**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 20 OF 2015**

**REPUBLIC……………...…………………...……PROSECUTOR**

**Versus**

**BENARD MBUVI……………..…...….........................ACCUSED**

# JUDGEMENT

**BENARD MBUVI,** hereinafter referred as the accused was charged with the offence of murder contrary to section 203 of the Penal Code and punishable under section 204 of the Penal Code. Particulars of the offence, Benard Mbuvi on the 20th day of June 2014 at Kisaju township Isinya District within Kajiado County murdered Benson Kupere hereinafter referred as the deceased.

The accused pleaded not guilty to the charge and particulars hereof. He was represented at the trial by Mr. Musymi advocate while the prosecution as conducted by Mr. Alex Akula for the state.

In order to prove the guilty of the accused the prosecution summoned and examined eleven (11) witnesses:

**Summary of the prosecution case:**

According to the prosecution PW4 Julius Kibet testified that on the day of the incident on or about 6.00 pm he was at twins bar. He was in company of the deceased and another man by the name Andrew. In the course of them enjoying one or two beers for the road, a bottle of beer fell down accidentally. The waiter of the bar by the name Peninah Wangui who testified as PW5 was aggrieved by the incident. This made PW5 to telephone a police officer who in a short while came to twins bar. It is further alleged by PW4 that when the police officer arrived he went to the verandan and got hold each one of them without any reason or explanation. The further evidence from the testimony of PW4 was that this caused some kind of scuffle between them and the police officer. It was further the testimony of PW4 that the police officer pushed the deceased which occasioned him to fall on his head as he hit the ground. Thereafter according to PW4 he left the bar but came back again only to find the deceased lying on the floor bleeding and foam passing out. PW4 decided to inform the deceased brother PW3 Julius Muthensea who came with a motorcycle and took the injured brother to Isinya Hospital. The initial examination by the medical officer at Isinya Hospital according to PW3 referred the deceased to Succuzi Hospital where he died while undergoing treatment on the same day. In cross examination by the defence counsel Mr. Musyimi PW4 admitted that they had taken some beers but not to the extent they were intoxicated. PW4 also denied that they were disorderly and caused a disturbance during that social evening at twins bar. He also told this court that upon reporting the incident to the brothers of the deceased he left them to take over the issue and went to his house to sleep.

In the evidence of PW5 Peninah Wangui who operates twins bar testified that on the material day she had

been informed by one of the workers by the name Judith that there was disturbance in the bar. She saw a young man lying on the veranda and attempts to talk to him did not yield any response. It is that same man PW5 referred as “Shilingi.” PW5 was shown photographs of the scene which she was to identify the verandah where Shilingi, the deceased was lying on that particular night. In cross-examination PW5 told this court that she was not present when the alleged disturbance took place. It was further her testimony that she did not also witness the scuffle between the police officer and the deceased person together with his group.

The evidence of PW6 Doreen Kemunto who was a counter at twins bar on 20/6/2014 when she saw a man lying down on the entrance of the verandah. In the testimony of PW6 the man was later taken away by his relatives but was not aware what had occasioned him to lie down on the ground.

The further case of the prosecution is that of PW7 Moses Mukindila and PW8 George Parantai whose testimony was that of identifying the body of the deceased to the pathologist who conducted the postmortem on 24/6/2014.

PW9 Fredrick Saitoti Soikan a brother to the deceased stated on how he was telephoned regarding his injured brother at a bar in Kisaju. On arrival at the scene PW8 made arrangements with PW3 to take the deceased to Isinya Hospital who was later referred to Succuzi Hospital for further medical treatment. According to PW9 the deceased died while undergoing treatment on 21/6/2014. Following the death of the deceased according to PW3 and PW9 this now became a police case which was reported to Isinya Police Station.

This triggered police officers action as confirmed from the testimony of PW1 Chief Inspector Robert Kibet. PW1 told this court that acting on instructions from the officer incharge he moved to the scene with other police officers. That is where PW1 testified that several witnesses were interviewed who recorded statement on the incident. It was through the information provided PW1 recommended that a charge of murder be preferred against the accused.

According to PW2 Chief Inspector Baraza, the murder evidence and circumstances on the commission of the alleged offence was reported to him by PW3 and PW9 who were in company of other Maasai men. Through this report PW1 and PW2 took the necessary police station which culminated in the indictment against the accused person before court.

