



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL CASE NO. 44 OF 2012**

**REPUBLIC.....RESPONDENT**

**VERSUS**

**F N G.....ACCUSED**

**JUDGMENT**

1. The accused **F N G** was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code** the particulars of which were that on the night of 7<sup>th</sup> and 8<sup>th</sup> November, 2010 at [particulars withheld] court apartments in Kilimani Nairobi within Nairobi County murdered **J M K**.

2. He pleaded not guilty to the charge and to prove its case the prosecution called a total of Sixteen (16) witnesses and when the accused was put on his defence he tendered unsworn evidence and called no witness.

**FACTS AND PROSECUTION CASE**

3. The facts of the prosecution case as presented through the evidence of the witnesses was that the accused and the deceased had been friends from a long time. The accused used to visit the deceased frequently at [particulars withheld] court Apartment and would often accompany him while visiting his rural home and relatives including his grandmother, Aunts and sister. The accused would occasionally be driven by the deceased or would drive alone the deceased motor vehicle registration number [particulars withheld] and would spend the night with the deceased in his bed sitter house.

4. The friendship between the deceased and the accused was confirmed by **PW2 M K** a minor aged 13 years who testified on oath and stated that he had known the accused as his uncle (the deceased's) friend and was a frequent visitor to his grandmother (the deceased mother) at home. It was his evidence that the accused would when visiting with the deceased sleep in the deceased rural home together with the deceased and that he last saw the deceased together with the accused when they visited the deceased rural home and thereafter he learned of the death of the deceased. **PW2** positively identified the accused at an identification parade.

5. **PW3 V W K** a sister of the deceased confirmed the close relationship between the accused and the deceased and testified of having seen the deceased and the accused on several occasions mostly when the deceased would be going on safari as he would pass through her place in the company of the accused. It was her evidence in chief that the last time she saw the deceased was on 7/11/2010 while in good health

only to be informed on 9<sup>th</sup> of November 2010 that the same was missing from his place of work. With this information she went to the accused residence and that is what led to the discovery of the deceased body in his house.

6. **PW4 M N K** a sister of the deceased testified that on 9/11/2010 the deceased co-workers from [particulars withheld] went to their Rural home seeking the whereabouts of the deceased. Her evidence was corroborated by that of **PW7 R W** the mother of the deceased who testified that the deceased had visited her that weekend with his friend called Ngari whom he left with after lunch to visit his Aunt in Kiambu. It was her evidence that when the deceased co-workers came looking for him and reported him missing, they went to his Aunt's place in Kiambu who confirmed that they had indeed visited her but left in the night having promised to call her on phone upon arrival in Nairobi.

7. It was her further evidence that they tried calling the cell phone of both the deceased and the accused but they were off. She positively identified the accused on the dock and further stated that at the time of his death the deceased was single his wife having left him. Under cross examination she stated that the accused never used to bring ladies to her home but would always be accompanied by the deceased or other men.

8. **PW8 SIMON KIBICHI NDIWO** a security guard with Lavington Security who was manning the gate at the court wherein the deceased lived confirmed the close friendship between the deceased and the accused and placed the deceased at the scene. It was his evidence that on 7<sup>th</sup> November, 2012 at about 8.00 p.m. the deceased and the accused drove together into [particulars withheld] court driving motor vehicle Reg. No. [particulars withheld] and he booked them in the OB at the gate. The next day the accused left alone driving the said motor vehicle at about 5.00 a.m. and he booked him out. Since he was someone known to him he did not suspect any foul play. It was his evidence that when the deceased and the accused arrived at the compound they were talking in a friendly manner.

9. This evidence was corroborated by **PW1 THOMAS I. O. ODUOR** the property manager of [particulars withheld] court whose evidence was that on 9/11/2010 he was called and informed that he was required at the court since there was a bad odor coming from one of the servant quarters and upon arrival they checked through the window and could see the body of the deceased. Upon the police breaking down the door they entered the room which had lots of bloodstains and broken utensils. It was his evidence that the body had wounds all over. There was further a handwritten note on the table and a blood stained knife. He further confirmed that from the OB at the gate the deceased together with the accused entered the compound on 7/11/2010 at 6 p.m. and the accused left alone on 8/11/2010 driving the deceased's motor vehicle.

