



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 12 OF 2010**

**REPUBLIC .....PROSECUTOR**

**VERSUS**

**KENNEDY IRERI alias CHUMA..... ACCUSED 1**

**STANLEY GITONGA KIVUTI ..... ACCUSED 2**

**JOHN KARIUKI NJIRU ..... ACCUSED 3**

**OBADIAH MUGENDI ..... ACCUSED 4**

**J U D G M E N T**

1. **KENNEDY IRERI alias CHUMA, STANLEY GITONGA KIVUTI, JOHN KARIUKI NJIRU and OBADIAH MUGEDI** hereinafter referred to as Accused 1, Accused 2, Accused 3 and Accused 4 respectively stand charged with the offence of Murder contrary section 203 as read with section 204 Penal Code. The particulars being that Accused 1, Accused 2, Accused 3 and Accused 4 on 20<sup>th</sup> April 2010 at Gicheche trading Centre, Gichiche sub-location in Embu East District within Eastern Province jointly with others not before Court murdered JACKSON NDWIGA IRERI.
2. The prosecution relied on the evidence of fifteen (15) witnesses. PW4 Amos Nthiga Richard is a brother to the deceased. He testified that on 20<sup>th</sup> April 2010 he was at **Alternative Bar** Gichiche with the deceased and another brother drinking. They left the deceased at the bar. He learnt of his death the next morning. PW5 John Mwaniki Habiri was a bar attendant at **Corner Bar**. He stated that on 20<sup>th</sup> April 2010 he went to see the barman of **Alternative Bar** where he met the deceased and his family members drinking. He left them at the said bar.
3. PW6 Cyrus Mureithi worked at Alternative Bar. He testified that on 20<sup>th</sup> April 2010 the deceased was at his bar drinking with his brothers from around 3pm. The deceased left between 6.30pm – 7.30pm. He closed the bar at 10.30pm.
4. PW7 Andrew Kiura Kathanji went to buy a match box on 20<sup>th</sup> April 2010 at 10.30pm at Gichiche market from a shop that closes late. He was at the shop for about 15 minutes. While there he heard screams from **Rukungu Bar** which is 6 steps from the shop. The path to his home passes by the said bar. As he went home he saw someone lying next to the bar. He said he saw Accused 1 hit the person lying down with one metal crutch as he used the other crutch to support himself.
5. He also saw Accused 2 – Accused 4 hit the person lying down with sticks/timber. As he tried to get a view of the person lying down he was confronted by Accused 1 who hit him and he ran away. Later the next day he informed the assistant chief about what he had witnessed the previous day. The electricity light from Gicheche School and the bar assisted him to identify the accused persons. He further added that he knows the accused persons well as they are from the same

- village with him.
6. During cross-examination he stated that the other person who was in the company of the accused and not in Court was Kariuki. He emphasized that he knew all the accused persons as they are people he saw around. He confirmed that there was electricity light at Gichiche Secondary School which is 200m from the bar. He denied being drunk that night saying he had stopped drinking before the incident.
  7. PW8 James Nyaga Munyi the chief received a report of the death of the deceased. He went to the scene and found the deceased's body. He announced that anybody with information of the death should call him. PW7 alerted him that he had seen the accused persons beating someone. He also received another report from Kithaka – PW10. He confirmed that Rukungu Bar was near the scene and it had electricity. According to him the body was killed elsewhere and brought to the scene.
  8. PW9 Ephantus Gitonga worked at J.K. Corner Bar. He testified that on 20<sup>th</sup> April 2010, Accused 4 and Kariuki were at the said bar and he had to chase them away as he wanted to close the bar at 10.00pm. They left protesting. On his way to Rukungu bar to eat and after closing his bar he met the two people (Accused 4 and Kariuki). They attacked and beat him. He ran back to his bar and locked himself there and slept. In cross-examination he said Rukungu bar is 5M from where he was beaten but 10M from J.K. Corner Bar.
  9. Pw10 John Kithaka Nyaga testified that he knew all the accused persons. He further said he knew the deceased. On 20<sup>th</sup> April 2010 at 10.30pm he saw people fighting. They were the accused persons, Kariuki and the deceased. One person was hit with a crutch and he fell down. PW10 then closed his door behind him. He therefore heard cassava trees being broken and used to beat the person. The next day he learnt that the person who was being beaten had died. He identified all the accused persons as the persons who had been beating the deceased.
  10. In cross-examination he said there was electricity light at the scene and those fighting were drunk. He also confirmed that the deceased had been removed from the bar by an attendant and that's when the accused persons started beating him.
  11. PW11 Dr. Joseph Thuo a Psychiatrist at Embu Provincial General Hospital examined the accused and confirmed that they were all mentally fit to stand trial. He produced their respective reports as EXB 2A-2D.