PW10 Dr. Kaggia Serah testified on the examination of the deceased body to come up with an autopsy report. On account of the autopsy report the deceased sustained haematoma on the left temporalis/occipital region, right parietal, subdural haematoma on the parietal, cerebral hemisphere, flattening of the gyri. The sulci with urical grooving. The autopsy report was admitted in evidence as exhibit 3.

PW11 PC Obed Balesa the scenes of crime officer who documented the scene of murder and the body of the deceased at the mortuary, the photographs taken processed and developed by PW1 were produced in evidence as exhibit 4 (a-d) together with the certificate in support of the prosecution case.

At the close of the prosecution case the accused was placed on his defence under section 306 (2) of Criminal Procedure Code. In his defence the accused gave a sworn statement. As regards this charge the accused testified that while at AP Post at Kisaju he received a telephone call from twins bar. According to the telephone call a report was made about the second generation alcoholic drinks and also causing disturbance by some patrons in the bar. The accused further said that on arrival at the scene he found some people fighting over some drinks. It was in the course of that some of them ran away but one of them was spotted lying on the floor of the bar. It was the accused explanation that next to where the person was lying he saw along type of stool. The accused alleged that maybe he must have fallen from the said stool. The accused claimed that the person later stood from that floor and walked towards the veranda. The accused further stated that when he saw the deceased he was alive and never to pursue the issue again. According to the accused the other men had ran away and he did not bother with the one who remained behind. He denied all allegations made against him by the prosecution witnesses.

At the close of the trial Mr. Musyimi learned counsel for the accused made detailed submissions. The gist of Mr. Musyimi submission was that the prosecution has absolutely failed to establish the charge of murder beyond reasonable doubt against the accused. Mr. Musyimi further submitted that there are material contradictions to the evidence of PW4 who alleged to shade light on the incident at twins bar. According to Mr. Musyimi the ingredient of malice aforethought and positive identification of the accused as the perpetrator is absent in this case. In support of his submissions Mr. Musyimi relied on the following authorities; ***Republic v Nicholas Onyango Nyolo [2011] eKLR, Joan Chebii Sawe v Republic [2003] eKLR.***

Mr. Musyimi urged this court to resolve the doubt in favour of the accused and enter an order of acquittal.

In a rejoinder to the submissions by the defence Mr. Akula learned counsel for the state submitted that all the eleven (11) witnesses fully supported the prosecution case. Mr. Akula advanced the arguments that all the ingredients of the offence of murder against the accused have been proved beyond reasonable doubt.

In order to buttress the submissions Mr. Akula placed reliance on the following cited authorities; ***Republic v Daniel Onyango Omoyo [2015] eKLR, Republic v Godfrey Ngotho Mutiso [2008] eKLR, Libambula v Republic [2003] KLR 683, Republic v Tubere S/O Ochen [1945] 12 EACA 63, Morris Aluoch v Republic Cr. Appeal No. 47 of 1996.***

The upshot of Mr. Akula submissions was to the effect that the watertight evidence warrants a verdict of guilty and conviction of the accused for the offence of murder contrary to section 203 of the Penal Code.

**Standard of proof:**

It is trite that the prosecution has a duty to prove the guilty of the accused person beyond reasonable doubt. This was clearly stated in the case of ***Miller v Minister of Pensions [1947] 2ALL ER 371 at pg 373-374*** where the court stated interalia:

> **"The proof beyond reasonable doubt does not mean proof beyond a shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable the case is proved beyond reasonable doubt, but nothing short of that will suffice."**

The essential elements of the offence facing the accused which the prosecution must prove beyond reasonable doubt are:

**(a) The death of the deceased person – Benson Kupere**

**(b) That the deceased death was due to unlawful act of omission or commission.**

**(c) That in causing death the deceased had malice aforethought.**

**(d) That in causing the death of the deceased the accused either participated directly or indirectly.**

As stated in the case of ***Republic v Andrew Mileche Omwenga [2009] eKLR:***

> **"It is clear from the definition of murder that an accused person to be convicted of murder, it must be proved that he caused the death of the deceased with malice aforethought by an unlawful act or omission. There are therefore three ingredients of murder which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are:**
>
> **(a) The death of the deceased and the cause of that death.**

**(b) That the accused committed the unlawful act which caused the death of the deceased.**

**(c) That the accused had the malice aforethought."**

In connection with the charge before court it is my duty to consider each of the ingredients vis viz the entire evidence to come up with a finding whether the prosecution has discharged the burden of proof as provided for under section 107 (1) of the Evidence Act Cap 80 of the Law of Kenya.

