



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

**CRIMINAL CASE NO. 108 OF 2012.**

**LESIT, J.**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**SAID SALIM SENGASU .....ACCUSED**

**JUDGMENT**

1. The accused **SAID SALIM SENGASU** is charged with murder contrary to **section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence are:

**“On the 9<sup>th</sup> day of December 2012 at Muchatha village, Kiambu District within Kiambu County murdered BONIFACE NJERU NJAGI.”**

2. The prosecution called a total of 8 witnesses.
3. The prosecution evidence was as follows. PW1 was a neighbour of the accused because they lived in the same plot together with PW3 and 6. PW2 was the daughter of the landlord and their home was in the same plot. PW1 had a market stall very near where she lived. PW1 testified that accused and deceased were also her customers since they bought vegetables at her market stall.
4. According to PW1, she saw the accused and the deceased fighting on two occasions on the material day. The first fight took place on the road. The second fight was at 8 p.m. and was outside PW1's market stall. In both occasions PW1 could not tell the reason for the fight. However, PW1 said that both the accused and deceased were drunk and that as was usual with them; they always fought once drunk for no reasonable cause.
5. PW1 testified that she chased away the 2 from fighting near her stall when A police man emerged. The police man is said to have slapped the accused and told him to go home. The deceased then held the accused and told him he would take him home otherwise he would spend the night in the police station.
6. PW1 heard the accused abuse the deceased calling him a prostitute and asking him to leave him alone. The deceased then slapped the accused before the accused walked away.
7. PW1 testified that the deceased gave her a vegetable order to cut kales for him and carry them to her house together with a can of paraffin which he was to collect later. Indeed the deceased went to PW1's house at about 8.30 p.m. to collect his goods. The accused ate food at PW1's house before leaving.
8. As the deceased ate his food, PW1 went to relieve herself in the toilet which was outside her house. While there she saw the accused outside her house. The accused even called her as she returned to her house but PW1 declined to speak to him. PW1 then warned the deceased not to leave just then as the accused was outside her house.
9. The deceased stood to leave and he asked, one Kevin an older man who was in PW1's house to

- escort him as he felt afraid but he refused to escort him. PW1 chose to stand at her door and watch as the deceased walked away. It was as PW1 watched the deceased leave her house that she first heard a horrifying sound of a man. She then heard footsteps and then people wrestling. She went outside to find the accused and deceased on the ground in a tussle.
10. PW1 stated that she went back into her house to collect a lamp and on returning found the deceased full of blood on his yellow polo neck P.Exh.1. She screamed for help and her screams were heard by PW2, 3 and 6.
  11. PW3 and 6 who lived on either side of accused house heard a person enter the house of the accused. While PW2 called the Police on her phone, PW6 locked the door to the accused house.
  12. PW7 was among the first Admin. Police Officers to appear at the scene. They arrested the accused from his house. The Police noted the bloodied pullover the accused was wearing. PW8 who got the accused from PW7 recovered the pullover and sent it to the government examiner for DNA profiling. At the same time PW8, the investigating officer of this case, who went to the scene after the arrest of the accused asked PW2 and 6 to look for the murder weapon around the area the next day. They were able to see the knife near some bushes next to the plot. They called PW7 who came and recovered the weapon P. exh.2, and handed it over to PW8.
  13. PW8 took the yellow polo neck pullover which the deceased was wearing at the time of the attack, P. exh. 1. That pullover, together with the knife, P. exh. 2 and the accused pullover, P. exh. 6 were taken to the Gov. Chemist. The Govt. Chemist's report was P. exh. 5. According to the report, after the DNA profiling, the knife and the accused's pullover both had deceased blood.
  14. After the prosecution closed its case, the accused was placed on his defence. He opted to keep quiet and say nothing.
  15. The accused was defended by Mr. Muoki, advocate. However Ms. Wadegu made the submissions. With due respect to the defence counsel, the submissions bordered on a statement of defence. In the submissions the counsel for the accused gave statements of fact of matters which were not testified to. Counsel submitted that the reason why the accused attacked the deceased was over some money the deceased owed the accused which he had refused to pay. Counsel also submitted that the accused was drunk at the time, and she urged the court to invoke the provisions of **section 207 of the Penal Code**. Counsel also relied on an unreported case which she did not provide.
  16. The Prosecution Counsel was Ms. Wafula who made submission which in part were not based on evidence adduced before the court. For instance counsel urged that PW6 had testified that she heard the accused saying that he would kill someone and run away to his country. Counsel urged that the accused had time to cool off as he had gone to his house first and only attacked the accused later. On drunkenness Ms. Wafula submitted that since the accused ran to his house after the attack, he understood what was happening.
  17. I have considered the evidence adduced in this case and submissions by counsels in this case. The issues which arise in this case are **whether the accused was positively identified; whether there was a dying declaration and whether it was reliable; whether there was other evidence implicating the accused with the offence?**
  18. The accused faces a charge of murder contrary to **section 203** as read with **section 204** of the **Penal Code**. **Section 203** provides as follows:

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

19. The prosecution must show that it is the accused that attacked the deceased and stabbed him once in the chest; that the deceased succumbed and died as a result of the injuries inflicted on him by the accused. The prosecution must adduce evidence to establish that at the time the accused attacked and injured the deceased, he had formed the necessary malice aforethought or intention to either cause death or grievous harm to the deceased.
20. **Section 206** of the **Penal Code** sets out the circumstances which constitute malice aforethought as follows:

**206. 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.**

- 21.Regarding identification there was no eye witness of the attack. However the evidence of PW1 is clear that the deceased had just eaten in her house before he went out of her house where he met his death. PW1 stated that she had gone to the toilet outside her house before the deceased left her house, and that while outside, she saw the accused. PW1 testified that the accused even called her name but she chose not to answer.
- 22.The attack occurred soon thereafter and according to PW1 she went back to the house to get a lamp after she heard a strange sound, then a struggle before finding the deceased lying on the ground with serious injuries. The deceased died soon thereafter.
- 23.I find that for the reason PW1 needed to get a lamp in order to see what had happened to the deceased is a clear proof that the conditions of lighting outside her house that night was not conducive for a positive identification. The lapse of time between the period PW1 saw and heard the accused call out her name was enough to require other evidence to corroborate the same and connect the accused to the deceased death.
- 24.There was other evidence which was that of a statement PW1 attributed to the deceased. It was PW1's evidence that the deceased was calling out "SAID, SAID, SAID". SAID is accused name. The issue is whether that statement could be considered as a dying declaration, and if so what weight can be attributed to same?
- 25.The Court of Appeal in the case of **MICHAEL KURIA KAHIRI -V- REP CRIMINAL APPEAL NO.45 OF 1991 (NRB)**observed,

**“There is no doubt that the appellant’s conviction by the superior court was dependent on the deceased’s statements as to her cause of death. The law relating to the weight to be attached to such statements was correctly stated in PIUS JASUNGA s/o AKUMU –V- REGINA [1954] 21 EACA 331. In that case the Court of Appeal for Eastern Africa said that although it is not a rule of law that, in order to support a conviction; and there may be circumstances which go to show that the deceased could not have been mistaken in his identification of the accused, it is, generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person, made in the absence of the accused and not subject to cross-examination, unless there is satisfactory corroboration.**

**And in MIGEZO MIBINGA –V- UGANDA [1965] E.A. 71 the same Court pointed out that:**

**‘It is not always appreciated that the probative force of a statement as to the cause of his death by a person since deceased is not enhanced by its being made in the presence of the accused unless by his conduct, demeanor, etc., the accused has acknowledged its truth. Consequently, it is advisable that a trial judge should expressly state whether he is satisfied or not that there was such acknowledgement.’**

- 26.I noted that the deceased was answering PW1's question to him to the effect what happened to him. At the time she asked that question, PW1 is clear that she had not gone for the lamp. It was

therefore dark where the deceased was when she asked him the question. The evidence of PW3 supports that position because she testifies that at the time she heard PW1 screaming and went to her place, PW1 had just entered her house and she soon came out with a lamp to find PW3 outside. PW3 did not see the accused and she did not refer to him being outside when she arrived at the scene. It is therefore clear that at the time PW1 came out with the lamp, the one who attacked the deceased was not at the scene.