10. **PW5 DR. JOHANSEN ODUOR** conducted post mortem examination on the body of the deceased on 10/11/2010 while **PW12 PC BENARD AMBUKO** testified that on 9/11/2010 he went to the crime scene and broke the door to the deceased house and drew a sketch map. It was his evidence that there was handwritten note recovered from the scene which stated the accused had committed the offence because the deceased had sodomized him. This evidence was corroborated by **PW16 INSPECTOR PAULINE NJOKI KIMANI**.

11. **PW9 HENRY KIPTOO SANG** confirmed having received various times and blood samples from both the accused and the deceased body for examination which he examined and confirmed that the blood stains collected from the scene belonging to the deceased. **PW6 PC ANTHONY MUSEMBI** confirmed receiving a report of a road traffic accident on 23<sup>rd</sup> February, 2012 along Nairobi-Naivasha road which led to the arrest of the accused. **PW16 INSPECTOR PAULINE NJOKI KIMANI** confirmed that on 12/6/12 they received the information of the accident involving motor vehicle Reg. No. [particulars withheld] which had been driven by the accused out of the scene of the accident and through the aid of an informer they followed the accused to his home area where he was arrested and was able to positively identify the accused at the dock.

12. When put on his defence the accused gave unsworn statement and stated that on 5/10/2010 the deceased called him to Nairobi as he wanted him to take supplies to his grandmother in Kiambu which he

did. Since the deceased had been assigned duties in Mombasa he requested the accused to take him to his rural in Ruiru before passing through his grandmother. It was his evidence that on 6<sup>th</sup> November, 2010 which was a Saturday they slept in Ruiru and on Sunday 7<sup>th</sup> they went to church and later on left for Nairobi through Kiambu at 7.00 p.m.

13. They got to Nairobi at 9.00 p.m. and drunk at a pub until 11.00 p.m. before proceeding to the house where they ate supper before continuing with drinking. Since he was drunk he fell asleep and at 4.00 p.m. he felt someone touching him wanting to sodomize him. When the accused tried to get out of the room he found the door locked and since he was drunk he knocked down the wardrobe breaking the mirror glass which the deceased allegedly used to cut him on the hand and back. Since there was a knife on the table he took the same in self defence when the deceased threatened to kill him and stabbed the same. As they were struggling the deceased showed him where the key was and he managed to get out. He then proceeded to Kilimani police station where he reported the matter. This alleged report to Kilimani police station was informally confirmed by Mr. Mwenda the learned prosecutor.

14. He further stated that the police took his details and advised him to seek treatment and promised to call him if they needed him. He then proceeded to Pangani where he was treated before proceeding to his rural home where he stayed until 12/6/2012 when he was arrested and taken to Kilimani police station where he was positively identified by PW2 and PW8 the watchman. He further stated that he committed the offence since the deceased attempted to sodomize him which according to him is outlawed in Leviticus 18:22.

### **ANALYSIS AND DETERMINATION**

15. The offence of murder is defined under Section 203 of the Penal Code as:-

***“Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.”***

The prosecution is therefore required to prove beyond reasonable doubt the following ingredients:-

- a) The fact and the cause of death.
- b) That the deceased met his/her death as a result of an unlawful act or omission on the part of the accused.
- c) That the said unlawful act or omission was committed with malice aforethought.

16. From the evidence tendered the fact and the cause of death of the deceased are not in dispute. Most of the prosecution witnesses confirmed that the deceased was found dead in his bedsitter house. PW5 Dr. Johansen Oduor performed post mortem examination on the body of the deceased and found the following injuries:-

- (i) Stabbed wound in the chest
- (ii) Stabbed wound on the lower loin with intestine coming out.
- (iii) Stabbed wound on the right thigh he formed an opinion that the cause of death was multiple injuries due to stab wounds.

17. The next issue for determination is whether the said act was as a result of the actions of the accused person. From the evidence tendered the accused person was placed at the scene of the death of the deceased by **PW8 SIMON KIBICHI NDIWO** the guard at the gate who confirmed that the deceased and the accused went into the compound together on the night of 7<sup>th</sup> November, 2010 and the accused left alone on 8<sup>th</sup> only for the dead body of the deceased to be found on 9<sup>th</sup> of November, 2010. The accused

himself in his unsworn statement confirmed that he was indeed with the deceased on the material date and that he stabbed the same with a kitchen knife. I therefore found and hold that the prosecution has proved that the death of the deceased was caused by the act of the accused person.

