



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL CASE NUMBER 68 OF 2014**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**BENSON NJUGUNA KAMAU.....ACCUSED**

**JUDGEMENT**

Benson Njuguna Kamau, the accused in this case, is charged with the murder of Paul Nyamweya Nyamwamu contrary to section 203 as read with section 204 of the Penal Code. The offence is alleged to have been committed on 23<sup>rd</sup> July at 2014 at Mwiki Mutirithia Area in Kasarani District within Nairobi County. The accused denied committing the offence. He is represented by the firm of M/s Ekin & Company Advocates.

The prosecution called a total of eight witnesses in support of its case. PW1 Peter Kinyanjui received information about an injured man on 24<sup>th</sup> July 2014 at 10.30am. He was the village elder of Mwiki Village within Kasarani. He went to the scene and found the deceased lying on the ground covered with a blanket. He lifted the blanket and saw that the person was not dead but was bleeding on the head. According to PW1, the deceased could not talk. PW1 says he was shown the accused and informed that he is the one who had injured the deceased.

PW2 is Elijah Abusa Nyamwamu brother to the deceased. He testified that he received information on 27<sup>th</sup> July 2014 while he was in Eldoret that his brother the deceased was sick. He called his sister Dorothy Kwamboka Nyamwamu, PW3, to assist in taking the deceased to hospital. PW2 also gave Dorothy the telephone number of Thomas Munyendo, PW4, said to be deceased's friend and told to contact him.

Dorothy confirmed receiving a call from her brother Elijah from Eldoret about their brother, the deceased. She told the court that she was given a telephone number of Thomas and told to contact him. She confirmed calling Thomas on 27<sup>th</sup> July 2014 and asking him to place the deceased in a taxi and take him to Kenyatta National Hospital where Dorothy would meet them. She testified that Thomas did as asked and they met at the hospital; that the deceased could not talk; that he was admitted in hospital but died the following day.

The evidence of Thomas is that he received information on 24<sup>th</sup> July 2014 that his friend the deceased had been assaulted and that he went to the residence of the deceased where he found him injured. He testified that the deceased told him that he had been assaulted by one "Ngui" a nickname used to refer to the accused. Thomas said the accused was known to him by that nickname. Thomas said he did not know the accused by any other name. He said that he did not see any visible injuries on the deceased. He said that he took the deceased to Mama Lucy Hospital where he was treated and released to go home but his

condition deteriorated; that Thomas called his relatives and informed them; that he was told to call Dorothy sister to the deceased which he did and they agreed to meet at Kenyatta National Hospital. Thomas said the deceased could talk on the day of assault but could not talk by the time PW1 arrived.

Dr. Joseph Ndung'u, PW5, examined the body of the deceased on 30<sup>th</sup> July 2014 at Kenyatta Hospital Mortuary and found a bruise on the right frontal region of the scalp and a laceration on the right medial angle of right eye measuring 2 cm long. Internally the deceased had haematoma of the front region and right orbital bones, a laceration of the right lobe of the brain with the whole brain was covered with yellow pus and the brain signs of raised intracranial pressure. The doctor concluded that the deceased died as a result of post traumatic meningitis secondary to orbital fracture due to blunt force trauma to the head.

Paul Thuo testified as PW6. He lived with both the accused and the deceased in his house. Both were his friends. He told the court that he was in his house sick on 24<sup>th</sup> July 2014 around 10.00 pm when the accused and the deceased came home. Both were very drunk. They started arguing over money with the accused claiming that the deceased has stolen his money. Thuo told them to go out as they were making noise to him. Thuo told the court that he lived in a single room measuring 10 feet by 10 feet. He said the two went out and shortly thereafter he heard a bang as if something had been hit or fallen. He went out to see what was happening. Using light from the buildings nearby, Thuo saw the deceased on the ground and the accused holding a block of stone intending to hit the deceased with it. Thuo told the accused not to hit the deceased and the accused obeyed and placed the stone on the ground. Thuo said he found the deceased with an injury and he thought the accused may have hit him before he, Thuo, went out. Thuo said there was a third person known as Mwangi who was a friend of the accused and that Mwangi was attempting to stop the accused and the deceased from fighting. Thuo told the accused to take the deceased to hospital but they found the nearest clinic closed and went back.

