



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIVASHA
CRIMINAL CASE (MURDER) NO. 42 OF 2015

REPUBLIC.....PROSECUTOR

-VERSUS-

SAMUEL WAMAIGA MWANGI.....1ST ACCUSED

SAMUEL MUGWE NUNGARI.....2ND ACCUSED

J U D G M E N T

1. This is yet another typical case of the many senseless killings that take place in the ubiquitous beer dens, both licensed and unlicensed, that operate in this county and elsewhere. The facts of the case were that the deceased traded in drawings or some sort of art. He resided at Guard village Engineer. On the night of 14th June 2015 he was at a bar christened “**Guard Bar**” operated by one **Charles Muiruri Mwangi (PW4)**, who also employed two ladies **Mary Wambui (PW2)** and one **(Lillian) Njeri** as bar attendants. There were several patrons at the bar on the material night, including **Moses Wangunyu Muchoki (PW1)**, **Stephen Gatuma Mwangi (PW6)** and the deceased, **Kamau Njoroge Kimani**.

2. The 1st and 2nd Accused herein were also drinking at the bar, although it seems that that former was a brother of **PW4** and also worked there. The bar closed at about 10.30pm. On the next day, the body of the deceased was found lying on a path some 30 feet from the bar. It had a deep stab wound on the upper back. Police led by **CIP Paul Kipkurui (PW7)** visited the scene and commenced investigations. **PW1** and the two Accused were among those placed in custody during investigations. Eventually the two Accused were charged with Murder contrary to Section 203 as read with 204 of the Penal Code. The information states that on the 14th day of June 2015 at Guard Village, Kitiri Location, Nyandarua South District within Nyandarua County, they jointly murdered **Kamau Njoroge Kimani**.

3. It was the prosecution case that on the material night, the deceased caused an incident as the bar was closing. He was involved in an argument with the two Accused, allegedly because, he tried to take a glass of beer with him; that he threw a beer bottle at the 1st Accused before fleeing. The bottle cut the 2nd Accused. It is the prosecution case further that the 1st and 2nd Accused pursued the deceased and on catching up, the 2nd Accused punched the deceased, even though the said Accused also had a knife. That **PW1** who also followed the two Accused persons, separated the fight and the men parted ways. The body of the deceased was discovered close to the said scene on the next morning. Results of the post mortem examination revealed that death was caused by a deep penetrating wound on the back which resulted in a penetrating injury to the spleen.

4. The two Accused when placed on their defence gave unsworn statements. The first Accused said he worked at Guard Bar operated by **PW4** and that after taking the day’s accounts on 14/6/2015 he retired to

bed. He was arrested on the following day. For his part, the 2nd Accused made a statement, to the effect that, on the material night he was at the bar in question until closing time then he went home. He was informed on the next day that a person had been murdered.

5. There is no dispute that the Accused persons were at the bar in question on the material night and that they stayed there until closing time. That on the next day, both were questioned regarding the murder of the deceased herein. The cause of and death of the deceased on the material night is also not disputed. The injury causing death is well documented in the post mortem report by **Dr. Maingi (PW5)**.

6. The court must determine whether of malice aforethought, the accused persons jointly inflicted the fatal injuries on the deceased. Firstly there is evidence supported by the bar owner **PW4**, the bar attendant **PW2** and **PW1** an eye witness who earlier had accompanied the 1st Accused to the bar, that the deceased was in the bar in question. Both **PW4** and another patron (**PW6**) seemingly left the bar early on in the night.

7. Before then, there had been another drunken brawl involving a patron identified as **Kamau Gituku** who was allegedly armed with a knife, and **PW6** over the bar maid **Njeri**. **PW4** said he disarmed the said **Kamau Gituku** and retained the knife. The said Gituku subsequently left the bar. Later, **PW6** left with **Njeri** who it seems was the object of the initial brawl. The second brawl therefore occurred at closing time when the two Accused on the one hand quarreled with the deceased concerning a glass of beer. Although it seems that the quarrel started between the 1st Accused who at the time had a knife, and the deceased, the 2nd Accused joined in when a beer bottle hurled by the deceased at the 1st Accused caught and cut the 2nd Accused.