18. The final issue for determination is whether the action on the part of the accused was with malice aforethought. Section 206 of the penal code defines malice aforethought in the following terms.

***“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 grievous 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 the death or a 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.***

***c) An intention to commit a felony.***

***d) An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”***

19. The accused in his unsworn defence has admitted attacking the deceased but stated that he did the same in self defence and further under provocation by the deceased who attempted to sodomize him on the material night while he was drunk. **Section 207** of the **Penal Code** states that when a person who unlawfully kills another under circumstances which but for the provision of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as defined (in **Section 208**) and before there is time for the passion to cool, is guilty of manslaughter only.

20. **Section 208 (1)** states that the term provocation means and includes except as hereinafter stated any wrongful act or insult of such a nature as to be likely when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in conjugal, parental, filial or fraternal relation, or in the relation of master servant, to deprive him of the power of self control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.

21. As submitted on behalf of the accused, the deceased and the accused were friends who spent most of their time together, they shared at times a single bed in a single room where the deceased lived in Nairobi and whenever they went visiting the deceased rural home, they would sleep together in the deceased rural house as confirmed by the mother of the deceased and PW2 a nephew. The deceased was portrayed as a single man who liked the company of males rather than females after his marriage failed.

22. What did not come clear and there remains a doubt there on is whether the accused and the deceased were in an homosexual relationship before the date of the commission of the offence herein **PW13 N K M's** evidence was that he had seen the accused and the deceased together almost six times before the 7<sup>th</sup> of November, 2010 when he last saw them together. **PW14 A M M** a sister of the deceased testified that the accused was so close to the deceased that she had seen him at the funeral of one of their aunt's where he was one of the pallbearers.

23. **PW8** the guard at the apartment where the deceased lived confirmed that the material night when the deceased and the accused checked into the apartment, they were in a friendly mood. This was corroborated by the accused in his defence who testified that they had spent that Sunday the 7<sup>th</sup> together and upon arrival in Nairobi they drunk at a pub until 11.00 p.m. when they went to the apartment and continued drinking after supper. There was no evidence tendered by the prosecution to prove any ill will towards the deceased. It is therefore clear to the court and I find that the accused had not premeditated

the killing of the deceased and therefore the accused accused the deceased of attempting to sodomize him on the material night which infuriated him causing him to stab the same in self defence cannot be ruled out and is believable.

24. The issue of an attempt by the deceased to sodomize the accused or having sodomized him is supported by the evidence of **PW1 THOMAS I.O. ODUOR** who testified that when they broke into the deceased house, they found an handwritten note on the table and that the room looked like there had been commotion therein, the deceased was only dressed in an underwear.

25. PW12 the first police officer to arrive at the scene also confirmed having seen a note on the table in which it was written “*I had done this because he had sodomized me.*” The prosecution did not produce this note neither did they offer any explanation on his whereabouts and therefore make an inference that if the said note was produced it would have been adverse to the prosecution case and give the benefit of the same to the accused person.

26. The accused in his defence stated that sodomy is outlawed in Leviticus 18:22 which states “*Thou shalt not lie with mankind as with womankind. It is abomination*” and therefore if the deceased attempted to sodomize him against his will and conviction then that was provocation enough as supported by the evidence of PW1, PW12 and DW1 which demonstrated that the accused acted on the heat of the moment having lost power of self control. Taking into account the close relationship outlines herein above, the degree of provocation is reflected by the number of knife stabs inflicted upon the deceased by the accused.

27. I therefore find and hold that the prosecution have failed to discharge the burden of proof for the charge of murder. I however find the accused **guilty of manslaughter** contrary to **Section 202** as read with **Section 205** of the Penal Code and hereby convict the same accordingly.

DATED, SIGNED and DELIVERED at Nairobi this 2<sup>nd</sup> day of May, 2017.

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**J. WAKIAGA**

**JUDGE**

**In the presence of:-**

*Miss Mwaniki for the State*

*Mr. Nyankole for the accused*

*Accused present*

*Tabitha court clerk*