



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 20 OF 2013**

REPUBLIC.....PROSECUTOR

VERSUS

ANTONY MBAGO RUMUSU.....1<sup>ST</sup> ACCUSED

HARRISON MAINA KAMAU.....2<sup>ND</sup> ACCUSED

**JUDGEMENT**

Antony Mbago Rumusu, the 1<sup>st</sup> accused, and Harrison Maina Kamau, the 2<sup>nd</sup> accused, are charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on the night of 11<sup>th</sup> and 12<sup>th</sup> of January 2013 at Umoja 1 Estate in Nairobi County, within Nairobi Province (*sic*) jointly with others not before the court murdered Nicholas Vaati Ndavi, the deceased.

On 11<sup>th</sup> January 2011 (record shows it was 2013), the deceased was drinking at Doc's Pub Buruburu. At around 10.30pm he called Paul Maingi (PW1) to join him at the Pub. Maingi was employed to drive deceased's *matatu* registration number KBN 610 A. Maingi went to the Pub in company of Nicholas Wambua (PW2) and Nicholas Ndavi (PW3) loader and conductor in the same *matatu* respectively. They parked the vehicle outside the Pub about 10 metres away and joined the deceased in the Pub. They took beer until late, 2.00am according to PW3, or after midnight according to PW1. They decided to go home. On getting outside, they found the two accused persons standing at the parking. They two demanded to be paid for cleaning the *matatu* and since it had not been washed the deceased did not pay them. The deceased asked for the ignition keys from Maingi who refused to give them to him since he was very drunk and did not know how to drive according to Maingi. This seems to have annoyed the deceased who told Maingi that he (deceased) had sacked Maingi. He asked for the spare keys from PW3, his brother, and he was given. Evidence on this issue does not agree. Maingi said that the deceased asked for spare keys from PW3 and was given but PW3 did not mention this. Evidence on what happened outside is not clear but it seems the 1<sup>st</sup> accused got the *matatu* keys either after he was given by the deceased or after he had snatched them. Whatever the case may be, it seemed that the 1<sup>st</sup> accused did not drive the vehicle and that the deceased disembarked from the vehicle and started walking to his home at Umoja.

Maingi, PW2 and PW3 tried to stop him to no avail. Maingi decided to drive around to follow the deceased since he could not drive through the narrow alley the deceased was using to go home. PW2 was told to follow the deceased by foot while PW3 and Maingi went in the *matatu*. PW2 returned and reported that the deceased had crossed Outering Road. The three drove towards deceased's home. While at the gate of deceased's home, the deceased communicated to the three on phone and told Maingi to take the vehicle home and leave the key with his wife. He also told them he was safe. Shortly they called him back but he could not be reached. They decided to go back and look for him. As they were reversing the vehicle they noticed the deceased lying near the road about 200 metres from his house. He had injuries on

the right eye and face and was lying facing down. They took him to Metropolitan Hospital where he was given first aid and transferred to Kenyatta National Hospital where he died while undergoing treatment. The post mortem report indicates the date of death as 2<sup>nd</sup> February 2013. After investigations, the two accused persons were arrested from their place of work in Buruburu where they were still washing vehicles. They were identified to the police by Maingi and Nicholas Wambua, PW2.

The 1<sup>st</sup> accused denied committing this offence. He told the court that he was arrested on 4<sup>th</sup> February 2013 at his car wash place of work. He said he did not know the deceased and that they do never used to wash mini buses (*matatus*) at their place because the parking was small. He said he did not see anyone identifying him to the police and that the police called him to go to their booth and that he thought they were calling him for food but he was arrested and told that he had killed someone which he denied.

The 2<sup>nd</sup> accused also told the court that he was arrested at his place of work after the 1<sup>st</sup> accused had been arrested. He denied committing this offence. He told the court that he does not work at about 11.00pm because by that time his business is usually closed.

The onus is on the prosecution to prove beyond reasonable doubt that the two accused persons, with malice aforethought, caused the death of the deceased by an unlawful act or omission. The prosecution has the onus of proving that the unlawful death of the deceased occurred; that the death was caused by the 1<sup>st</sup> and the 2<sup>nd</sup> accused persons or any of them and that the two had formed the intention to kill the deceased.

