



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CRIMINAL CASE NO. 95 OF 2011**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**JOSEPH WACHIRA NJOKI.....ACCUSED**

**JUDGEMENT**

**Introduction**

Joseph Wachira Njoki, the accused, is charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on 30<sup>th</sup> November 2011 at around 11pm at Ndaragwa Shopping Centre in Ndeiya Location in Kiambu West District (*sic*) he murdered Simon Ngaruiya Thairu, deceased. The accused pleaded not guilty to the charge.

I took over the proceedings in this case after nine (9) prosecution witnesses had testified before my predecessor Hon. Lady Justice Florence Muchemi. I took evidence from four (4) prosecution witnesses and the accused person who was the only defence witness.

**The Prosecution case**

The case for the prosecution is that on 30<sup>th</sup> November 2011, the accused went to Wasafiri Bar in Ndaragwa Market where he found the deceased in company of Bernard Njenga Mungai, PW1, (Bernard), George Kimani, PW6 (George), Stephen Kariuki, PW5 (Stephen), Peter King'ang'i and the deceased Simon Ngaruiya. They were having drinks. Evidence on what exactly happened inside Wasafiri Bar after the accused entered is varied. According to Bernard the accused asked him (Bernard) to buy him (accused) a drink but Bernard told him he had no money. The accused then left the Bar but came back after about 30 minutes. He ordered a drink at the counter but the bar attendant, Sherry Wambui Karanja, PW2, refused to sell to him because operation time was up for the bar. According to George, the accused entered Wasafiri Bar, went to where George was seated and took George's beer. George asked the accused why he did so and the accused insulted him.

Evidence further shows that after the bar was closed, the accused went out. The rest of the patrons also went out through the back door. Outside at the Bar verandah the accused prevented the other patrons from leaving. George pushed the accused away and the accused resisted. This resulted in an altercation between the accused and George. The accused left the scene vowing to return. Shortly thereafter the accused returned carrying a panga. Without uttering a word to anyone, the accused attacked the deceased and cut him with the panga on the left side of his head. The accused then escaped from the scene.

The accused, bleeding profusely, was assisted by Bernard, George and Stephen to his home. They found his mother Elizabeth Muthoni Thairu (Elizabeth) who mobilized her other sons Paul Njoroge Thairu, PW7, and Nganga Thairu, PW8, to take the deceased to hospital. The deceased was taken to Kamangu Dispensary where first aid was administered. He was referred to Kikuyu Mission Hospital. He was however referred to Kenyatta National Hospital where he was admitted. He died on 2<sup>nd</sup> December 2011.

The accused was arrested the following day after the attack and after the investigations were completed, he was charged with this offence.

### **The Defence Case**

The accused who testified without taking oath gave a long story on how he spent 30<sup>th</sup> November 2011. The relevant part of his defence was that he spent the day working at a construction site until the evening when he left; that he went to his home which is situated near Ndaragwa shopping centre and left the shovel he was carrying there; that he went to Wasafiri Bar and took drinks with his friends until 10.30pm when the bar tender told the revelers that the bar operation time was up and that they should leave; that as he was leaving he found George (PW6), Simon Ngaruiya (deceased), David Njenga and Stephen Kariuki at the door; that he told George to allow him to pass but George held him by the collar and asked him where he was going; that George pushed him to a barbed wire which cut him; that he in turn pushed George to the same wire; that both George and the accused started fighting; that Bernard hit him and the fighting intensified with cousins of George and Bernard and the deceased joined in the fight against the accused.

The accused further testified that he managed to grab the shovel and swung it hitting Peter King'ang'i on the hand and the deceased on the head. He managed to escape and went home. He slept until the following day when he was arrested and taken to Tigoni Police Station.

### **Analysis and Determination**

At the close of the case for the defence, the defence submitted that the accused did not intend to kill the deceased; that he was acting in self-defence after he was attacked by the four cousins; that he was provoked into hitting at the attackers. The defence counsel, Mrs. Nyamongo urged the court to set her client free arguing that the prosecution has failed to prove malice aforethought on the part of the accused. The prosecution had not filed submissions by 16<sup>th</sup> December 2016 which was the deadline. By the time of writing this judgement on 3<sup>rd</sup> January 2017 submissions from the prosecution were not in the file.