8. From the evidence of **PW1** regarding the scene where the actual assault took place, it is the 2nd Accused who had the knife, but pounded the deceased with fists. During cross-examination, **PW1** admitted that he was initially arrested over the scuffle but released after recording his statement. Concerning the knife, he stated in cross-examination:

“I and accused are friends of same village and also age mates. All of us were together that night. Prior to the incident there was no quarrel between us. But when deceased threw a Guinness bottle, Mugwe (Accused 2) chased him because the bottle hit him. Accused 1 had a knife and walked slowly. I followed. Mugwe was hitting deceased with fists. Accused 1 stood by and did not assault the deceased. I intervened and we went away. Even deceased got up to go home. I did not know deceased sustained injury. His body found on road but not exact spot. It is near spot of incident of previous night. I left scene with Accused 1 and Accused 2. Accused 2 had knife. As far as I know there was only one knife. Yes I was arrested as suspect to the murder on 17/6/2015 from my home and released after 16 days.”

He proceeded to express surprise that the knife previously with the 1st Accused was in the possession of the 2nd Accused at the scene of fistfight.

9. **PW2** in her evidence largely corroborated the testimony of **PW1**. And though she said she did not see the 1st Accused armed with a knife, she confirmed that a knife had been taken from the earlier combatants at the bar. She did not know where it was kept by **PW4**. She also heard, soon after she got to her own room “noises” of what sounded like drunken people in the neighbourhood and therefore did not bother.

10. During its cross-examination of witnesses, the defence introduced to the prosecution witnesses the possibility that one **Njehia** whose wife had been ‘snatched’ by the deceased was a possible murder culprit. However the witnesses denied seeing **Njehia** at the bar on the material night, even though **PW7** initially questioned him also. Thus, it would seem from the evidence that the last persons to see the deceased alive were the two Accused, **PW1** and **PW2**.

11. As indicated, the evidence by **PW1** and **PW2** is consistent in major respects. I have considered and dismissed the possibility that **PW1** was himself an accomplice in the murder. While **PW2** also exonerated

him, there was no evidence to show that beyond his attempts to separate the combatants he was one of them himself.

12. Regarding the definition of an accomplice, the Court of Appeal stated in **Antony Kinyanjui Kimani -Vs- Republic (2011) KLR (Criminal Appeal 15/2007)** that:

“What legally constitutes an accomplice is not defined in our statutes but section 20 of the Penal Code makes every person who counsels or procures or aids or abets the commission of an offence, a principal offender. Section 396 of the Penal Code also defines an accessory after the fact but it does not cover a person who merely fails to report a crime. In the case of Watete v Uganda [2000] 2 EA 559, the supreme court held that “in a criminal trial a witness is said to be an accomplice if, inter alia, he participated as a principal or an accessory in the commission of the offence, the subject of the trial”, The same definition was restated by the same court in the case of Nasolo v Uganda [2003] 1 EA 181 where the court further stated:

On the authorities, there appears to be no one accepted formal definition of “accomplice”. Only examples of who may be an accomplice are given. Whether a witness is an accomplice is, therefore, to be deduced from the facts of each case.

In Davies of Director of Public Prosecutions (supra), the House of Lords said at 513:

On the cases it would appear that the following persons, if called as witnesses for the prosecution have been treated as failing within the category: (i) on any view, persons who are participes criminis in respect of the actual crime charged, whether as principals or accessories before or after the fact (in felonies) or persons, committing, procuring or aiding and abetting (in case of misdemeanors).”

13. However even if **PW1** was treated as an accomplice, his evidence appeared credible and was corroborated by the evidence of **PW2**. Indirectly, it is also corroborated by other witnesses such as **PW4** and **PW6** as regards the presence of a knife at the bar, and further by the medical evidence of the injuries sustained by the deceased. Further the sketch plan of the scene of murder, drawn by **PW7** confirms that the deceased died within metres of the bar.

