



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 98 OF 2010**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**TIMOTHY KIPYEGON..... ACCUSED**

**JUDGMENT**

1. By the Information dated 30<sup>th</sup> September 2010, the accused was charged with the offence of murder contrary to Section 203 as read together with Section 204 of the Penal Code, (*Laws of Kenya*). The particulars of the offence were that on 14<sup>th</sup> September 2010, at Ngareta Centre Narok North District within Rift Valley Province, the accused murdered Moses Koileken.

2. The prosecution's case was that the accused person inflicted fatal injuries on the deceased after a fight, which led to his death. PW1 told the court that on 14<sup>th</sup> September, 2010 at around 6.00pm, the deceased left home to attend to some matters at a repair shop for televisions and radios in Ngareta Centre. He was later seen at around 7.00pm by PW2 being thrown out of a club at the centre. On inquiring, the deceased informed PW2 that he had been beaten by a person but did not disclose to him who it was. He had no visible injuries on him at the time.

3. PW2 looked inside the club and saw two young men standing on a table arguing. He convinced the deceased to leave with him, but they had to return to the club as the deceased had left his "VCD Player". The same was issued to them by the owner of the club, Judy. The deceased who was still agitated because of the earlier fight, insisted that he wanted to have a drink to calm his nerves before going home. PW2 gave the deceased his mobile phone and left him in a bar adjacent to the club. This was around 9.30pm. During cross-examination PW2 stated that the accused was one of the men whom he had seen in the club arguing. He did not know him prior to the day of the fight and had not seen the person who pushed the deceased out of the club.

4. PW3 saw the deceased fighting with a Kalenjin man who he knew outside a bar known as Kilorit later that same night. With the aid of two men, Tanyai and Osama, he successfully intervened and stopped the fight. The Kalenjin man left while the deceased remained in the bar until 11.00 pm. The deceased told him that the accused person had insulted him. PW3 stayed in the bar until midnight. He informed the Police that he knew the person fighting with the deceased earlier and was present when the accused was arrested. He had blood stains on his legs and shoes. He thereafter recorded a statement at the Police which was produced as DEX2.

5. During cross-examination he stated that he saw blood stains on the deceased's shoes but he had no visible injuries. He also stated that he did not see the accused fighting with the deceased.

6. The body of the deceased was discovered at around 11.00 pm by PW4 a taxi driver in Narok. PW4 was returning from dropping some clients in Ngata area when he saw the deceased lying on the road. He recognized him and called the Police.

6. PW5 No. 970754 together with other officers went to the scene of the attack. He found the deceased's body lying on the road, covered in blood and with a clear stab wound on the neck. PW5 arrested the accused upon being informed by the owner of a local drinking den that the accused had quarreled with the deceased earlier that night. They found him at his house. Nothing was recovered from his house or at the scene of the assault. His statement was produced as DEX 1.

7. PW8 No. 232399 was the investigating officer. He visited the scene where the deceased had been killed and observed a pool of blood around him. His investigations revealed that after fighting with the accused at a bar owned by one Beatrice, the deceased left and was pursued by the accused. A commotion ensued and the deceased was later found stabbed.

7. The photographs of the scene and the deceased's body were taken by PW7 and were produced in this court as exhibits PEX2 (a), (b), (c) and (d). Dr. Soita N.A examined the body of the deceased and found that he had multiple cut wounds on the scalp, one on the right temporal side penetrating into the skull, cut wounds on measuring about 10-20cm on most of the right side of the head and a cut wound in the right ear measuring about 5 cm. He formed the opinion that the deceased died as a result of severe haemorrhage shock following bleeding of the scalp vessels and from the trauma caused by the head injury. The Postmortem Report of the deceased was produced by PW6 under Sections 33 and 77 of the Evidence Act (*Cap. 80, Laws of Kenya*) and with the consent of Counsel for the accused as exhibit 1.