27. From these facts it is also clear that the deceased, if at all he saw his attacker, he saw him under difficult circumstances which could not enable a positive identification of the attacker. Furthermore, the deceased did not mention the cause of his death. He merely mentioned the deceased name. In the circumstances, the deceased statement does not qualify to be a dying declaration, and is therefore of little probative value.
28. There was however other evidence against the accused. This was the evidence of PW2 and 6. Both heard a man enter the house belonging to the accused soon after they heard PW1 screaming and calling out that someone had been murdered. PW6 even locked the accused house from outside until PW7 came and opened only to get the accused out of that house. That means that the accused had been outside his house at the same time the deceased was murdered. It was in accused interest to explain why he ran into his house at the same time that the deceased was attacked. That is the statutory presumption under **section 111(1)** and **119** of the **Evidence Act** which stipulates as follows:

**“111.(1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:**

**Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecuting, whether in cross-examination or otherwise, that such circumstances or facts exist:**

**Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.”**

**“119. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”**

29. The accused person did not offer any explanation as he made no statement in his defence. That was not the end however. There was yet other evidence against the accused. The evidence of PW8 was that the pullover he recovered from the accused after he re-arrested him from PW7 had blood stains. The blood stains were seen by PW7, as well as PW1. PW5 who carried out DNA profiling on the blood samples from the accused, deceased and the blood stains on the deceased and accused pullovers found that the blood on the accused pullover was from the deceased. That means the accused came into contact with the deceased after the deceased was stabbed.
30. Under **section 111(1)** and **110** of the **Evidence Act**, it was in accused interest to explain how he came by the deceased blood. The accused offered no explanation for that either. In the circumstances the court is entitled to presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct in their relation to the facts of the particular case.
31. The accused had deceased blood in his clothes the same day and time that the deceased was murdered. The only explanation for the presence of deceased blood on the accused clothes is the fact that the two came into contact when the deceased got injured. The accused was present when the deceased was fatally wounded, and from the circumstances of the case, it must be the accused

- who inflicted the fatal injuries on the deceased.
32. I considered the fact that the deceased and accused fought twice earlier that day. The accused was thereafter seen hovering outside PW1's house at the time the deceased was at PW1's house. The accused was also heard running into his house soon after the deceased was injured. I find that from all these facts and circumstances, there is no doubt that it is the accused who had the motive and opportunity to injure the deceased. The inculpatory facts of this case are incapable of an explanation upon any other hypothesis than that of the accused guilt.
33. I find that from the evidence adduced by the prosecution the prosecution has discharged its burden to prove the charge against the accused beyond any reasonable doubt.
34. There is one more issue to determine whether there was any evidence which could reduce the charge of murder to a lesser offence?
35. Intoxication is a defence under **section 13** of the **Penal Code** which sets out the circumstances that would constitute the defence of intoxication. It states as follows:

**“13. (1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.**

**(2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and -**

**(a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or**

**(b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.**

**(3) Where the defence under subsection (2) is established, then in a case falling under paragraph (a) thereof the accused shall be discharged, and in a case falling under paragraph (b) the provisions of this Code and of the Criminal Procedure Code relating to insanity shall apply.**

**(4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.**

**(5) For the purpose of this section, “intoxication” includes a state produced by narcotics or drugs.”**

36. In **Mugwika v Rep. 1993 KLR 159** the Court of Appeal held:

**“Taking into account all the circumstances of the case before the trial judge and considering what took place where the deceased and the appellant were drinking, it appeared that the appellant's mind was affected by drink as to negative the inference of intentional killing.”**

37. PW1's evidence was that the accused and the deceased had been fighting that day. Most significantly, PW1 testified that both of them were drunk. In fact PW1 describes the accused state as so drunk that a Police Officer slapped him and told him to go home due to his state. The time when that happened was estimated by PW1 as 8 p.m. The attack against the deceased took place between 9 p.m. and 10 p.m. There was therefore a lapse of one or two hours between the last fight and the attack.
38. I considered the fact that the accused left the market and went to his house where he armed himself with the knife. He then waited outside PW1's house for the deceased to emerge from that house in order to attack him. As he laid in wait for the deceased, the accused was quiet. I find that the accused behaviour of arming himself and quietly waylaying the deceased was the conduct of a

person who had a clear understanding. I am satisfied that the accused was not suffering from any influence of drunk as to negative intentional killing. The accused actions were both deliberate and calculated. Malice aforethought was therefore proved.

39. Having carefully considered the entire evidence in this case I am satisfied that the prosecution has proved the charge of murder contrary to **section 203** of the **Penal Code** against the accused beyond any reasonable doubt. I find the accused guilty of murder under **section 322** of the **Criminal Procedure Code** and convict him accordingly.

**DATED AT NAIROBI THIS 3<sup>rd</sup> DAY OF MARCH, 2016.**

**LESIIT, J.**

**JUDGE**