14. The Court of Appeal for Eastern Africa in the case of **Republic -Vs- Ndara s/o Kariuki & 6 others (1945) 12 EACA 84, at Page 86** prescribed the correct approach in dealing with accomplice evidence as follows:

“A point which is sometimes lost sight of in considering accomplice evidence is, that the first duty of the court is to decide whether the accomplice is a credible witness. If the court, after hearing all the evidence feels that it cannot believe the accomplice it must reject his evidence and unless the independent evidence is of itself sufficient to justify a conviction the prosecution must fail. If however, the court regards the accomplice as a credible witness, it must then proceed to look for some independent evidence which affects the accused by connecting or tending not connect him with the crime. It need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime. But in every case, the court should record in the judgment whether or not it regards the accomplice as worthy of belief.”

15. The Accused in their defences admitted their presence in the bar until closing time, but the implied assertion that nothing untoward occurred, cannot be believed. Piecing together all the strands making up the prosecution evidence, it seems to me that there was a quarrel followed by a fight between the two Accused and the deceased as the bar closed. Although the immediate cause may well have been a glass of beer, it is very likely that the 1st Accused or both of them had an eye on the barmaid **PW2**. And ditto the deceased. Little wonder that **PW2** claimed that the 1st Accused first walked her to her room that was close to the bar after she closed down.

16. I believe the evidence by **PW1** that it is the 1st Accused who first had in his possession the knife, which in the circumstances herein must be the same one **PW4** had earlier taken from the man identified as **Gituku** in the first evening brawl. **PW4** did not account for the knife, stating in one breath that he took it to the Officer In-charge of station (**OCS**) and in another that he took it home. When the brawl between the 1st Accused and the deceased first broke out the 1st Accused had the knife. However it is the 2nd Accused who chased and caught the deceased because a bottle thrown at the 1st Accused caught and cut the 2nd Accused. This latter Accused was in possession of the knife at a later stage and was at the time punching the deceased. The 1st Accused was also present at the scene.

17. I believe that in the melee described by **PW1** the deceased was stabbed by one of the two men and also punched. The injury on his upper back was a deep one that penetrated his rib cage and went through the spleen. I do not doubt that the said injury was caused by an object such as a knife. On the question of common intent, it is evident that the two Accused “took on” the deceased and the brawl turned physical at a scene close to the bar, and on the next day, the deceased’s body was discovered not far therefrom.

18. Regarding common intent, the Court of Appeal in **David Opedhi Oima -Vs- Republic [2014] eKLR** wherein the decision of **Njoroge -Vs- Republic [1983] KLR 197** was cited. The Court stated that:-

“If several persons combine for an unlawful purpose and one of them in the prosecution of it kill a man, it is murder against all who are present whether they actually aided or abetted or not provided that the death was caused by the act of someone of the party in the course of his endeavours to effect the common assault of the assembly.....Their common intent may be inferred from their presence, their action and the omissions of either of them to disassociate himself from the assault.”

19. Reviewing all the evidence before me, I am satisfied that the two Accused jointly attacked and occasioned the deep stab wound on the back of the deceased that caused his death. As to whether the action was accompanied by the necessary *mens rea*, I have considered the circumstances of the stabbing. Both Accused and the deceased had been drinking for several hours before the fight broke out. There was no previous animus between them, and seemingly, there was some rivalry between them for the attention of the lady bar attendants, which may have intensified as the bar closed down. The deceased succumbed to one stab wound, albeit severe.

20. In my considered view, there is material tending to negate the existence of malice aforethought on the part of the two Accused. This is therefore a proper case in which to make a finding that the prosecution evidence has established a lesser charge of Manslaughter contrary to Section 202 as read with Section 205 of the Penal Code. I find such charge proven beyond reasonable doubt against the two Accused and will convict them accordingly.

Delivered and signed in Naivasha this **16th** day of **March, 2017**.

In the presence of:-

Mr. Mutinda for the DPP

Mr. Mburu for the Accused

Accused – present

Court Assistant – Barasa

C. MEOLI

JUDGE