PW12 C.I. Henry Nyakeri who received the murder report visited the scene and found no signs of struggle thereat. The body had injuries on the face, nose, ears and back of head. PW13 PC Jackson Kiproa a scenes of crime officer produced photos he took at the scene EXB 3(i) – 3(viii) plus his certificate of photography (EXB4). He is a gazette Officer under Notice No.407 of 18<sup>th</sup> January 2010.

12. PW14 PC Jackline Chemitei witnessed the Post Mortem. PW15 Dr. Godfrey Njuki Njiru produced the Post-Mortem report on behalf of Dr. Mumbo EXB5. The cause of death was severe head injury. PW1 – PW3 who are relatives of the deceased received reports of his death early morning of 21<sup>st</sup> April 2010.

### **DEFENCE CASE**

13. The 1<sup>st</sup> accused (Accused 1) gave an unsworn defence. He stated that on 20<sup>th</sup> April 2010 he woke up and went to his place of work. He later got a customer at 3pm near Corner Bar. After he finished the work he went back to his place. He continued working and closed at 6.30pm when he went home. The next day he reported at his place of work and while there he heard reports of a dead person. He went to the scene and returned. On 25<sup>th</sup> April 2010 he was arrested by the Police. At Embu Cpl Nyandoya took his crutches, and the same have been used against him. He further produced the statements of PW7 and PW10 (DEXB 1a and b) saying they differed from what the witnesses had stated in Court. He denied the charge.
14. The 2<sup>nd</sup> accused (Accused 2) gave unsworn evidence and stated that on 20<sup>th</sup> April 2010 he was at his place in Mwea where he had gone to visit his parents. He spent the night there and was arrested on 25<sup>th</sup> April 2010 at 7am as he went to Mwea. He denied the charge.

15. The 3<sup>rd</sup> accused (Accused 3) in his unsworn defence denied the charge. He said he sold PW10 a phone in December 2008. The phone was later blocked and this brought some commotion as a result of which he was cut with a panga on his nose. This was on 13<sup>th</sup> April 2010 and he was not able to go back to his place of work. On 20<sup>th</sup> April 2010 he took his grandparents' animals for grazing. His grandparents live far away and that is where he spent the night. He was then arrested on 25<sup>th</sup> April 2010 by his assistant chief and others. He stated that PW7 and PW10 are related and they ganged up to frame him because of the phone issue. He denied the charges.
16. The 4<sup>th</sup> accused (Accused 4) gave an unsworn defence, saying on 20<sup>th</sup> April 2010 he was in College in Meru and later visited his grandparents on 21<sup>st</sup> April 2010 at 5pm. He was arrested on 25<sup>th</sup> April 2010 after coming from a disco with his cousins who were released after giving the Police shs.5000/=. His cousins had been charged with murder but were released after paying a bribe. He stated that PW7 did not know his name and only lied to Court.