8. After the close of the Prosecution case, the accused was put on his defence and gave unsworn testimony. He denied having committed the offence with which he had been charged or that the deceased was known to him. His testimony was that he worked all day on 14<sup>th</sup> September 2010 upto 4.30 pm. He then went to have his dinner at a local butchery at about 6.30 pm and went home at 7.30 pm. Later that night, he was woken up by Police Officers who searched his house, arrested him and took him to the Police Station. According to the accused, the charges against him were fabricated as he was new in the area and did not have an Identification Card.

### **Analysis of submissions and evidence**

9. Counsel for the accused submitted that the prosecution had not proved its case beyond reasonable doubt. Of the eight prosecution witnesses, it was only PW2 and PW3 who placed the accused at the scene of the attack. PW2 however stated that he did not see who pushed the deceased outside the bar and only saw the accused and another man exchanging words in the bar. He also did not see any injuries on the deceased after he was ejected out of the club.

10. Similarly, PW3 who sat with the deceased upto 11.00 p.m. did not see any injuries on him. He also stated that the deceased fought with a "Kalenjin" and none of them had any weapons. Counsel further submitted that the accused was not seen with the deceased at 11.00pm when he was attacked. Therefore, it was necessary to for the Government Analyst to ascertain whether the accused's clothes were stained with the deceased's blood as he testified that he was arrested with the same clothes he had been wearing the previous day. Counsel therefore urged the court to acquit the accused as the charges against him had not been proved to the required standards.

11. The Prosecution Counsel did not make any submissions and chose to rely on the evidence on record .

12. The offence of murder under Section 203 of the Penal Code is committed when a person who of malice aforethought causes the death of another by an unlawful act or omission. From the evidence it was established that on the night of 14<sup>th</sup> September 2010, the deceased was assaulted with a sharp weapon and died from severe haemorrhagic shock following bleeding of the scalp vessels and trauma caused by the multiple cuts inflicted on his head. Malice aforethought under Section 206 of the Penal Code was also established from the circumstances of the attack. By stabbing the deceased multiple times on the head

with a sharp weapon the assailant either had an intention to cause the death of the deceased or cause him grievous harm; or must have had knowledge that this act would probably cause the death of the deceased or grievous harm.

13. The question that follows is whether it was proved by the Prosecution that it was the accused who inflicted the fatal injuries on the deceased. There was no direct evidence linking the accused to the murder of the deceased as none of the prosecution witnesses saw the accused attacking and inflicting upon the deceased the fateful injuries that resulted in his death. PW2 and PW3 who witnessed the different fights between the accused and the deceased stated that the deceased did not sustain any injuries from these fights and that neither the deceased nor the accused had any weapons. The fatal injuries must have been inflicted during the attack that occurred after the deceased left the bar at around 11.00 pm.

14. A conviction based on circumstantial evidence whether or its own or corroborated by other direct evidence has often been cited as the best evidence for it requires an intensive examination of the circumstances surrounding the offence as proved to draw an inference that the illegal act was probably committed by the accused. This was the holding of the court in *the English case of R V. TAYLOR WEAVER AND DONOVAN [1928] 21 Cr. App. R. 20* cited, with approval by the Court of Appeal in *JOHN NDUNDA MWANIKI VS REPUBLIC [2014] eKLR -*

***“Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which by intensified examination is capable of proving proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial.”***

15. The court must however satisfy itself that the inculpatory facts are incompatible with the innocence of the accused and incapable of any other explanation upon any other hypothesis than of guilt. *The Prosecution bears the burden to prove beyond reasonable doubt the existence of the facts which justify the drawing on the inference of guilt to the exclusion of of any other reasonable hypothesis of innocence. The evidence on the chain of events must be cogent and credible. The court in KIPKERING ARAP KOSKEI & ANOTHER VS REPUBLIC [1949] 16 EACA 135 held a similar view that:*

***“In order to justify, on circumstantial evidence, the inference of guilt the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt, and the burden of proofing facts which justify the drawing of this inference from the facts to the exclusion of innocence is always on the prosecution and never shifts to the accused.”***

