



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CRIMINAL CASE (MURDER) NO. 28 OF 2015

(Formerly Nakuru Criminal Case (Murder) No. 28 of 2014)

REPUBLIC.....PROSECUTOR

-VERSUS-

NICKSON MUTISYA.....ACCUSED

J U D G M E N T

1. Nickson Mutisya, the Accused herein was charged with Murder contrary to Section 203 as read with Section 204 of the Penal Code. In that on the 27th day of January, 2014 at Maasai Mara University in Narok North District within Narok County, he Murdered **Philip Mati**. He denied the charge and was represented by Mr. Mburu F. I.
2. The Accused and deceased were friends and in 2014 worked together on a construction project at Maasai Mara University, Narok. On the night of 27th January, 2014 the deceased and Accused were arguing and drunk as they approached a local bar known as Liquor Bank located close to the university.
3. **Simon Njenga Njoki** (PW1) a student at the university, familiar with the duo, spoke with them at the door. The deceased pleaded with PW1 to intervene saying the Accused was “disturbing” him. Shortly the two men left together but after a few metres **PW1** noted that the deceased had fallen to the ground, while the Accused was walking away. The witness drew near and on noting that the deceased was frothing and unable to speak called to the Accused in inquiry. He responded that the deceased had insulted him, before he melted away in the night.
4. The deceased was taken to hospital and a report made to police at Narok. **Job Muhaya** (PW2), the project engineer under whom both the deceased and Accused had previously worked, was one of those who took the deceased to hospital and made a report to police. He testified that the Accused joined him and others at the hospital claiming that he too had suffered injury on the right leg, displaying an abrasion thereon. But when the group proceeded to the police station he did not enter but instead went away to town.
5. The Accused was arrested on 28th January, 2014 after he contacted a colleague **Levis Lumbashi** (PW3) seeking to collect some tools. On arrest, he showed **CPL Paul Sitienei** (PW5) the injury to the right leg. He had reported earlier on 27th January, 2014 to have been assaulted by the deceased. He was charged with assault.
6. On 29th January, 2014 the deceased succumbed to his injuries at Kenyatta National Hospital

where he had been referred for further treatment. **Dr. Titus Ngulungu** (PW6) produced the post mortem report prepared by **Dr. Walong**. The report showed that death was due to a severe head injury occasioned by severe blunt trauma.

7. In his defence the Accused gave an unsworn statement. To the effect that, after work on the material date he went to a bar where he met the deceased with friends, drinking alcohol. The Accused sat alone and left at 7.00pm. On the way home some people attacked him and took his valuables. He sustained injuries. He reported to police. He only learned of the attack on the deceased on the next day when he went to work.
8. The court must determine whether the Accused, with malice aforethought inflicted the fatal injuries on the deceased. Firstly, there is no dispute that the Accused saw or met the deceased at a bar near Masai Mara University on the material night. That the deceased was attacked and injured fatally thereafter is not in dispute.
9. Equally, the prosecution evidence pointing to the culpability of the Accused is for the most part circumstantial. In **Republic –V- Kipkering Arap Koskei [1949] 16EACA 135** it was stated that:

“.....In order to justify on circumstantial evidence the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and in capable of explanation upon any other reasonable hypothesis than that of his guilt, and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused.”

The principles were further refined in the case of **Simoni Musoke –Vs- Uganda (1958) EA 715–** where the court citing the decision in **Teper –V- Republic [1952] 2 ALLER 447** added that:

“It is also necessary before drawing the inference of the accused’s guilt from circumstantial evidence to be sure that there are no co-existing circumstances which could weaken or destroy the inference.”

10. The prosecution star witness was **PW1**. He testified that he met the Accused and the deceased together at the bar entrance on the material night. That they were quarreling. The deceased spoke to **PW1** seeking his intervention. The two men then went away. Barely two minutes later **PW1** noticed the deceased lying on the ground and the Accused proceeding to walk away. Although **PW1** admitted he did not witness any exchange of blows between the two men, he said that when he drew close and observed the deceased, he noted foaming at the mouth and blood in the ears. The deceased could not speak. He questioned the Accused who was going away from the scene and he retorted that the deceased had insulted him.
11. From **PW1**’s description of the scene of the incident, it is evident that the area was well lit but possibly the witness did not visually follow the two departing men hence did not actually witness the attack. **PW1** struck me as an honest and believable witness. Allegations that it was the deceased who was attacked by unknown people as he left the bar were not put to **PW1** in cross-examination. Nor the presence of other persons at the scene of the attack.
12. If indeed the Accused was attacked by an unknown group, the report to police contradicts that: he reported that he had been injured in a fight with the deceased. Similarly, he followed **PW2** and others to hospital claiming to have suffered an injury on the leg but not suggesting the attack by other people.
13. In cross-examination **PW2** said the Accused claimed his assailant was the deceased. This evidence is consistent with the evidence of **PW1**. He had seen the two men before the incident, seemingly quarrelling. The deceased asked **PW1** to intervene. Shortly after they left the deceased fell to the ground but the Accused did not stop to assist. Instead he went off, retorting to

PW1'S inquiry that the deceased had insulted him. The deceased whom **PW1** had seen moments earlier on his feet was foaming at the mouth and bleeding from the ears. He could not speak or move.

14.The Accused's defence suggesting that a third party or parties may have attacked the deceased is not plausible. It is inconsistent with his words and conduct on the material date. In claiming to **PW2** and police the deceased had injured him, the Accused was indirectly justifying the attack on the deceased, and not in any way suggesting he was a victim of a robbery as he now claims.

15.That the deceased had defence injuries to his hands is suggestive of the use of a weapon by his assailant. This conclusion is reinforced by the severity of the sole injury to the head. So severe was it that the skin on the affected site had peeled off. The examination at post mortem categorised the injury as one consistent with blunt trauma. Whatever blunt weapon was used was evidently capable of causing severe trauma resulting in brain contusion which eventually led to death.

16.On the basis of credible evidence by the prosecution, there can be no doubt that the Accused is the person who assaulted the deceased. Both men were drunk on the material night and were moments earlier engaged in an argument of sorts. However they were known to colleagues such as **PW2** and **PW3** and relatives such as **PW4** to be mutual friends. It is not clear what led to the argument that led to the fatal assault. It is not disputed that the Accused had some slight injury.

17.The evidence before me appears to negate any premeditation on the part of the Accused. I would in the circumstances of this find that on the proven facts of the case, the prosecution has established a charge of Manslaughter Contrary to Section 202 of the Penal Code. I will proceed to find the Accused guilty and convict him on such offence.

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

In the presence of:-

State Counsel : Miss Waweru

For the Accused : Mr. Mburu

Court Assistant : Steven

Accused : Present

C. MEOLI

JUDGE