**(a) The death of the deceased Benson Kupere:**

The death of Benson Kupere is not disputed in this particular case. This is because the prosecution presented the evidence of PW1 and PW2 both police officers who visited the scene when they received the murder report. The visit confirmed that the deceased had suffered physical injuries on the 20/6/2014 which led him to be taken to Succuzi Hospital for treatment. According to PW3 and PW9 who testified as brothers to the deceased. They alluded to the fact of taking the deceased to the hospital after being injured at twins bar where he succumbed to death on 21/6/2014. PW3 and PW0 further were called in to identify the body to the pathologist PW10 before the postmortem. Report by PW10 indicated the death of the deceased as a result of the head injury caused by a brunt trauma.

This ingredient has been proved beyond reasonable doubt.

**(b) The death of the deceased was unlawful:**

Having sufficiently proved the fact of death the prosecution is also required to establish that his death was unlawful. This is what i call the ***actus reus*** of the offence.

Section 213 of the Penal Code defines causing death to include acts which are not immediate or sole cause of the death. The accused would be held responsible for another person's death although his act is not the immediate or sole cause under the following circumstances:

**(a) He inflicts bodily injury on another person and as a consequence of that injury the injured person undergoes a surgery or treatment which causes his death.**

**(b) He inflicts injury on another which would not have caused death if the injured person had submitted to proper medical or surgical treatment or had proper precautions as focus mode of living.**

**(c) He by actual or threatened violence causes such other person to perform an act which causes the death of such person, such an act being a means of avoiding such violence which in the circumstances appear natural to the person whose death is so caused**

**(d) ............**

**(e) His act or omission would not have caused death unless it had been accompanied by an act or omission of the person killed or of other persons.**

In the case of ***Gizambizi S/O Wesonga v Republic [1948] 15 EACA 65*** it is trite that all homicides of another human being are unlawful unless they occur in advancement of execution of a lawful sentence, in defence of property or self where on the latter the principle of reasonable force comes into play.

***Achibord [2016 at pg 19 -122 and DPP v Wesbury [1977] AC 500*** the court observed the following elements as constituting what can be said to be unlawful act:

**(1) A deliberate act which is unlawful i.e. assault.**

**(2) The act is a dangerous act in that it is, from an objective stand prove, one which is a sober,**

**reasonable and responsible person of the perpetrators ages and gender, would inevitably realise is an act which is likely to cause the deceased some physical harm, and**

**(3) The unlawful, dangerous act causes death even though death or harm of any kind is not intended.**

In the present case the deceased was alive on the evening house of 20/6/2014. He visited twins bar for a social evening with his friends who included PW4. As they were partaking the alcoholic drinks according to PW4 one of the beer bottles fell down and broke into pieces. This breakage was apparently reported to the owner PW5. PW4 further confirms that a police officer was telephoned by one of the workers to call and quell the so called disturbance. That is how according to PW4 the accused came in and immediately went to the veranda where they were having a good time.

In the testimony of PW4 the police officer who became the accused pushed the deceased which occasioned him to fall down on the floor of the veranda on his head. The investigation officer PW11 told the court that statement recorded referred to the circumstances of accused being involved in a scuffle with the deceased and other patrons. PW4 confirms that when he managed to free himself from the accused he ran away from the scene. He however returned back shortly only to find the deceased who got injured still lying on the floor of the veranda. This injury by the deceased was occasioned on 20/6/2014. PW3 and PW9 took him to the hospital for treatment. The deceased died in the course of treatment at Succuzi Hospital. The injuries to the head PW10 associated the injuries to blunt trauma. The accused denied that he touched or pushed the deceased at any time while at twins bar. In the testimony of the accused he alluded the fact to the high stool in the bar which the deceased must have suddenly clipped down. The accused however was not clear whether he saw the deceased fall from the height of the stool.

When i weigh the evidence by the prosecution, the accused and submissions by both counsels, I am of the holding that the direct testimony of PW4 pointing at the accused as the one who pushed the deceased and caused him to fall down has not been impeached. I believe the testimony of PW4. He was candid and even during cross-examination he was not shaken in explaining the events of 20/6/2014 at twins bar. On observing the demeanour PW4 impressed me as a honest and truthful witness who had no grudge or reason. There is no evidence that in using force against the deceased the accused was acting in self defence or in defence of property. If indeed there was a fight in the bar as alluded to by PW5 the best the accused could have done is to maintain law and order.

