



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 40 OF 2008**

**REPUBLIC..... PROSECUTOR**

**VERSUS**

**JOSEPH NTONGAI NTOBUURI ..... ACCUSED**

**JUDGMENT**

**Joseph Ntongai Ntobuuri** is charged with the offence of murder contrary to **Section 203 as read with Section 204 of the Penal code**. The particulars of the charge are that on 19/5/2008 at Njia Location, Igembe District, murdered **John Kobia Ntobuuri**.

The case proceeded for hearing before J. Makau. The prosecution called a total of 4 witnesses while the accused testified on oath but did not call any other witness. This court took over the matter because J. Makau had gone on transfer and the defence agreed that the matter proceeds from where the Judge stopped. The defence was led by Mr. Otieno Advocate while Mrs. Murithi led the Prosecution and later, Mr. Mulochi.

The deceased, John Kobia was a brother to the accused. PW2 Apostol Murithi, another brother to accused and deceased testified that the three brothers had sold their charcoal at Muhutine Market on 19/5/2008 from 11.00 a.m. till 7.00 p.m. They proceeded to their farm at Soloi. PW2 said that they started to count the money. The three disagreed over sharing of the money as the accused wanted to deprive PW2 and deceased of their money; that accused attacked PW2 with a *panga* and cut him on the mouth whereby he lost one tooth; that Kobia (deceased) intervened and managed to snatch the *panga* from accused and threw it away but accused drew a sword from a sheath and stabbed Kobia on the left shoulder and left side of the ribs and threw him on the ground. PW2 on seeing that, ran away and hid in the neighbour's banana plantation till morning. Next morning, PW2 went to check the scene and found Kobia was dead and informed the Assistant Chief, Karoti (PW3) and the Assistant Chief in turn called the Chief. They reported the incident at Maua Police Station. The body was picked up by police and taken to the mortuary. Later PW2 learnt that accused had been arrested by members of public at Kiorweni. He said that the three of them related well before the incident but that accused had drunk alcohol on that day as they worked in shifts i.e. selling charcoal.

**PW3, Gilbert Karoti Mutia**, Assistant Chief, Njia Location, said that PW2 Aposto went to his home on 20/5/2008 about 6.00 a.m. while crying and bleeding and reported that he had been stabbed by his brother Ntongai (accused) and that they had been with his other brother Kobia (deceased). PW3 gave him a referral letter to go to Hospital but he returned 20 minutes later to inform him that he had found his older brother Kobia dead in the *shamba*. PW3 informed the Area Chief who in turn informed the Police who came for the body. Later at 9.00 a.m., he was informed that accused had been arrested; he rearrested him and handed him to the DO's officer, Kangeta.

**Dr. Isaac Macharia** performed the post mortem on the body of the deceased and the report was produced in court by **Dr. Grace Nguyo (PW1)**. The Doctor found that the deceased had sustained a stab wound on the right side of the chest, cut wound on the left arm 7 cm long, a stab wound on the left axilla, fractured 4<sup>th</sup> and 5<sup>th</sup> ribs, laceration of both lungs and on the left ventricle of the heart. The Doctor was of the opinion that the cause of death was shock secondary to a penetrating chest injury.

**PW4, PC Mathias Kadenge** told the court that on 21/5/2008, in company of OCS Maua Police Station, they went to Kangeta DO's office where they found accused had been arrested for murdering his brother. They proceeded to the scene at KK Muuti Area. He drew the sketch plan of the scene and took the body to the mortuary while accused was taken to Maua Police Station; that on 6/6/2008, he was accompanied by Ezekiel Kobia to identify the body at the mortuary.

When called upon to defend himself, accused stated on oath that on 19/5/2008 he was at Rinjau the whole day, searching for his goats which were lost. He found two goats at 6.00 p.m. and since it was late, he could not go back home and slept at the home of Ngiri wa Kimunga and next day, he took his goats to the market but on the way to the market at Kioloni, he was arrested by Assistant Chief (PW3) for allegedly killing his bother. He said that he had been on good terms with the deceased and there was no reason why he would kill him; that as for Aposto, they had a dispute over land because Aposto used to claim that their mother loved accused more and had been given the most productive *miraa* land; that they had a case with elders who confirmed that the land was his; that Aposto had caused his wife to go away and took accused's properties. He denied killing the deceased. Accused wanted one Ngiri wa Kimunga summoned as a witness but the Chief of the area where he hailed from told the court that the said person died in 2012.

