



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT CHUKA

HCCR NO. 1 OF 2015

(FORMERLY MERU HCCRC 62 OF 2012)

ABDUL HAZIZ MUGO alias ESTON.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. On 19th September, 2012, Abdul Haziz Mugo alias Eston was arraigned before this court with the offence of Murder contrary to section 203 as read with section 204 of the Penal Code Cap 63 of the Laws of Kenya. The information alleged that on 3rd September, 2012 at Munyaka Bar within Chuka Township in Tharaka Nithi County within Eastern Province, the accused murdered one Josephine Nkirote Mworira. The accused denied the charge.

2. The prosecution case was that on 3rd September, 2012 at about 5 pm, Doreen Muthoni (PW1) went to Munyaka Bar which is situated in Moi Girls slum within Chuka Township. She proceeded to the rear part of the bar where beer was being sold. There were people some whom she knew and others she did not know, who were taking beer. Then the accused came and stood behind her. Suddenly, the accused stretched his hand as if to point at Nkirote (“the deceased”). PW1 stretched her hand to block the accused but when the accused was withdrawing his hand, she discovered that she had been injured by an object which the accused had. The deceased fell down crying. On realizing that the deceased had been stabbed, those present started running away from the scene including the accused. The deceased was taken to hospital by one of her colleagues then working with her in that bar. However, she died at Chuka District Hospital while undergoing treatment. According to PW1, the accused stabbed the deceased on the left side of the chest. PW1 had known both the accused as well as the deceased for sometime. She told the court that she did not see the weapon with which the accused stabbed the deceased. She denied that the deceased might have fallen on something sharp. She denied the suggestions that she was drunk at the time or that the accused and the deceased were fighting over a beer of bottle.

3. PW2 and PW3 told the court how they attended the post mortem of the body of the deceased on 11th September, 2012 at the Chuka District Hospital Mortuary. PW2 told the court that the body had an injury on the frontal left side of the chest. The post mortem was carried out by Dr. Justus Kitili Mutuku (PW4) who told the court that the body had an external injury that extended two (2) inches. Internally, the injury extended into the 4th intercostal space of the thoracic cavity then through the left lung. There was a lot of blood in the thoracic cavity. He formed the opinion that the cause of death was cardiopulmonary arrest due to left haemothorax due to penetrative chest injury. He produced the Post Mortem Report as PExh 1.

4. Corporal John Mwai (PW5) was the investigation’s officer. He told the court that on 3rd September,

2012, he was on duty when the O.C.S. Chuka Police Station instructed him at about 5pm to go to Munyaka Bar where a murder report had been made. That when he reached the scene, he found blood on the floor. On making inquiries, PW1, who was still at the scene, told him that the accused and the deceased had quarreled over a bottle of beer which the accused had attempted to leave the bar with. That when the deceased took the bottle away from the accused, the latter left for about ten (10) minutes and returned. He then removed a chisel from his jacket and stabbed the deceased on the left side of her chest. He found that the deceased had been taken to hospital. He proceeded to Chuka hospital but found that the deceased had succumbed to the injury. He thereupon commenced investigations. On 4th September, 2012, he received information that the accused was at Moi Girls slum within Chuka Township whereby he, in the company of other officers, went there and arrested him. PW5 concluded that the accused had been offended by the deceased in her having taken away the beer of bottle from him. He told the court that it was PW1 who informed him that the accused used a chisel to stab the deceased.

5. In his defence, the accused told the court that he is a carpenter and that at the material time he was employed by one Silas Mbogo. That on the material day, he woke up between 7.00 and 8.00 am and before going to his place of work, he decided to pass through Munyaka Bar and have a beer. He found between twenty to thirty (20-30) people taking beer. He saw the deceased in a company of three (3) other women. The deceased was not selling beer but was giving change to other bar attendants or bringing beer from the store. That he took several beers until 4pm when the owner of the bar one Ileri ordered everyone out. He went to his home in Rukindu. The following day, he returned to Munyaka Bar and found enraged people breaking doors and windows of that Bar. When he stopped to witness what was happening, the police came and arrested him. That those who were destroying the Bar run away but he did not. That when the police arrested him, they did not tell him why they were arresting him. He denied killing the deceased nor witnessing the killing. In cross-examination, he admitted that in his trade as a carpenter, he uses implements such as a jack plane, saw, chisel amongst others; that they are not allowed to remove such implements from the workshop but one could if he sought permission. He admitted knowing the deceased as working in Munyaka Bar. That he did not know why the owner of Munyaka Bar ordered everyone out at 4 pm of 3rd September, 2012. That on that day, he did not go to his place of work and he did not therefore have any work implement with him.

6. In his submissions, Mr Mugo, Learned Counsel for the accused urged the court to consider that there was only one (1) eye witness (PW 1) and the danger there could be in convicting on the evidence of a single eye witness; that although there were many people in the bar at the time of the incident, only PW 1 was paraded by the prosecution; and finally that there were contradictions in the evidence of the investigating officer and PW 1. On his part, Mr Ongige for the state submitted that there is no requirement as to the number of witnesses who are supposed to prove a case; that the witnesses that testified were those that were considered vital and that there was no contradiction between the evidence of the investigating officer and PW 1. To him, the prosecution had proved its case to the required standard.