The law places the burden of proving a criminal case like the one before me on the prosecution. For a murder trial, the prosecution must prove beyond reasonable doubt that the death of the deceased has occurred due to an unlawful act or omission on the part of the accused person before the court. The prosecution must also prove beyond reasonable doubt that the accused person under trial possessed malice aforethought in causing the death of the deceased. Malice aforethought, or the intention to cause the death of the deceased, is defined under section 206 of the Penal Code to include (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 and (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.

It is not disputed that the deceased died. Evidence from the brothers of the deceased, Paul Njoroge (PW7) and Nganga Thairu (PW8), is that the deceased died on 2<sup>nd</sup> December 2011 and that PW8 identified his body to the doctor to perform the post mortem on 8<sup>th</sup> December 2011. The death of the deceased was medically confirmed by Dr. Oduor Johansen (PW13) who examined the body of the deceased. He confirmed that the deceased had a stitched wound on the left side of the face extending from the inner left eye to the left side of the head. Internally, the deceased had a fractured skull on the left side of the head and extensive bleeding in the brain. The cause of death was confirmed to be due to penetrating trauma to

the head. With this evidence it is my finding, and I so hold, that the prosecution has proved the death of the deceased beyond reasonable doubt.

The accused was in Wasafiri Bar on the evening of 30<sup>th</sup> November 2011. He had an altercation with George Kimani and a fight between the two ensued. The prosecution witnesses did not mention that other than George the rest of them joined in the fight against the accused. The accused said this is what happened. In cross-examination, Bernard Njenga told the court that he hit the accused with a stick which he normally carries to stop the accused from fighting George and causing trouble. Although the accused said all the five joined in to fight him there is no evidence to show that the accused had sustained any injuries after the fight. The accused is said to have run to his home nearby and to have returned to the scene with a panga which he used to cut the deceased without talking to anyone. He then ran away after the assault.

I have considered the entire evidence. If indeed all the five, that is the three brothers, their cousin the deceased and Peter Kingangi had attacked the accused as he claims and beaten him senseless as submitted by his counsel, he would have sustained injuries. From the evidence he seemed to have provoked the other group of brothers and cousin and their friends as testified. He also admits to have picked a shovel and swung it around. He made a conscious decision to leave and go to pick a weapon. He ought to have gone home and sought help yet he did not do so. He returned to the group and attacked the deceased. Although the accused said he hit Peter Kingangi on the hand there is no evidence of any other person injured by the accused.

I have however considered that George Kimani pushed the accused and that Bernard Njenga hit him with a stick. This must have prompted him to take revenge on the brothers. Unfortunately he attacked the deceased who according to the evidence did not attack the accused. I have no doubt in my mind that the accused attacked the deceased with a weapon that caused a sharp penetrating trauma to the head and fracture to the skull. The doctor's opinion on cross-examination is that this weapon could have been a panga. All the witnesses who were present said it was a panga. The accused however said he used a shovel.

My conclusion on this issue is that the prosecution has proved beyond reasonable doubt that the accused attacked the deceased and caused him fatal injuries. As regards malice aforethought, it is my considered view that the prosecution has failed to prove that the accused had formed an intention to kill the deceased. He may have acted in response to having been pushed by George and hit with a stick by Bernard. I find that the charge of murder has not been proved beyond reasonable doubt. I however find that the charge of manslaughter has been proved beyond reasonable doubt. Consequently, I hereby acquit the accused of the offence of murder contrary to section 203 as read with section 204 of the Penal Code. I substitute the offence of murder with manslaughter contrary to section 202 as read with section 205 of the Penal Code. In my considered view the offence of manslaughter has been proved against the accused beyond reasonable doubt and I hereby convict Joseph Wachira Njoki accordingly. It is so ordered.

**Dated, signed and delivered this 19<sup>th</sup> day of January 2017.**

**S. N. Mutuku**

**Judge**