IP Nicholas Wambugu Mucheru, PW7, took photographs of the body of the deceased at Kenyatta Hospital Mortuary. He produced the three photographs as exhibits 3(a), (b) and (c).

CPL Patrick Mwaura, PW8, investigated the case. He took into custody the accused that was taken to Mwiki Police Station by members of public on 24<sup>th</sup> July 2014. He also visited the scene and met Thuo who narrated to him what had happened. He collected the block of stone allegedly used to hit the deceased. He produced the stone in evidence as exhibit 2. PW8 told the court that he did not find the deceased at the scene but he learned that he had been taken to Mama Lucy Hospital. PW8 further told the court that he received information that the deceased had died on 28<sup>th</sup> July 2014. PW8 also produced the report showing that the accused was fit to stand trial on behalf of Dr. Shako.

This court examined and analysed this evidence. It concluded that the accused had a case to answer and placed him on his defence. He testified under oath that on 24<sup>th</sup> July 2014 he had been drinking with the deceased; that when he was going home to the house of Paul (PW6) where he lived with Paul, deceased and Mwangi, after running some errands, he was accosted by the deceased and Mwangi stole his phone, money and driving license; that he went to report at Mwiki Police Station but was told to return in the morning; that he went home where he found Paul who was sleeping and deceased and Mwangi; that he asked them why they had attacked him and demanded that they return his items; that they went outside in order not to make noise for Paul and that Mwangi and the deceased started beating him.

He further testified that PW6 opened the door of his house and Mwangi and the deceased started running away; that the deceased fell on a building stone and was injured; that PW6 told the accused to take the deceased to hospital but they found Ushirika Clinic closed and they returned home. He told the court that they spent the night and that when he woke up he did not find the deceased but later found him in a drinking place. He further told the court that he went back to report to the police about assault and theft but was placed in cells and later charged with this offence.

I have examined all the evidence by the prosecution and the defence. I have also considered the submissions both at the close of the prosecution case and at the close of the defence case. The defence counsel raises issue with contradictions in the evidence of PW1 who told the court that he instructed

someone to take the deceased to hospital while he, assisted by four people, took the accused to the police station. It was submitted that PW4 told the court that he found the deceased bleeding and instructed the accused to take the deceased to hospital. It was submitted that the accused could not have been taken to the police station at the same time be instructed to take the deceased to hospital. It was further submitted that the post mortem form indicates 28<sup>th</sup> July 2014 and 29<sup>th</sup> July 2014 as the dates of death and this is not possible.

Defence counsel questioned the credibility of the evidence of PW6 in regard to the cause of events; that there was no light outside to enable PW6 observe events and that Mwangi, who was mentioned as having been present was not traced to testify; that PW6 was at pains to identify the stone alleged used to hit the deceased and that the Investigating Officer conducted poor investigations. The defence further asserted that the stone produced in evidence is not relevant to the prosecution case and that the case was not proved beyond reasonable doubt for failure to establish malice aforethought.

The prosecution bears the burden of proving that the deceased died as a result of an unlawful act or omission perpetrated by the accused person and that in perpetrating that act or omission the accused had malice aforethought. In other words, the prosecution must prove *actus reus* and *mens rea* on the part of the accused.

According to PW5 the pathologist who examined the body of the deceased the cause of death was due to post traumatic meningitis secondary to orbital fracture due to blunt force trauma to the head. He explained that the yellow pus found on the brain was an indication of meningitis due to the fracture and that meningitis was secondary problem to the trauma the patient has suffered and that it was a complication arising from the fracture. On cross-examination PW5 said the meningitis infection was a bacterial infection and it can affect within two days after the trauma. This in my view confirms the death of the deceased. I am satisfied that the prosecution has proved the fact of death beyond reasonable doubt.

The accused was placed at the scene of the offence. He admits he was at the scene although he claims he was attacked by the deceased and Mwangi. The only witness who was present is PW6 Thuo. He knew both the accused and the deceased. Both were his friends and he had accommodated them at the time because they did not have their own accommodation. He told the two to go out after they started quarrelling inside the house and making noise to him. He said he heard noise of something either falling or being hit and when he went out he found the deceased on the ground and the accused holding a stone ready to inflict a blow on the deceased. He said he cautioned the accused not to hit the deceased and the accused abandoned the idea and dropped the stone.