7. The issue for determination in this matter is, whether the deceased was murdered by the accused. The law requires that the prosecution does prove its case beyond reasonable doubt. If there is any doubt whatsoever, the same has to be resolved in favour of an accused. In a criminal trial, the burden of proof rests upon the prosecution throughout and does not shift. In the present case, PW 1 the only eye witness told the court that she knew both the deceased and the accused well. Her relationship, however with the deceased was not good. It is because of their frosty relationship that on the material day, PW1 failed to call for any help for the deceased after the latter had been stabbed. PW1 went to Munyaka Bar at 5pm and shortly thereafter, the accused entered. She was firm both in her evidence in chief and cross examination that it is the accused who stabbed the deceased. She gave graphic details how the stabbing took place. She testified that the accused stretched his hand to the deceased as if pointing at her but PW1 realised that the accused had actually stabbed the deceased with a sharp object when blood oozed from her own hand after coming into contact with that of the accused when the latter was withdrawing his hand from the deceased. It is then that she discovered that the accused had a weapon with which he had stabbed the deceased. On being stabbed the deceased fell down crying and was immediately rushed to Chuka hospital where she died while undergoing treatment. PW4 Dr. Justus Mutuku told the court that on examining the body, he formed the opinion that the deceased died out of a penetrative injury. According

to PW1, the deceased sustained the subject injury was at Munyaka bar and was inflicted by none other than the accused. PW1 told the court that after stabbing the deceased, the accused disappeared from the scene.

8. The accused's defence was an attempted alibi. He told the court that he is a carpenter and that on the material day, he passed at Munyaka bar between 9.00 and 10.00am to have beer. That he took beer until 4pm when a Mr Ileri the alleged owner of the bar chased everyone out of the bar. That the accused went home and slept until the following morning when he again passed by Munyaka bar only to find enraged people demolishing its doors and windows. It is then that the police came and arrested him. I find the accused's defence to be contradictory and not adding up. Initially, he told the court that on the material day, he was on his way to work when he decided to detour and, pass at Munyaka bar between 9 and 10 am. He then took beer upto 4pm when allegedly the bar was forcefully closed by the owner. In cross-examination, he stated that on 3rd September, 2012, his employer had allegedly gone to Nairobi and they were not opening the workshop. In this court opinion, his testimony that the bar was forcibly closed at 4pm is meant to contradict the testimony of PW1 that the murder occurred around 5pm. This court takes judicial notice of the fact that bar businesses in this country open after 5pm but of course there are those which may flout the law and open before that time. It will however be most improbable that twenty (20 to 30) people would be taking beer at Munyaka bar between 10am up to 4pm without a police raid or any arrests.

9. This court saw the witnesses testify. PW1 was calm, consistent and credible. She told the court that she went to Munyaka Bar on the material day at 5pm. That the accused came after she had arrived. That he stood beside her before stabbing the deceased. Her evidence that she actually saw the accused at Munyaka bar on the material day at 5pm was not displaced. The accused did not deny that on the material day he was at Munyaka bar. I believe the testimony of PW1 as to the timing which was corroborated by PW5. PW5 told the court that he received instructions from the O.C.S. Chuka Police Station at about 5pm of 3rd September, 2012 to go to Munyaka bar where a murder had been reported. He proceeded to that bar and found PW1 still to the scene. It is true that there were other eye witnesses to the incident but it is only PW1 who seems to have recorded her statement with the police about the incident. In terms of **Abdalla Wendo – V – Republic [1953] 20 EACA 166**, I do warn myself of the danger of convicting on the evidence of a single witness. However, I note that the circumstances of identification in this case were favourable. The incident took place in broad day light. The same was in the presence of PW1. PW1 knew both the deceased and the accused. In my view, the chances of error are nil. I do not find any reason why PW1 should lie and implicate the accused. In any event, she told the court that her relationship with the deceased was frosty. In this regard, this court makes a finding that the death of the deceased was caused by the accused who stabbed her. Although no weapon was recovered, PW1's evidence was that the accused disappeared with it.

10. The question that arises is whether there was malice aforethought. PW1 and PW5 testimony on the intention of the killing was contradictory. PW1, the eyewitness, denied that the accused and the deceased fought over a bottle of beer. PW5 on the other hand told the court that the cause of the killing was because the deceased was enraged by the deceased's act of taking the bottle of beer away from the accused. In the court's opinion, while it is clear that the accused stabbed the deceased with a weapon which none of the prosecution witnesses stated to have seen, the intention of the stabbing was unclear. In this court's view, the intention of the accused stabbing the deceased was not proved although he nevertheless caused her death.

11. In this regard, I find that the prosecution has proved that the accused did cause the death of the deceased but have failed to prove the offence of murder. I find that the accused unlawfully caused the death of the deceased and offence of manslaughter has been proved. Accordingly, under the provisions of section 179 (2) of the Criminal Procedure Code, I convict the accused with the offence of manslaughter contrary to section 202 as read with 205 of the penal code.

DATED and DELIVERED at Chuka this 12th day of May, 2016

A MABEYA

JUDGE.

Judgment read and delivered in open court in presence of all the parties

A.MABEYA

JUDGE

12/5/2016