



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIVASHA

CRIMINAL CASE (MURDER) NO. 20 OF 2015

REPUBLIC.....PROSECUTOR

-VERSUS-

JAMES MATHU WANGARI.....1ST ACCUSED

RICHARD SABOKE KEMARI.....2ND ACCUSED

J U D G M E N T

1. The Accused persons were charged with Murder Contrary to Section 203 as read with Section 204 of the Penal Code. In that on the 21st day of February, 2015 at Sulmac Trading Centre within Nyandarua County they jointly murdered **Isaac Kimotho Ndungu**. The Accused denied the charge and were represented by Mburu F. I. Advocate. The prosecution called five witnesses and presented the following case.

2. The deceased visited **Migingo** bar at Sulmac Trading Centre on the night of 21st February, 2015 and found another patron, the 1st Accused already present. The said Accused invited the deceased to join him, ordering a bottle of beer for him. The deceased who appeared drunk rejected the offer but the 1st Accused forced the beer bottle into his mouth. Some of the beer was spilt. The deceased then sat back with his head on the table.

3. Presently the 1st Accused got up and grabbed him. He knocked the deceased's head severally against the wall. The commotion attracted the watchman, 2nd Accused who took deceased out of the bar, followed by the 1st Accused. When the bar closed, both men were left outside the bar with the deceased who was lying down, the 2nd Accused claiming he would escort the deceased home later upon sobering up. The bar workers **Margaret Wangechi Mathu** (PW1) and **Marion Mungai** (PW2) left.

4. On the next day the body of the deceased was found not far from the bar. Police came to the scene and collected the body. During post mortem, it was established that the cause of death was head injury attended by brain concussion (vascular) and raised intracranial pressure (ICP). The injuries were caused by blunt trauma to either side of head and the back of the head. The Accused were arrested and charged after the investigations were completed.

5. In the unsworn defence statement, the 1st Accused stated that he patronized the bar in question on the material night for refreshment. On the way out he met the deceased in conversation with a relative outside the bar. He was later arrested for an offence he denies committing. The 2nd Accused claimed he too

patronized Migingo bar on the material night. He later went home. He was subsequently arrested. He denied the offence.

6. The court must determine whether through acts of omission or commission the two Accused, with malice aforethought caused the death of the deceased.

7. Regarding the biological cause of death the post mortem form tendered by **Dr. Ngulungu (PW3)** indicates that there were five circular bruises to either side of the head and the rear side. There was however no fractures but the brain was concussed raising the intracranial pressure, resulting in death. He described the bruises as blunt force trauma.

8. In cross-examination **PW3** asserted that the bruises were recent and unconnected to alleged injuries from a road traffic accident allegedly suffered by the deceased earlier and surgery in 2013. He especially disputed a medical document shown to him purporting surgery on deceased in 2013, saying that the alleged treatment, namely, draining of pus, was inconsistent with alleged illness – meningitis as indicated in the said documents.

9. Further he denied that there was a drilling or surgical scar on the deceased's head. The report was not produced by the defence, however. Secondly, the evidence of **PW3** was plausible and consistent. If indeed the deceased had suffered from meningitis or complications from an earlier alleged traffic accident, an explanation is sorely needed for the five fresh bruises on the head.

10. It is the prosecution case that the injuries resulted from the assault on the night of 21st February, at the hands of the 1st Accused. **PW1, PW2** and **PW4** gave evidence, consistent for the most part, that the 1st Accused dashed the deceased's head against a wall in the bar, eventually attempting to drag him outside. On this score, the witnesses denied that one of them, **PW2** assaulted the deceased for ordering for and failing to pay for a beer. On his part the 1st Accused admits he saw the deceased at the bar on the night in question but denied any contact with him.

11. Even though **PW1, 2** and **4** may have initially been treated as suspects by the investigating officer, it is difficult to believe that they picked on the 1st Accused for blame out of all other admitted bar patrons present on the material night. The 1st Accused did not reiterate his canvassed defence – that **PW2** attacked the deceased – in his testimony. The fact that the witness **PW2** believed she had initially been rounded up by police for selling alcohol after legal hours, or that **PW4** took them as suspects does not detract from the evidence of the eye witnesses.

12. A man, last seen in their bar had been found dead close by the bar on the next day. **PW1** and **PW2** did not, like typical Kenyans avoiding entanglement with police, volunteer statements to police. Until the matter was fully investigated, all the persons last seen with the deceased were potential suspects. The witnesses were arrested at their bar on the date of arrest.

13. There is no evidence beyond the disputed allegations in cross-examination, not repeated in testimony, that **PW1** and **PW4** implicated the 1st Accused to cover up for the real assailant, **PW2**. Reviewing the entire evidence, I am persuaded that **PW1** and **PW2** spoke the truth about the incident. Further the evidence is confirmed by a patron **PW4** and the medical report on record. The 1st Accused by severally bashing the deceased's head against the wall caused him serious injuries to the head.

14. Further, the 1st Accused was the last person, with his co-accused seen with the deceased while alive on the material night. His defence is not believable or plausible and must be disregarded. It would seem that both the deceased and the 1st Accused were inebriated during the material incident. But the 1st Accused was stable enough to force the deceased to drink alcohol from a bottle and to bash his head against the wall before dragging him outside. The motive seems unclear, as is usually the case in senseless brawls frequently occurring among drunk people. Motive however is not an ingredient of the offence of murder.

15. In my view motive ought not be conflated with the element of *mens rea* anticipated in respect of murder in Section 206 of the Penal Code which states:-

“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 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;**
- c. an intent 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.”**

16. When a man severally bashes the head of another against a wall violently, he cannot be said to not intend to cause his victim, at least grievous harm, merely because the motive of the assault is unknown. In this case, the 1st Accused’s actions need not be accompanied what reasonable people would call a “sensible cause” to amount to necessary malice aforethought under Section 206 of the Penal Code. The malice is deducible from the violence of his actions. He cannot but be said to have by them intended to cause at least grievous harm to the deceased.

17. Besides, as the deceased lay outside the bar following the assault the 1st Accused apparently made no effort to seek the medical assistance. Indeed having declared to **PW2** that he would take the deceased home when he ‘sobered’ up, he apparently abandoned him at a spot close to the bar. I am satisfied that the prosecution has proved the offence charged beyond reasonable doubt, against the 1st Accused. I find him guilty and convict him as charged.

18. However, regarding the 2nd Accused, while there is overwhelming evidence that he worked as a watchman at the bar, and not a farm handsman as he claimed in his defence, the evidence against him is insufficient. He was on duty and intervened when the brawl broke out, to take the deceased outside. He was left at his duty station when the bar closed down. There is no evidence that he took part in assaulting the deceased at any time, or otherwise acted in a manner outside his scope as a watchman at the bar. I would therefore find the case against him not proved and acquit the 2nd Accused at this stage

Delivered and signed at Naivasha, this **12th** day of **February, 2016.**

In the presence of -

State Counsel : Miss Waweru holding brief for Mr. Kibelion

For the Accused : Mr. Mburu for Accused persons

Court Assistant : Steven

Accused : Both present

C. MEOLI

JUDGE