To prove a charge of murder, the prosecution has a duty to establish the following ingredients:

- 1. Death of the accused;**
- 2. That the accused caused the death through an unlawful act or omission;**
- 3. That accused possessed an intention to cause harm/kill or malice aforethought.**

A postmortem was carried out on the body of the deceased by Dr. Macharia on 6/6/2008 in the presence of PW4. PW4 stated that he was with one Ezekiel Kobia. The Doctor's evidence did corroborate the evidence of PW2, who told the court that he witnessed the incident and PW4 who observed the deceased when he picked up the body to take to the mortuary. The death of the deceased is not in dispute.

**Who caused the death?** Accused totally denied having committed the offence. In this case, there is only one witness who claims to have witnessed the commission of the offence, PW2. Under Section 143 of the Evidence Act, a fact can be proved by the testimony of one witness. The accused, deceased and PW2 were brothers. From the evidence of PW2, the incident occurred at about 8.00 p.m. when they were at their Soloi farm. They had been together the whole day selling charcoal. There is no evidence that there was anybody else present where they were. An argument broke out between them over the money they had realized. PW2 said there was moonlight. Having been with the two brothers the whole day and since the issue at hand was the money they had realized from the sale of charcoal, I find that the issue of identification did not arise.

In his defence, accused raised a defence that there was a grudge between him and PW2 over land. PW2 testified in court; so did the Assistant Chief of the Area and the Investigations Officer. At no time did the issue of dispute over land arise. If indeed elders had presided over the land issue, I am sure the local administration who include the Assistant Chief (PW3) would have been involved. When asked whether he could call the elders who presided over the dispute, accused declined. I am satisfied that no such grudge existed. In fact, PW2 said the brothers had all been on good terms. That is why they could have been doing the charcoal business together. His defence of existence of a grudge is an afterthought and is unbelievable.

Even if there was no medical evidence adduced by PW2 on the injury that he sustained, PW3 who saw him early on the morning of 20/5/2008, confirmed that PW2 was indeed injured and bleeding on the mouth. PW2 recollected that the accused first attacked him, then when the deceased intervened and disarmed him, he turned on the deceased, drew a sword from a sheath and stabbed him.

PW2's testimony is materially consistent with the first report he made to PW3, that the brothers had disagreed over sharing of the money realized from sale of charcoal and hence the attack by accused. I have no doubt in my mind that PW2 told the court the truth. Accused also raised another defence of alibi – that he was looking for his goats the whole day and slept at the home of Ngiri Wakimunga. The said Ngiri was summoned as a defence witness but was found to have died in 2012. Despite the fact that the said Ngiri was not found, I believe the testimony of PW2. If at all accused went to spend the night at Ngiri's house, it is after he committed the offence.

Accused also raised an alibi defence. He claims to have been elsewhere looking for his goats. The law on the defence of alibi is clear. The fact that accused raised an alibi does not lighten the burden placed on the prosecution to prove its case beyond any doubt. It is sufficient if the alibi casts a doubt on the prosecution case. In *Uganda v Sebyala & Others 1969 EA 204*; the Judge quoting his Lordship CJ of Tanzania in CRA 12D 6R/1969 where he said as follows:

***“the accused does not have to establish that his alibi is reasonably true. All he has to do is create doubt as to the strength of the case for the prosecution. Where the prosecution case is thin, an alibi which is not particularly strong may very well raise doubts.”***

PW2's testimony is materially consistent with the first report he made to PW3; that they had disagreed over money from sale of charcoal and that accused then attacked both his brothers. I have no doubt in my mind that PW2 told the court the truth. The alibi did not dislodge the prosecution evidence.

**Whether accused had malice aforethought:** PW2 told the court that on the material day, they sold their charcoal in shifts and that accused had taken alcohol during the shifts. PW2 told the court that before this incident, there had been no bad blood between the three brothers which I believe to be the truth bearing in mind that they were doing business together, then sharing the proceeds and had even gone to spend the night in their other farm away from home. Though the accused has not raised the defence of intoxication the court cannot ignore that evidence of PW2 that accused may have been intoxicated. The accused may have been acting under the influence of alcohol and hence his sense of judgment was impaired. Further, according to PW2, the attack arose after an argument over money. There is therefore no evidence that accused had planned to commit the offence. For the above reason, I will find that the accused killed his brother but under the influence of alcohol and therefore he did not have the intention to cause death. Malice aforethought is therefore not proved. I will find him guilty of the lesser charge of manslaughter under **Section 202 as read with Section 205** of the Penal Code and convict him accordingly.

**DATED, SIGNED AND DELIVERED THIS 11<sup>TH</sup> DAY OF JULY, 2016.**

**R.P.V. WENDOH**

**JUDGE**

**11/7/2016**

**In the Presence of:**

Mr. Mulochi for State

Mr. Otieno for Accused

Ibrahim/Peninah, Court Assistants

Present, Accused