I am satisfied that the ingredient of unlawful acts of assault have been proved by the prosecution.

**(c) The final ingredient requiring proof in a murder charge is that of mensrea.**

This is the neutral element and in law is defined as malice aforethought. Malice aforethought is defined by section 206 of the Penal Code 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 grievious 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 death or grievious harm to some person, whether that person is the person killed or not, accompanied by indifference whether death or grievious injury occurs or not or by a wish that it may not be caused.**

The acts which causes grievious harm are defined under section 231 of the Penal Code. According to the penal code grievious harm includes interalia any person who with intention to maim, disfigure or disable any person or to do some grievious harm to any person ........unlawfully wounds or does any grievious harm to any person by any means whatever or.......is guilty of a felony and liable to imprisonment for life.

The element of malice aforethought in our law has components of an intention to cause the death of another human being or to do grievious harm to any person.

Dealing with the question of malice aforethought several decisions have come up to guide on how to approach the issue. In the House of Lords in the case of ***Republic Hyam [1975]*** it was held that a person who without intending to endanger life, did an act knowing that it was probable that grievioys harm would result was guilty of murder of death resulted.

The intent to kill or do grievious harm may be inferred from the behaviour of the accused. The prosecution has a duty to prove that the accused intended to inflict harm which in fact resulted in the deceased's death (given the possibility that the accused was called in to deal with some kind of disturbance) in the bar owned by PW5. It was in the course the accused came into contact with the deceased as evidenced by PW4.

I am a bit uncertain to conclude that the accused action was accompanied by malice aforethought. In the case of ***Republic v Tubere S/O Ochen [1945] 12 EACA 63*** the court held that the following circumstances can constitute malice aforethought:

**(a) The nature of the weapon used.**

**(b) The part of the body targeted.**

**(c) The manner in which the weapon was used.**

**(d) The conduct of the accused before during and after the attack.**

As far as the present case is concerned i have read the evidence and the documentary exhibits in support of the prosecution case. The following features emerge:

There was no murder weapon involved. The accused was at the scene on request by the owner of the bar. There is no evidence to indicate that the disturbance being referred to involved the deceased and others was violence. What comes out clearly from the prosecution was a broken bottle of beer. The circumstances in which the beer broke were clearly restated in court by PW4. That version was never rebutted by any other cogent evidence directly or indirectly. The injuries suffered by the deceased are traceable to the fall on the floor of the veranda. The fall by the deceased was not accidental. This count has direct evidence of PW4 whose testimony pointed at the accused. It was the action of pushing the deceased which made him fall down. According to PW4 the deceased fell down on his head. This was confirmed by the postmortem report. The external injuries were mainly on the head. There is no dispute that was the vulnerable part of the body. The accused did not seem to bother to assist the deceased.

The basis of my finding flows on the circumstances of this case which i decipher as follows:

The accused in this case was on duty at the administration police camp at Kisaju. In the course of duty he receives a telephone call about a disturbance at twins bar which required a police officer to visit and maintain law and order. In an answer to that call of duty the accused leaves the police camp for the scene where he was shown some young men allegedly the center of the disturbance. The action taken by the accused on arrival at twins bar is well choreographed by PW4 one of the young men who caused the owner of the bar to call for assistance of the accused. The key evidence by PW4 was to the effect that accused moved to their location and made an attempt to arrest them. In communication with the complainant that is when he broke wood as per PW4 naratted that accused pushed one of them to the wall occasioning his head to come into contact with that surface.

What followed was the deceased sustaining physical harm which disabled him completely his movements. That action by the accused started a painful journey of the deceased who was initially rushed to the hospital for treatment. However weighing the evidence by the prosecution its entirely i am satisfied that the offence of murder has not been proved. The evidence availed however proves the offence of

manslaughter. As the testimony of PW1, PW2, PW3, PW9 and PW10 the deceased died as a result of the injuries while undergoing medical treatment.