### **SUBMISSIONS**

17. All the defence Counsels made oral submissions. Mr. Mugambi for Accused 1 submitted that the charge of murder had not been proved as PW7 said he only saw people playing. Secondly he did not explain how he identified Accused 1. He submitted that there was a contradiction in the evidence of PW4 and PW6 as to who between the deceased and PW4 was left in the bar. He also submitted that there were inconsistencies in the evidence of PW4 – PW7 and PW10. He wondered how Accused 1 could have used his crutches to beat anyone when he uses them to support himself.
18. Mr. Kinyanjui for Mr. Githinji for Accused 2 submitted that the case against Accused 2 had not been proved. Accused 2 raised an *alibi* which had not been dislodged by the evidence of the prosecution witnesses. The conditions were not favourable for a positive identification. He referred the Court to the following authorities on this;

- i. ***REPUBLIC –V- NGOME MRIWA MWAMKUNGU MOMBASA HCR CASE NO.11/07***
- ii. ***SHADRACK BAABU KINYUA –V- REPUBLIC NYERI CRA NO.163/11.***

Finally he submitted that the murder weapons were not recovered. And that there was no evidence to prove *mens rea*.

19. M/s Njeru for Accused 3 submitted that murder had not been proved. She discredited the evidence of PW7 and PW10. She said PW10 had admitted to having a dispute with Accused 3 over a phone – two months prior to the incident.
20. Mr. Momanyi for Accused 4 cast doubt on the credibility of the evidence of PW7 and PW10. He said PW7 had claimed to have been injured but there was nothing to support that. And that there were many contradictions in the evidence of the prosecution witnesses. Finally he submitted that the 4<sup>th</sup> accused was not placed at the scene of incident. And that his arrest had nothing to do with this offence of murder.

### **DETERMINATION**

21. This is now the case before this Court for determination. Murder is defined under section 203 Penal Code as follows;

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

This definition brings out two main ingredients which must be proved beyond reasonable doubt. They are;

- i. That act of killing (*Actus reus*)
- ii. The intention to kill - malice aforethought (*Mens rea*).

Malice aforethought is well defined in section 206 Penal Code as follows;

- 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.***

22. In this case there is all the necessary evidence to prove the fact of death by PW1 – PW8, PW10, PW12 - PW15. The cause of death was established by Dr. Mumbo whose Post –Mortem report (EXB5) was produced by Dr. Nderitu – PW15. He found the cause of death to be a severe head injury. All accused persons were examined by Dr. Thuo – PW11 who found them to be mentally fit to stand trial.

23. The 1<sup>st</sup> issue to determine is whether the accused persons are the ones who killed the deceased. The evidence on record confirms that the deceased’s body was found at Gichiche Trading Centre. It has also been established by the witnesses that the deceased’s body was found in a ditch/trench near a road. According to PW12 C.I. Henry Nyakeri, there were no signs of struggle at the place where the body was found.

24. It was the evidence of PW5 and PW6 that the deceased was at **Alternative Bar** on 20<sup>th</sup> April 2010. PW5 who worked at **Corner Bar** found the deceased there at 6.30pm. And PW6 who worked at the said **Alternative Bar** stated that the deceased had been at the said bar with his brothers from 3pm drinking. The deceased left between 6.30pm – 7.30pm. Where did the deceased go after leaving Alternative Bar at 7.30pm? It does not clearly come out from the evidence but PW10 stated that the deceased was removed from **Rukungu Bar** by the bar attendant at 10.30pm. The bar attendant is unknown as no one from the said bar testified. He could not have gone to sit at Rukunga bar. He must have been there drinking.

25. PW7 Andrew Kiura Kathanji was on his way to Gichiche market to buy a matchbox. This was on 20<sup>th</sup> April 2010 at 10.30pm. After buying it, he assisted the shop keeper to carry his merchandise. Thereafter he heard screams from Rukungu bar. As he walked home past Rukungu bar he saw a person lying next to the bar and the person was being beaten by the accused persons and another. He identified the accused persons but not the person being beaten as he was prevented from going near the person lying down. He stated that Accused 1 who uses crutches hit him with one crutch and he ran away and went home.

26. He explained that he was able to identify and recognize the accused persons because of the light from Gicheche Secondary School and the bar itself. The school was 200m from the bar he said, though PW8 said the school was 400m from the bar.

