence of PW.6 is to the effect that he had pursued the deceased outside the bar and further attacked the deceased on the head and stomach. This left no doubt that the injuries he inflicted on the deceased led to the death as confirmed by the pathologist who conducted the post mortem and who confirmed that the fatal injuries on the head and stomach had led to the death. The 2nd accused though placed at the scene of crime should be given the benefit of doubt so as to leave the 1st accused to be the man responsible for the death of the deceased since majority of the witnesses pointed him out as the assailant. Further, the 1st accused in his defence evidence confirmed that there was a fight between him and the deceased.

23. As regards the third ingredient and hence the unlawful nature of the death, the law presumes every homicide to be unlawful unless it occurs as a result of an accident or is one authorized by law. See the case of **Republic –vs- Boniface Isawa makiod [2016] eKLR** that referred to the case of **Gusambizi Wesonga –vs- Republic [1948] 15 EACA 65** where it was held:

“Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable it must have been caused under justifiable circumstances for example in self defence of property.”

24. The deceased herein was found to have died from severe head and abdominal injuries. The 1st accused in his evidence and that of his witness is that the deceased had hurled insults at him by alleging that he (1st accused) was having an affair with the proprietor of Mombasa Raha bar one Annah Nduku Mutua (PW.10). The said proprietor confirmed in her evidence that the deceased upon finding her in the company of the 1st accused enquired from her whether she was being seduced by another man to which she denied and went about her business of selling alcoholic drinks to her customers. The 1st accused stated that the deceased who appeared too drunk held his neck and that they both struggled towards the main door as the other patrons intervened and separated them and that the deceased was later ejected out of the bar. He maintained that he had no differences with the deceased prior to the incident and thus had no ill will against him. The 1st accused herein seems to suggest that the attack if any on the deceased was not accompanied by any element of malice aforethought and therefore was excusable to some extent.

25. Section 111 of the Evidence Act provides that in criminal case an accused person is legally duty bound to explain of course on a balance of probabilities, matters or facts which are peculiarly within his knowledge. The 1st accused has claimed that the deceased held him by the neck and he thus warded him off leading to the scuffle between them and therefore raising the defence of self defence.

26. In Black’s Law Dictionary , 9th Edition at page 1481:

Self defence is “the use of force to protect oneself, one’s family or one’s property from a family or one’s property from a real or threatened attack. Generally a person is justified in using a reasonable amount of force in self-defence if he or she reasonably believes that the danger of bodily harm is imminent and that force is necessary to avoid this danger.”

27. The defence of self defence is found in section 17 of the Penal Code where it provides that a lawful self – defence exists when (1) *the accused reasonably believes that he or she is in imminent danger of an attack which causes reasonable apprehension of death or grievous hurt.* (2) *the accused reasonably believes that the immediate use of force is necessary to defend against that danger;* and (3) *the accused uses more force than is reasonably necessary to defend against that danger.* In 2nd case does it justify the inflicting of more harm than is necessary to inflict for the purpose of defence? An accused person raising this defence is not expected to prove, beyond reasonable doubt the facts alleged to constitute the defence. Once some evidence is adduced as to make the defence available to the accused it is up to the prosecution opt disprove it. The defence succeeds if it raises some reasonable doubt in the mind of the court as to whether there is a right of self defence. See **Selemani –vs- Republic [1963] EA 446.**