I have also taken the issues raised by the defence counsel into consideration. My understanding of the evidence on the sequence of events is that on 23<sup>rd</sup> July 2014 the deceased and the accused who lived with PW6 argued while inside PW6's house. The cause of that argument could have been due to allegations that the deceased had stolen the accused's money. Paul, their host and who had been sleeping due to his sickness, told the two to go out because they were making noise. The two left and shortly therefore started fighting outside. PW6 heard the sound of a bang as though someone had fallen or had been hit. He decided to go out and check. He found the deceased on the ground injured and the accused standing over him holding a block of stone. PW6 persuaded the accused not to hit the deceased and the accused obeyed. PW6 told the accused to take the deceased to hospital but they found the nearest clinic closed. They returned and spent the night.

The following day 24<sup>th</sup> July 2014 PW1 found the deceased injured and lying down. The accused was nearby seated. The deceased told him that the accused had assaulted him. He asked some members of public to take deceased to hospital while he, assisted by other four people, took the accused to Mwiki Police Station and handed over to the police. The accused was taken to Mama Lucy Hospital, was treated and released to go home. While at home, his conditions worsened. His relatives were informed. His brother Elijah PW2 was in Eldoret at the time of receiving this information. He telephoned his sister Dorothy, PW3, to take care of the situation. Dorothy called Thomas, PW4, to assist in taking the deceased to Kenyatta National Hospital.

The contradictions alluded to by the defence counsel are in respect of the sequence of events on that day. However, my careful reading of the evidence reveals the sequence of events was as I have explained above. The deceased was injured on 23<sup>rd</sup> July 2014. He was not treated on that day because the clinic to which he was taken by the accused was closed. On the following day 24<sup>th</sup> July 2014 he was taken to the Mama Lucy Hospital by members of public including PW4 Thomas while PW1 and other members of public took accused to Mwiki Police Station. PW4 could not remember the date he took the deceased to Kenyatta National Hospital but he admitted it was the day he met Dorothy. This would be 27<sup>th</sup> July 2014. It would seem therefore that this was done about four days after he was injured.

The only witness who was present when the deceased sustained the injuries was PW6 Paul. He told the court that he did not witness the assault. He testified that when he went out to see what was happening after he heard his friends (accused and deceased) fighting, he found the deceased lying down and accused standing holding a block of stone. He also said that it was possible that the accused had injured the deceased before he, PW6, went outside or that the deceased had fallen and got injured. According to the doctor the cause of death was head injury due to a blunt force trauma. PW6 said the block of stone he found the accused holding did not have blood stains on it. It is therefore not clear that the stone was used to hit the deceased. The stone was not forensically examined to confirm if it had been used on the deceased.

I find evidence lacking to explain what was happening to the deceased in the intervening period between 23<sup>rd</sup> July 2014 and 27<sup>th</sup> July 2014 when the deceased was taken to Kenyatta National Hospital. There is also mention of one Mwangi who was in company of the deceased on 24<sup>th</sup> July 2014. This person was not traced to attend court and testify.

My considered view after taking into consideration of all the evidence is that the prosecution evidence leaves some gaps as to whether the accused is the one who assaulted the deceased and in regard to what happened in the intervening period before the deceased was taken to Kenyatta National Hospital where he died. I have also considered the issue raised by the defence counsel on the date of death indicated on the post mortem report. However, although the post mortem form has 28<sup>th</sup> July 2014 and 29<sup>th</sup> July 2014 as the dates of death, this is an error that is curable under section 382 of the Criminal Procedure Code. It is an error that does not occasion any prejudice on the part of the accused.

My conclusion of the issues before me is that I find that the prosecution has not proved this case, specifically as to who fatally injured the deceased and the issue of malice aforethought, beyond reasonable doubt. I therefore find that the offence of murder has not been proved against the accused beyond reasonable doubt. I also find that a lesser charge of manslaughter has also not been proved in this case. I have no choice in the matter than to obey the law and acquit the accused person for the offence of murder which I hereby do. Benson Njuguna Kamau is hereby acquitted of murder. He is at liberty to enjoy his constitutional right to freedom unless for any other lawful reason he is held in custody. Orders shall issue accordingly.

**Dated, signed and delivered in open court this 2<sup>nd</sup> March 2017.**

**S. N. Mutuku**

**Judge**