



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 65 OF 2017**

**FORMERLY MACHAKOS HCCR NO. 06 OF 2015**

**REPUBLIC.....PROSECUTION**

**VERSUS**

**BONIFACE KALI KITAVI.....ACCUSED**

**RULING**

1. **Boniface Kali Kitavi** the accused stands charged with the offence of Murder contrary to section 203 as read with section 204 penal code. The particulars being that the accused on the night of 31<sup>st</sup> December 2014, at Kalamba Village, Kalungu Sub-location in Kibwezi District within Makueni County murdered Musyoki Kaithama.
2. The prosecution called a total of six (6) witnesses. The post mortem report was produced by consent under section 77 of the Evidence Act. The cause of death was said to be “*a severe head injury secondary to assault.*”
3. The case presented by the witnesses is that the deceased was one of the customers who had been attended to, at a bar at Mwatena market. The bar belonged to one Munyao. PW2, **Faith Mwangangi** served the deceased on 31<sup>st</sup> December 2014 at 7.00 p.m. and he left at 9.00 p.m.
4. PW3, **Sabina Faith Musembi** testified that she worked with PW2 in the same bar. That on 31<sup>st</sup> December 2014 she served the deceased with alcohol at around 9.00 p.m. when he walked into the bar. He took the alcohol and left at 9.00 p.m. Both PW2 and PW3 therefore confirmed that the deceased was among the people who had been at the said bar taking alcohol, that night.
5. A watchman, Titus Muthiani Nando who testified as PW1 also confirmed that he had seen the deceased among those who were taking drinks at a bar at Kalamba market. After doing his several rounds at the market and church that night of 31<sup>st</sup> December 2014 he went behind the shops. On inspection using his torch he was able to see a person lying dead with half clothes on. He identified the said clothes. He was too scared to do anything at that moment, and went back to the church and slept. He alerted some people the next morning and the matter was reported to the police. He said he had seen the deceased drinking with one Mutua Kisili.
6. PW4, **Paul Munyao Muli** was the employer of the deceased and all he said was that he had parted ways with the deceased on 31<sup>st</sup> December 2014 at 6.30 p.m. He was surprised when he did not turn up for work on 1<sup>st</sup> January 2015 only to learn of his death the same day.
7. PW2 also confirmed that the accused person had come to the bar and she served him with a sprite and he continued chewing miraa on the veranda. He left between 11.00 p.m. – 11.30 p.m. At around midnight the accused returned having tied his tee shirt on his waist and only wore a vest. His arms had soil on them. He went to the counter direct and washed his hands using water that was in a jug, after which he left.
8. It was PW3’s evidence that on this night at midnight his boss had told her to go outside and look for Boniface Kali Kitavi(the accused). She went but did not find him and she informed her boss about the result. When they were closing the bar, the accused came back and went straight to the counter, took a jug, washed his hands and left. She however did not notify her boss of the accused’s return.
9. PW6, **Fredrick Kitavi** is the father of the accused. He said he was at home when police officers came there with the accused who was under arrest. He opened the accused’s house for them upon their request, and took away his two clean tee shirts. Though in court and marked as MFI 1 & 2 they were never produced as exhibits, since the Investigating Officer never testified.
10. This so far is the evidence before the court. The post mortem report (EXB 1) confirms that the deceased did not die a natural death. The issue is who killed him.

11. PW1, PW2, PW3 and PW4 were all shocked to hear of the deceased's death on the morning of 1<sup>st</sup> January 2015. Mr. Munyao the owner of the bar where the accused and deceased had been served by PW2 and PW3 with drinks never testified. It is therefore not known why he was looking for the accused at around midnight of 31<sup>st</sup> December 2014.

12. Besides being mentioned as having taken a drink, at Mr. Munyao's bar and washing his hands at the counter around midnight, there is no *scintilla* of evidence which has been given to link the accused with the deceased's murder. It was also very irresponsible of the Investigating Officer in this case to fail to testify in order to tell this court why he charged the accused person.

13. In conclusion, I find no *prima facie* case established to make me place the accused on his defence. On my part I find him not guilty and acquit him under section 306 (1) Criminal Procedure Code. He shall be set free forthwith unless otherwise lawfully held under a separate warrant.

Orders accordingly.

**DELIVERED, SIGNED & DATED THIS 4<sup>TH</sup> DAY OF JULY, 2019 IN OPEN COURT AT MAKUENI.**

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**HON. H. I. ONG'UDI**

**JUDGE**