The critical questions to be answered in relation with malice aforethought is whether the intention to cause the death or intention to cause grievious harm does exist the in set of the circumstances of this case. My take from the evidence placed before me does not respire confidence that the accused was manifested by malice on his actions. What is more probable and established beyond reasonable doubt is the unlawful act or omission on the part of the accused. The law in respect to this can be clarified on the case of ***Republic v Adomako [1994] 3 ALL ER 79*** where the court observed as follows on a four stage test for negligence manslaughter:

> **(a) The existence of a duty of care to the deceased.**
>
> **(b) A breach of that duty of care which**
>
> **(c) Causes or significantly contributes to the death of the victim and**
>
> **(d) The breach should be characterised as gross negligence and therefore a crime.**

In the present case the accused employed by the Kenya government as Administration Police Officer owes a duty of care to maintain law and order whenever a situation calls for that intervention. It is this duty of care which made the owner of twins bar to call for assistance from the accused. What was required of the accused was to act within the standard operating procedure of the National Police Service to take reasonable step in enforcing the law. What arose was an omission and unlawful act which resulted in the deceased sustaining physical harm.

The accused with the special skills and knowledge of a police officer would have foreseen the danger that could ensue in pushing the deceased against a hard surface as it happened in this case. It is for this reason i rule out that the key element of malice aforethought was proved beyond reasonable the accused person in this case. The prosecution evidence both direct and circumstantial paints a picture of case proven of the offence of manslaughter. This resonates well with the principles in the persuasive authorities which i find useful in deciding the case against the accused.

As stated in the case of ***DPP v Jones [1977] AC 50 and DPP v Newberry*** the accused is held liable for the offence of manslaughter where:

> **(a) An accused was guilty of manslaughter if it was proved that he intentionally did an act which was unlawful and dangerous and that act in advertedly caused death and.**
>
> **(b) That it was unnecessary to prove that the accused knew that the act was unlawful or dangerous; that the test was the objective test namely whether all sober and reasonable people would recognize that the act was dangerous and not whether the accused recognized its danger.**

The mensrea should be appropriate to the unlawful act. ***Republic v Lamb [1967] 51 Cr. Appeal 417*** the court held:

> **"On unlawful act causing death of another could not simply because it was unlawful act render a verdict of manslaughter lieu table for such a verdict in exorably to follow the unlawful act must be such that all sober and reasonable people would in veritably recognize it as an act which must subject the other person to at liase the risk of some harm resulting. Therefore from albeit not serious harm."**

I am satisfied that the prosecution had evidence on how Benson died that evidence of PW4 stands unchallenged. I do not believe the defence testimony that the deceased fell from a height that defence has been diminished by the testimony of PW4. The testimony by PW4 in the first instance falls within the

principles in the cases of ***Abdalla Wendo v Republic [1953] 20 EACA 166*** and ***Roria v Republic EA 573*** for the legal proposition that it is trite a fact maybe proved by the testimony of a single witness save for the court to satisfy itself that all the circumstances it is safe to act on such evidence on identification. In this case though the testimony of PW5 and PW6 being the owner and employee of twins bar corroborates the evidence of PW4 that the accused had been telephoned to visit the bar to quell a creating of the disturbance scene.

The direct evidence of PW4 coupled with the circumstantial evidence of PW5 and PW6 places the accused positively at the scene. This was succinctly decided in the case of ***Abanga alias Onyango v Republic Cr. Appeal No. 32 of 1990 UR*** where the Court of Appeal set out the principles to apply on circumstantial evidence in the following passage:

> **"It is settled law when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:**
>
> **(i) The circumstances from which an inference of guilty is sought to be drawn, must be cogently and firmly established.**
>
> **(ii) Those circumstances should be of adequate tendency unerringly towards guilt of the accused.**
>
> **(iii) The circumstances taken cumulatively should form a chain so complete that there is no escape from the inclusion that within all human probability the crime was committed by the accused and none else."**

These principles are in favour of the prosecution case which touches on circumstantial evidence against the accused. There is a nexus between the presence of the accused at the scene and the fatal injuries inflicted upon the deceased.

In the result then i am satisfied that the charge of murder contrary to section 203 has not been proved beyond reasonable doubt but elements of manslaughter contrary to section 202 of the Penal Code do exist and proved by the prosecution as required by law established.

I therefore substitute the offence of murder with that of manslaughter and do enter a verdict of guilty contrary to section 202 as read with section 205 of the Penal Code and convict the accused accordingly.

**Dated, delivered and signed in open court at Kajiado on 2nd day of May, 2017.**

**..........................**

**R. NYAKUNDI**

**JUDGE**

**Representation:**

Mr. Musyimi for accused present

Mr. Naikuni for the family present

Mr. Akula for Director of Public Prosecutions present

Mr. Mateli Court Assistant

Accused present