27. Another witness who claims to have witnessed this incident is PW10 John Kithaka Nyaga. He stated that he lived in a house behind Rukungu bar from where he sold his miraa outside. What did he see before he closed the door to his house behind him? This is what he said at page 48 lines 7 - 12 of the typed proceedings;

***“While at Gichiche the bars closed. At 10.30pm I saw people fighting. There was Ireri, Mugendi, Kariuki, Joel and Gitonga and Jack. I was about 30M away. I saw one person hitting another. I did not identify him. He used a crutch to hit the other. The one hit fell down. I then saw 2 people lying on him. It was late. I closed the door behind me”.***

28. From this passage PW10 saw the four accused persons, Kariuki and the deceased fighting. One unidentified person hit another unidentified person. The one hit fell. The issue he now brings in about cassava sticks is neither here nor there because he was locked up in his house and did witness that. Who is the unidentified person who hit another? And who is it that was it? Why was he not able to identify these two persons? He had said he was 30M from the scene and those

- fighting were people he knew, and there was electricity light.
- 29.If his story is to be believed, what did each of the accused persons do to this unidentified person who fell down after being hit?
- 30.The defence has raised issues with the issue of identification. The accused persons deny having been at the scene on this date in issue. In the case of **WAMUNGA –V- REPUBLIC [1989] KLR 424** the Court of Appeal held thus;

***“Where the only evidence against a Defendant is evidence of identification or recognition, a trial Court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction”.***

And in **KARANJA & ANOTHER –V- REPUBLIC [2004]2 KLR 140** the Court of Appeal held thus;

- i. ***“Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital important that such evidence is examined carefully to minimize this danger.***
- ii. ***Whenever the case against an accused person depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the accused in reliance on the correctness of the identification.***
- iii. ***Recognition may be more reliable than identification of a stranger but even when a witness is purporting to recognize someone he knows, it should be borne in mind that mistakes of recognition of close relatives and friends are sometimes made.***

- 31.It is therefore the duty of this Court to scrutinize the evidence of PW7 and Pw10 on the identification of the accused persons on 20<sup>th</sup> April at 10.30pm.

**Did PW7 Andrew Kiura Kathanji identify the person whom he found lying down?.**

- 32.From the evidence he says he saw a person lying down, next to the bar. All the accused persons were beating this person with timber. Accused 1 used one of his crutches to hit this person. He stated that as he tried to go near to see the person lying down he was hit by Accused 1 and **he ran away**. When it was discovered the next morning that the deceased had died he concluded that the deceased was the one who was being beaten the previous night. Otherwise there is no evidence to show at what point he identified the person who was lying down. In cross-examination at page 35 he states, **“I did not recognize the victim as I could not move near him”.**
- 33.What confirms that indeed PW7 was at Gichiche market on 20<sup>th</sup> April 2010 at 10.30pm? There is no single witness who said he saw him at the said market that night. Secondly, inspite his assertion that he was hit by a metal crutch on his head, there was no evidence adduced to confirm that he was ever injured. No one saw the alleged injury on him. PW8 who saw him the next day denied seeing any injury on him. PW7 produced no medical chit to confirm his having received any medication for the injury.
- 34.Thirdly PW7 alleges to have gone to a shop near Rukunga bar that night. Besides buying a match box and/or tobacco, he assisted to ferry the **shop keeper’s** merchandise to a place not stated. This shopkeeper appears not to have witnessed anything as he was not called as a witness. At least he should have come to confirm that he was still open on the material night and that PW7 was his last customer. Even PW10 has not made any mention of him (PW7) in his evidence, as having been at the scene.
- 35.Fourthly PW7 did not report anywhere about what he had allegedly witnessed on the said night. He is said to have told the assistant chief the next day in the evening.
- 36.My finding is that PW7’s presence at Gichiche market has not been established. He also failed to link the beating incident to the killing of the deceased because he has not shown that the deceased is the person who was being beaten that night.
- 37.**Did PW10 John Kithaka Nyaga identify the person who fell down and the one who hit him?**

His evidence is that the accused persons, the deceased and Kariuki were fighting. He says the following at page 9 lines 1-4 of the typed proceedings;

***“They fought outside the bar. The fight took one minute. They were all fighting and moving from one place to another. They were drunk. The deceased was removed from the bar by the attendant. That is when they started beating him”.***