16. *The Prosecution case was that on the fateful night the deceased and accused fought on two different occasions which were stopped by intervening third parties. The circumstances demonstrated that the dispute between the parties remained unsettled, leaving the accused still agitated. The Prosecution therefore argued that when the deceased was found murdered later that night, the only inference that can be drawn is that it was the accused who killed him.*

17. In my view, it was upon the Prosecution to prove the chain of events leading to the commission of the crime by the accused. The first fight is alleged to have occurred at Judy's bar at around 7.00pm. PW2 who was at the scene did not witness the same as he alleged to have arrived as the deceased was being hauled out of the club by an unknown person but he confirmed that it was not the accused. He also stated that the deceased informed him that he had been beaten but did not disclose to him the person who had attacked him or the reasons.

18. His testimony, however, was that the accused was at the scene of the fight. He said that he saw two young men in the club standing on a table arguing and only clarified that the accused was one of the men during cross-examination. It was his testimony that the accused was not known to him prior to that day, that there were many people in the club and that he was outside when he saw him.

19. This court must exercise caution, having regard to the circumstances under which the witnesses observed the accused and whether he was known to them prior to the incident, to ensure that there was no

mistake in the identification of the accused particularly because he denied being at the club. In this regard, I am guided by the holding in **WAMUNGA VS REPUBLIC [1989] KLR 424 at page 430-**

***“Evidence of visual identification in criminal cases can bring about miscarriages of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness or 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 defendant in reliance on the correctness of the identification.”***

20. Considering that PW2 did not know the accused previously, and the fact that the circumstances under which he saw the accused were not calm so that he could comfortably observe him and be able to identify him, I am not satisfied that the witness was able to positively identify the accused person. Having regard to the gravity of the charge against the accused which carries a death sentence upon conviction, it was essential for the prosecution to provide water tight evidence that the accused was seen in Judy's bar where the first fight occurred.

21. PW3 was able to identify the accused as the person who fought the accused at Maina's Bar. He stated that he saw a “Kalenjin” and the deceased fighting outside on the streets. He stated that he knew the Kalenjin before the material day and upon receipt of the news of the death of the deceased, he informed the Police that he knew the person who had been fighting with the deceased earlier that night.

22. The evidence of PW2 and PW3 did not disclose circumstances that would lead this court to support the findings of the Investigating Officer, PW8 that the accused pursued the deceased after he left the bar that night and killed him. PW3 stated that after stopping the fight between the accused and the deceased, the accused person left the scene leaving the deceased in the bar drinking. The flow of events was not so continuous as there was a considerable amount of time from the time the accused left the scene to when the deceased left the bar .

23. Although the motive to commit an offence is not an necessary ingredient to prove murder, it would have been essential in the circumstances of this case, to show an intention by the accused to kill the deceased to enable this court infer that driven by this intention, the accused person waited for the deceased to leave the bar and he killed him. In addition, when the accused was arrested later that night or early the following morning, no weapons or other evidence linking him to the offence was found. Although PW3 alleged that his shoes and legs were stained with blood, this blood was tested by the Government Analyst and confirmed to be that of the deceased.

24. I agree that the circumstances of the case demonstrate a strong suspicion that it was the accused who killed the deceased, but this cannot be a basis to infer the guilt of the accused. (See **SAWE VS REPUBLIC [2003] eKLR**). I find that the circumstantial evidence as tendered by the Prosecution did not point irresistibly to the accused as the person who killed the deceased that night.

25. For the above reasons I find that the Prosecution failed to prove its case against the accused and accordingly acquit him of the charge of murder contrary to Section 203 of the Penal Code against him. He shall be set at liberty forthwith, unless otherwise lawfully held.

**Dated, signed and delivered at Nakuru this 10<sup>th</sup> day of October, 2014**

**M. J. ANYARA EMUKULE**

**JUDGE**