28. It is common knowledge that every human being is wired right to use force to prevail over an attacker or to repel an attack or using reasonable force even if it may lead to death of the attacker. The evidence adduced herein by both prosecution and defence revealed that the deceased was at the time too inebriated having imbibed alcohol for the better part of the day in several bars before arriving at Mombasa Raha Bar and as such he was no match for a serious fight. It also transpired from the evidence that the deceased had been in the habit of hurling insults and picking fights with patrons. On the material date it is not in dispute that the deceased upon finding the proprietor in company of the 1st accused issued insults suggesting that the 1st accused was actually seducing the said proprietor. It would seem to me that the deceased might have been eyeing the said lady proprietor and was thus unhappy to find her in the company of the 1st accused. Indeed, matters of the heart always get those involved to be sentimentally emotional. It seems that the insults made by the deceased had rubbed the 1st accused the wrong way and which explains why he assaulted him. However, all the patrons present at the bar were aghast at the conduct of the 1st accused in viciously attacking the hapless deceased who was too inebriated to even appreciate his circumstances. This fact of deceased’s drunkenness can be explained by the fact that upon being attacked by the 1st accused he lay on the ground motionless outside the bar until the following day when he was escorted to hospital. I am satisfied that the amount of force used by the 1st accused was unjustifiably unreasonable and excessive. Even if the deceased had held the 1st accused by the collar, the same did not warrant the kind of retaliation by the 1st accused herein even if it was in self defence. Granted that the deceased could have hurled unprintable insults at the 1st accused who might have found them to be below the belt and got him hot on the collar, the 1st accused who was then relatively sober was expected to have some thick skin and to withstand the insults and hold his emotions in check bearing in mind that the deceased being a habitual drunkard is wont to rub patrons the wrong way. The amount of force used by the 1st accused was excessive and unnecessary in the circumstances. This would then weaken his claim to self defence. On the other hand the 1st accused’s defence that the deceased had provoked him by the insults merits consideration. Under section 207 of the Penal Code, killing under provocation might lead to reduction of a murder charge to a manslaughter one. The same provides as follows:-

“when a person who unlawfully kills another under circumstances which but for this section would constitute murder does the act, which causes death in the heat of passion caused by sudden provocation as herein defined (in section 208), and before there is time for his or her passion to cool he or she commits manslaughter only.”

29. In the case of **Republic –vs- Andrew Moeche Omwenga [2009] eKLR** the court held the following to be the requirements for provocation to reduce murder to manslaughter:

- a. The death must have been caused in the heat of passion before there is time to cool.**
- b. The provocation must be sudden.**
- c. The provocation must be caused by a wrongful act or insult.**
- d. The wrongful act must be of such a nature as would be likely to deprive an ordinary person of the class to which the accused belongs of power of self-control.**
- e. The provocation must be such as to induce the person provoked to assault the person by whom the act or insult was done or offered.**

30. It is clear from the evidence that the insults made by the deceased infuriated the 1st accused and upon the two coming to an encounter, the 1st accused attacked the deceased who subsequently died due to the injuries inflicted. The evidence also disclosed that there had been no past differences between the 1st accused and the deceased so as to suggest malice aforethought on the part of the 1st accused. I find that both provocation and self – defence are available in the instant case and that the final effect of these defences is that the allegation of malice aforethought has been successfully rebutted. The evidence therefore properly establishes an offence of manslaughter contrary to section 202 as read with section 205 of the Penal Code. Under the provisions of section 179 of the Criminal Procedure Code this court is empowered to convict an accused for a lesser offence for the evidence adduced even though such a charge had not been preferred. The offence of manslaughter is a lesser charge to a charge of murder. The evidence adduced proved that the 1st accused committed the offence of manslaughter while there is doubt about the involvement of the 2nd accused who should be given the benefit of such doubt by being acquitted of the charges.

31. In the final analysis it is my finding firstly that the prosecution has not proved the charge of murder against both accused herein. Secondly that the charge against the 2nd accused herein Michael Kitheka Mutua has not been proved beyond any reasonable doubt and hence he is not guilty of the offence of murder and is hereby acquitted of the charge and to be set at liberty forthwith unless otherwise lawfully held; Thirdly, that the prosecution has proved a charge of manslaughter contrary to section 202 as read with section 205 of the Penal Code against the **1st accused Kyalo Ndaka** beyond any reasonable doubt and who is convicted accordingly of that charge.

Orders accordingly.

Dated and delivered at Machakos this 14th day of October, 2020.

D. K. Kemei

Judge