Further at page 49 lines 8-12 he says;

***“He was hit with a crutch but I did not see the person. I can see the crutch here in Court. They surrounded the deceased jokingly. It could be possible that the person who hit him is the one absent. The cassava sticks are not here. I even told the assistant chief what I witnessed. I can’t tell who among the accused hit the deceased. I was observing those present”.***

38. PW10 did not clearly identify the person who fell down and the one who hit him. And if indeed the deceased was hit when he was removed from the bar who was it that hit him and with what was he hit and where? PW10 should have stated this.

The same witness states that he was with some people when all this was happening but he could not recall their names because they left after paying his money for miraa. Did he know these people or not? Did the Police make any attempt to get them and interrogate them? The answer is NO.

39. In as much as PW10 stated that he was at his house and witnessed all that happened, PW7 told the Court that the house of the miraa seller (PW10) is behind the bar. And that the said house can’t be seen from the bar, so which of them lied to the Court on this?

40. It was the duty of the Prosecution to link the beating of a person at Gichiche market – Rukunga bar with the killing of the deceased on this night of 20<sup>th</sup> April 2010. Was the person beaten at Rukunga bar the same as the deceased person?

PW7 never saw nor identified the person who was lying down. He ran for his dear life after being hit. PW10 did not identify the person who was hit and the person who hit him.

41. Can it then be assumed that the person who was allegedly beaten by the accused persons is the deceased herein? This is a serious issue where the Court cannot make any such assumptions. The mere fact that a person may have been assaulted at the Market Centre and the deceased’s body found lying in a trench at the roadside does not automatically mean he was the one who was being beaten.

The very light that enabled PW7 and PW10 to identify the aggressors ought to have equally been used to enable them identify the victim. In this incident that appears not to have been the case.

42. According to PW10 the deceased was allegedly removed from Rukunga bar by an attendant. There is no single witness from Rukunga bar who was interrogated and/or gave evidence. To this Court’s surprise, witnesses from other bars in Gichiche Market came to testify yet those other bars closed business much earlier than Rukunga bar and did not offer any useful evidence to assist the Court. How come this bar which was the last to close and which was the deceased’s last stop, and from which the deceased was allegedly thrown out was never directly linked to this incident? The Rukunga bar attendant who allegedly removed the deceased did not testify, and was not even interrogated by the Police.

43. My finding is that the prosecution failed to link the beating of an unidentified person outside Rukunga bar and the death of the deceased. Proper investigations ought to have been carried out.

Secondly the evidence of PW7 and PW10 which was heavily relied on by the prosecution is not credible for the reasons already outlined above.

Thirdly the conditions for a favourable identification were lacking. If indeed there was sufficient light for identifying the culprits why is it that PW7 and PW10 were not able to identify the victim?

44. PW9 in his evidence stated that he had chased away the 4<sup>th</sup> accused and Kariuki from J.K. Corner bar on 20<sup>th</sup> April 2010 at 10pm when he had wanted to close. And that on his way to Rukunga bar he met them and they beat him up. His evidence has no link with the deceased's death. The accused are not charged for assaulting PW9.
45. It is the duty of the prosecution to prove its case beyond reasonable doubt. On the issue of the *actus reus*, I find that the prosecution failed to prove that indeed the accused persons are the ones that committed this murder. And the prosecution having failed to prove the accused persons' connection to the act of killing I find the charge of murder not proved sufficiently against all the accused persons.
46. For my part, I find them not guilty and acquit all of them forthwith under section 322(1) Criminal Procedure Code.

**DATED, SIGNED AND DELIVERED AT EMBU IN OPEN COURT THIS 9<sup>TH</sup> DAY OF SEPTEMBER 2014.**

**H.I. ONG'UDI**

**J U D G E**

In the presence of;

Mr. Okwaro for Mugambi for accused 1

Mr. kinyanjui for Githinji for accused 2

M/s Njeru for accused 3

Mr. Momanyi for accused 4

Mutero/Kirong – C/c