I have examined the evidence on record and find that there is evidence proving beyond reasonable doubt that the deceased died by unlawful act. Dr. Mary Mungania, PW5, testified that the deceased had a surgical wound on his skull. She noted the main injury was on the head which had a fractured skull on the right temporal region extending to the base of the skull. There was laceration in the brain on the right temporal region and intra cerebral bleeding in the right temporal lobe. The doctor formed the opinion that the cause of death was severe head injury. I am satisfied that the unlawful death of the deceased has been proved beyond reasonable doubt.

Did the accused persons kill the deceased and did they have the intention of so doing? The events of that evening were narrated by Maingi, Nicholas Wambua and Nicholas Ndavi. They all said they joined the deceased at Doc's Pub Buruburu and all including the deceased drunk beer until very late. They stated that as they were leaving the two accused persons confronted them at the parking area where they had parked the *matatu* number KBN 610A. The two accused were demanding to be paid Kshs 700 for washing the vehicle but the deceased refused. The matter was even reported at the police booth nearby but according to the witnesses the police did not record their complaint because they were thought to be drunk. After the altercation about the vehicle keys and the 1<sup>st</sup> accused being given the same by the deceased evidence shows the deceased left intending to walk home from Buruburu. Umoja is on the other side of Outering Road. Maingi said by the time he finished reversing the vehicle he did not see the two accused persons again. Nicholas Ndavi, PW3, told the court that:

**“At the time we were following the deceased we did not see any of the accused persons..... I saw the 2 accused persons last at Buruburu parking lot”.**

He also contradicted himself and said that **“I saw 1st accused last as he crossed Mutindwa Road.”** He did not describe Mutindwa Road in relation to the direction the deceased had taken nor did he explain whether by Mutindwa Road he meant Outering Road. On cross examination PW3 told the court as follows:

**“We did not see Anthony (1<sup>st</sup> accused) following the deceased. We saw Nicholas (PW2) following deceased alone. When we caught up with him, Nicholas told us he had seen deceased cross the road”.**

PW2 said he saw the 1<sup>st</sup> accused following the deceased and that he saw the 1<sup>st</sup> accused standing near a

fence at the scene. It is not clear what he meant by this and which scene he was referring to, whether parking lot at Doc's Pub or at the place deceased was found lying down.

I have considered this evidence carefully. While evidence shows that the two accused persons were at the parking area near Doc's Pub Buruburu, although they deny this, I find that the evidence as to their involvement with the death of the deceased is shaky. They may have argued over payment of some money for having washed the *matatu*. The 1<sup>st</sup> accused may have been given the car keys by the deceased. However, I am not convinced that they followed the deceased and perhaps assaulted him because I do not have evidence proving this is what happened. Evidence shows that the deceased had received the money for that day's collection. When he was found assaulted he did not have the money or his mobile phone. Those who assaulted him may have taken the money and phone. While I find that there is suspicion that the two accused may have seen the deceased being given the money and may have followed him given that he had not paid them as they had demanded, this will remain a suspicion. It has been held in various authorities that suspicion no matter how strong cannot be used as a basis for conviction (see **Sawe Vs Republic (2003) KLR 364**).

The evidence so far adduced falls short of the threshold in a criminal trial. I find evidence lacking to prove that it is the accused persons who assaulted the deceased inflicting serious injuries that led to his death. Having so found, it is not useful to continue determining whether the final ingredient, that of malice aforethought, has been proved. The benefit of doubt must go to the accused persons. They have been in custody since February 2013 and I think this court has no reason to hold them in custody any further. They are free to go home. They shall be released from custody forthwith unless for any other lawful cause they are held in custody. It is so ordered.

**Dated, signed and delivered on this 14<sup>th</sup> day of July 2016.**

**S. N. Mutuku**

**Judge**

**In the presence of:**

Ms Macharia for the prosecution

Mr. Mochere for the accused persons

Both accused persons present

Mr. Daniel Ngumbi court clerk